



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 235 OF 2018

SAMUEL UIRU.....PLAINTIFF

VERSUS

GEORGE MBURU.....DEFENDANT

JUDGMENT

By a Plaint dated 3rd September 2018, the Plaintiff herein has sought for the following prayers against the Defendant;-

- 1. An order that the Defendant do execute all necessary documents /instruments to sever the joint proprietorship and transfer of Land Parcel No. Kiambaa/Ruaka/2448 including Application for consent of land control Board to the Plaintiff.***
- 2. The Deputy Registrar of this Honourable Court be and is hereby authorized and directed to execute all necessary documents / instruments to sever the joint proprietorship and transfer of land parcel No. Kiambaa/ Ruaka/2448 including Application for consent of the land control board to the Plaintiff.***
- 3. Costs**

In his statement of Claim, the Plaintiff averred that pursuant to a Judgment of the High Court in **Nairobi HCC No. 684 of 2004**, the Plaintiff were registered as the owners of **L.R Kiambaa/ Ruaka/2448**, and **2446** jointly measuring **3.5 acres** each while their sister **Joyce Wanjiku Kagwara** was registered as proprietor of land parcel No. **Kiambaa/ Ruaka 2447**, measuring 2 acres. That the Plaintiff was the sole owner of **L.R 2448**, while the Defendant was the sole owner of **L.R 2446**, and that they have always occupied and utilised their respective portions. He further averred that he had on various occasions requested the Defendant to execute the necessary documents to sever the joint ownership to facilitate issuance of individual titles but that the Defendant has neglected to do so.

Despite being served with the suit papers the Defendant did not enter appearance nor file any defence. The matter proceeded by way of formal proof wherein the Plaintiff testified for himself and closed his case.

PLAINTIFF'S CASE

PW1 Samuel Uiru the Plaintiff herein adopted his witness statement dated 3rd September 2018 as his evidence. He further produced his list of documents as exhibit 1,. He urged the Court to allow his claim.

After close of viva voce evidence the Plaintiff filed written submissions which the Court has carefully read and considered and finds that the issue for determination is ***whether the Plaintiff is entitled to the orders sought.***

The Defendant failed to enter appearance and thereby defend the suit. The fact that the suit has not been defended means that the Plaintiff's evidence remained unchallenged and uncontroverted. However the Court will not just enter Judgment without interrogating the veracity of the evidence placed before it as the Plaintiff is still required to prove his case on the required standard of balance of probabilities. See the case of **Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR**, where the Court cited the case of **Karuru Munyororo.....Vs....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988**, where the Court held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”

The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with logical conclusion as *exparte* evidence is not automatic prove of a case as the Plaintiff has the duty to discharge the burden of proof. See the case of **Kenya Power & Lighting Company Limited... Vs...Nathan Karanja Gachoka & another [2016] eKLR**, the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

Further the case of **Gichinga Kibutha...Vs...Carooline Nduku (2018) eKLR**, where the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

The Plaintiff has sought for the order of this Court to sever the ownership between him and his brother who is the Defendant herein. It is the Plaintiff's contention that he jointly owns the suit property with his brother and that together with the Defendant, they are the registered owners of the suit property. That though each one of them is in occupation of their separate share they hold the title as joint registered owners and that his brother has refused to sign documents to sever their ownership. However, no documents were produced before the Court to prove that the suit property is jointly owned by the Plaintiff and the Defendant. However, the court acknowledges that as per the Judgment attached in evidence, the Plaintiff was to get 3.5 acres of the property and the Defendant was equally entitled to 3.5 acres of the suit property.

Though the Plaintiff has alleged that the suit property is jointly owned, it is the Court's considered view that the suit property is owned in common, as each party has their own share of the property though undivided. From the provisions of the Land Registration Act, the key features of a tenancy in common are that each tenant has a distinct share in the common property which has not yet been divided among the co-owners, and there is no right of survivorship as among the co-owners. Therefore the size of a tenant's share is not affected by the death of the other co-owners, and when a tenant dies, his interest in the property passes on to his or her beneficiaries under a will or intestacy.

