



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**E.L.C.A NO. 10 OF 2016**

**CYRUS MUCHIRA NDAMBIRI.....APPELLANT**

**VERSUS**

**FAITH WANJIRU NDAMBIRI.....RESPONDENT**

**JUDGMENT**

**(BEING AN APPEAL FROM THE JUDGMENT OF HON. MOGIRE ONKOBA – SRM**

**IN GICHUGU PMCC NO. 10 OF 2015 DELIVERED ON 21<sup>ST</sup> JUNE 2016)**

**BACKGROUND**

The applicant was the defendant in PMCC No.10 of 2015 where the respondent who was the plaintiff had sought for an order that the defendant/appellant be compelled to sign all the necessary documents to facilitate partition of L.R. No. BARAGWI/THUMAITA/1289 into two portions, attend the Land Control Board and release the original title deed to the plaintiff. The plaintiff/respondent had also sought an alternative order that the Honourable Court do authorize the Executive officer to sign all the necessary documents to facilitate partition of the said parcel of land into two portions. The plaintiff/respondent had also sought a third prayer that the Honourable Court do authorize the Land Registrar, Kirinyaga to dispense with the production of the original title deed, the defendants copy of Identity Card, his Passport, and his copy of P.I.N during the registration of the sub-divisions.

In a statement of defence dated 27<sup>th</sup> April 2015, the defendant/appellant denied the plaintiff's claim. The plaintiff's claim is based on the fact that the appellant is her step-son and in 1977 when his mother left, she took care of him and his siblings until 1999 when their mother returned. In 1999, the suit land was transferred and registered jointly in the names of the respondent and the appellant. In 2012, she became sick and the appellant took the original title deed from her house and has refused to return it. According to the appellant, their family met in 1999 for purposes of deciding on how best to divide their father's land L.R. No. BARAGWI/THUMAITA/1288, 1289, 1290 and 1291. It was agreed that the younger persons be registered together with the parents so as to ensure that life interest to the parents and intergeneration interest goes to the younger persons. In that regard, he was registered together with the respondent being his step-mother and that those who did not appear in the titles to continue deriving livelihood from the same pieces of land. The respondent was also given L.R. No. BARAGWI/THUMAITA/2314 in addition to the life interest in L.R. No. BARAGWI/THUMAITA/1289.

The Court in its judgment delivered on 21/6/2016 held that the provisions of **Section 91 (8) of the Land Registration Act** is to the effect that on and after the effective date, joint tenants can only be possible with respect to spouses. Therefore, the respondent and the appellant commonly co-own the property as tenants in common and not as joint tenants and the respondent's prayers were allowed. The appellant being dissatisfied with the said judgment lodged the present appeal on the following grounds:

- (1) The learned trial magistrate erred in law and fact in failing to make a finding that the registration of the suit land number BARAGWI/THUMAITA/1289 in the joint names of the plaintiff and the defendant was done in 1999 under the old regime of the Registered Land Act, Cap. 300 Laws of Kenya (now repealed) and therefore the joint proprietorship cannot be separated.
- (2) The learned trial magistrate erred in law and fact in misinterpreting the provisions of Section 91 (8) of the Land Registration Act 2012 and making a finding that the same was to apply retrospectively.
- (3) The learned magistrate erred in law and fact in failing to appreciate the clear wording of Section 91(4) of the Land Registration Act 2012, which is equivalent to Section 102 (1) of the Registered Land Act Cap. 300 Laws of Kenya (now repealed) concerning joint ownership.

(4) The learned trial magistrate erred in law and fact in ordering for partition of land jointly owned without first converting ownership into tenancy in common, and also without specifying the shares of each owner.

(5) The learned trial magistrate erred in law and fact in failing to address himself to the evidence on record concerning the family arrangements as to ownership of the various portions of sub-division arising from the parent title number BARAGWI/THUMAITA/813.

(6) The learned trial magistrate erred in law and fact in failing to make a finding that the suit land is an ancestral/clan land and therefore the respondent cannot claim absolute ownership of the same.

(7) The judgment was against the weight of evidence adduced and the applicable legal principles.

### **APPELLANTS SUBMISSIONS**

The appellant through the firm of Maina Kagio & Co. Advocates submitted that the only issue for determination in this appeal is whether joint ownership can be severed? He submitted that from the pleadings, the judgment and the certificate of search, it's not in doubt that the plaintiff and the defendant who are now respondent and appellant respectively jointly own land parcel No. BARAGWI/THUMAITA/1289. It is also not in dispute that the registration was done in 1999 and that by then the legal regime applicable was the **Registered Land Act Cap. 300 Laws of Kenya** which was repealed in 2012. It is further submitted that **Section 102(1) of the now repealed Registered Land Act Cap. 300** provides thus:

**'Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently;-**

**(a) Dispositions may be made only by all the joint proprietors and**

**(b)**

**(c)**

**(d)**

**Section 102 (3)** of the same Act states that joint proprietors not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joint proprietorship, and the severance shall be completed by registration of the joint proprietors as proprietors in common and by filing the instrument. The appellant stated that it's clear from the proceedings that the parties herein had not filed the necessary instrument to convert the ownership from joint to ownership in common. He submitted that in justifying the partition of the suit property owned jointly, the learned magistrate relied on **Section 91 (8) of the Land Registration Act** which was misinterpretation of the law. He stated that that section of the law cannot operate retrospectively.