The Plaintiff has sought for severing of the property before this Court. However, the Court finds that it does not have jurisdiction to deal with the said issue as the law on the termination of a tenancy in common allows the co-owner to sever ownership by either acquiring the other person's interest, by sale and division of the proceeds or by petitioning the Land Registrar to partition the property so that each tenant is able to get their part of the share This is as per the provisions of **Sections 94 of the Land Registration Act** which provides for a severance of a common tenancy by way of partition.:

(1) Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a sub-division of land and of any covenants or conditions in a certificate of a land, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.

(2) An application, may be made to the Registrar, in the prescribed form, for an order for the partition of land owned in common by—

(a) any one or more of the tenants in common without the consent of all the tenants in common; or

(b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree.

Further see the case **Muhuri Muchiri ...vs... Hannah Nyamunya (Sued as the Administrator of the Estate of Njenga Muchiri also Known as Samuel Njenga Muchiri (Deceased) [2015] eKLR** where the Court held that:-

“co-owners to by agreement to sever the co-ownership by partition; by acquiring the interests of another co-owner and thus become solely entitled; or by the sale of the common property and division of the proceeds of the sale See the case of Shantaben Ramniklal Parmar & Another ...Vs... Beatrice Waruguru Gitutu, (2007) eKLR. It is also provided in Halsbury's Laws of England, Fourth Edition (Reissue) Volume 39(2) at paragraphs 214-215 as follows in this regard:

“214. Determination of union of interests in one person. A tenancy in common may be determined by the union of the various interests, whether by acquisition inter vivos or by testamentary disposition, in the same person, who therefore holds the entirety of the land.

215.Determination by partition. A tenancy in common may be determined by partition. The legal term ‘partition’ is applied to the division of land, tenements and hereditaments belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership between some or all of them.”

Under section 96 of the **Land Registration Act**, if for any reason the land sought to be partitioned is incapable of being partitioned, or the partition would adversely affect the proper use of the land, and the applicant for partition or one or more of the other tenants in common require the land to be sold, and the tenants in common cannot agree on the terms and conditions of the sale or the application of the proceeds of the sale, the tenants in common may make an application to the court for an order for sale and the court may—

“(a) cause a valuation of the land and of the shares of the tenants in common to be undertaken; and

(b) order the sale of the land or the separation and sale of the shares of the tenants in common by public auction or any other means which appears suitable to the court; or

(c) make any other order to dispose of the application which the court considers fair and reasonable.”

It thus clear that the Plaintiff has testified that he is in use and occupation of the suit property. He is not seeking for sale of the said property, and therefore he is entitled to partition which he seeks by asking the Court to order that the Defendant sign transfer documents. Therefore it is not in doubt as the Court has provided the procedure through which the same can be accomplished by way of partition. Consequently, the Plaintiff herein is thus required to follow the laid down procedure as per the provisions of **section 94 of the Land Registration Act** in this regard.

Under the section 94 the power to partition land held under *common tenancy* is given to the Registrars appointed under **section 12 and 13 of the Land Registration Act**, for the above reasons, this Court therefore finds that it cannot grant the order sought of severing the common tenancy as there is a procedure set down in law. See the Case of **Paul Muraya Kaguri ...Vs... Simon Mbaria Muchunu [2015] eKLR** where the Court held that;

“It is now trite law that where a statute establishes a dispute resolution mechanism, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say her rights were denied.”

Having carefully considered the available evidence and the available provisions of law, the Court finds and holds that the Plaintiff is not entitled to the orders sought.

This Court has carefully read and considered the pleadings, the provisions of law and the written submissions, and finds and holds that the Plaintiff has not proved his case on the required standard of balance of probabilities. For the above reason the Court finds and holds that the Plaintiff’s claim as set out in the Plaint dated **3rd September 2018**, is not merited and the same is dismissed entirely with no orders as to costs.

It is so ordered.

Dated, Signed and Delivered at Thika this 23rd Day of July 2020

L. GACHERU

JUDGE

23/7/2020

Lucy - Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of:

Ndumu Kimani & Co Advocates for the Plaintiff

No Consent for the 1st Defendant

No Consent for the 2nd Defendant

L. GACHERU

JUDGE

23/7/2020