### **SUBMISSIONS BY THE RESPONDENT**

The respondent through the firm of Nduku Njuki & Co. Advocates submitted that the respondent as a registered joint proprietor of land parcel No. BARAGWI/THUMAITA/1289 was clearly not comfortable with the joint proprietorship and indicated this in her evidence. He submitted that this Court should accord the suit property the meaning accorded to it by **Article 64 of the Constitution of Kenya, 2010**. The respondent also submitted that this Court should find that a Kenyan citizen has a right to own property either singly or jointly and that a joint proprietorship should be treated as a marriage. He submitted that if a marriage is not sustainable, the parties either by consent or by one party, has a right to a separation and/or divorce. It can never be contemplated in law that a joint proprietorship cannot be severed as that would be in contravention of the Constitution particularly Article 40.

### **ANALYSIS AND DISPOSITION**

I have considered the submissions by counsels for the appellant and the respondent. I have also considered the authorities and the applicable law. The subject of this appeal which was also an issue before the trial Court was land parcel No. BARAGWI/THUMAITA/1289 which was registered jointly in the names of CYRUS MUCHIRA NDAMBIRI (Appellant) and FAITH WANJIRU NDAMBIRI (Respondent). The two were registered as joint proprietors in the year 1999 under the old regime of the Registered Land Act, Cap 300 Laws of Kenya (now repealed). **Section 102 (1) of the repealed Act** provided that joint proprietorship is held by the owners in un-divided shares and no one person is entitled to any separate share. **Section 102 (3)** of the same Act (repealed) provides that joint proprietors not being trustees, may execute an instrument in the prescribed form signifying their mutual intention to sever the joint proprietorship and that the severance shall be completed by registration of the joint proprietors as proprietors in common and by filing the instrument.

From the proceedings and the judgment by the trial magistrate, there is no mutual agreement that the joint proprietors herein had filed the necessary instrument to convert the ownership from joint to ownership in common. By relying in **Section 91 (8) of the Land Registration Act**, the trial magistrate misdirected himself both in law and in fact in partitioning of the suit property owned jointly between the appellant and the respondent. Since the suit property had been registered jointly between the appellant and the respondent as joint proprietors under the old regime, the trial magistrate erred in law by justifying the partition of the property to ownership in common under **Section 91 (8) of the Land Registration Act**. The law under that section provides as follows:

**"On or after the effective date, except with leave of a Court, the only joint tenancy shall be capable of being created between**

**spouses, and any joint tenancy other than between spouses that is purported to be created without the leave of a Court shall take effect as a tenancy in common”.**

The provision of the law is clear that it only comes into effect after the effective date of the new law and cannot operate retrospectively. In the case of *Isabel Chelangat Vs Samuel Tirop Rotich & 5 others (2012) e K.L.R*, Justice Munyao Sila distinguished between joint ownership of land and land held in common and stated as follows:

**“A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else, they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities”. The right of survivorship (Jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant .....**”

**In a tenancy in common, the two or more holders hold the property in equal individual shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words they have separate interests only that it remains undivided and they hold the interest together .....**”

Again in the case of *MUKAZITONI JOSEPHINE VS ATTORNEY GENERAL REPUBLIC OF KENYA (2015) e K.L.R*, the Court of Appeal held thus:

**“A joint tenancy cannot be severed unless one of the four unities of title, time, possession or interest is broken. A joint tenant has the right to the entire property or none – since the other joint tenant also has a right to the entire property. This is expressed in Latin as totum tenet et nihil tenet, a joint tenant holds everything and nothing”.**

I agree with the decisions by the learned Judges. Under the law, a joint tenancy can be converted into a tenancy in common by the doctrine of severance. **Section 91 (7) of the Land Registration Act** provides that joint tenants are free to sever the tenancy which severance must be completed by registration. The parties can only sever joint tenancy by executing an instrument in the prescribed form signifying that they agree to sever the joint ownership. Unless that is done, there is no other lawful way of separating co-ownership of property. From the above analysis, I find this appeal merited and the same is allowed as follows:

**(1) The appeal is allowed.**

**(2) The judgment of the Senior Resident Magistrate in PMCC No. 10 of 2015 delivered on 21<sup>st</sup> June 2016 be and is hereby set aside and the same is substituted with an order dismissing the plaintiff’s claim.**

**(3) The costs of this appeal and the suit below being PMCC No. 10 of 2015 (Gichugu) to be borne by the plaintiff/respondent.**

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 22<sup>nd</sup> day of May, 2020.**

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**E.C. CHERONO**

**ELC JUDGE**

In the presence of:

1. Mr. Asimwe holding brief for Nduku Njuki for Respondent
2. Wambui holding brief for Maina Kagio for Appellant
3. Okatch, Court clerk – present