



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ELC NO. 2 OF 2014 (O.S)
IN THE MATTER OF PARTITION OF CO-TENANCY
AND
IN THE MATTER OF L.R NO. LOC.8/GATARA/166
AND
IN THE MATTER OF ADMINISTRATION OF THE ESTATE OF RABAN WAIHARO
MWANGI, PAUL KAMAU NATHAN AND HERMAN KIRIGWI M. MWANGI (ALL
DECEASED)

MARY NJERI KAMAU.....PLAINTIFF

VERSUS

STANLEY MAINA WAIHARO1ST RESPONDENT

BILHA WAMBUI KIRIGWI.....2ND RESPONDENT

JUDGMENT

1. The plaintiff **Mary Njeri Kamau**, took up the summons dated **9th January, 2014** for determination of the following questions:-

- 1) Whether the partition of the suit property to sever the shares of the different persons entitled to it should as much as its possible take into account the parts the respective beneficiaries/heirs occupy and the developments they have effected thereon?**
- 2) Whether she should be adequately compensated for any loss of the developments on her share of the suit property occasioned by the intended partition of the co-tenancy by the beneficiaries of such lost developments?**
- 3) Who should pay the cost of the application?**

2. The application is supported by the affidavit of the plaintiff (applicant) in which she has deposed that the suit property is registered in the names of Herman Kirigwi M. Mwangi (deceased), Raban Waiharo Mwangi (deceased) and Paul Kamau Nathan (deceased); that the deceased persons herein were entitled to 3.16, 4.66 and 3.16 acres respectively as co-tenants of the suit property; that despite holding the suit

property as co-tenants each of the deceased persons and their families lived in distinct portions of the suit property where they had or have made various developments.

3. She explains that upon demise of her husband, she applied for letters of Administration of her deceased husband's share and was issued with letters in respect thereof in Kangema SRM Court's Succession Cause No. 27 of 2011 and that the grant was later confirmed granting her the 3.16 acres which belonged to her deceased husband. The 1st respondent is also said to have applied and obtained grant of letters of administration in Kangema SRM Court's Succession Cause No.28 of 2011.

4. Explaining that the administration of the estates of the first two deceased original co-tenants was duly effected by the registration of the respective beneficiaries as proprietors of the deceased person's respective shares of the suit property, the applicant points out that the estate of Herman Kirigwi is yet to be administered but his wife is in possession of his portion.

5. She further explains that the respective heirs of the estates, with the intention of severing the subsisting co-tenancy, have obtained the consent of the Land Control Board to effect the requisite sub-division. She points out that during sub-division she lost about 3000 tea bushes valued at approximately Kshs. 2,000,000/=.

6. Terming the proposed partition of the suit property greatly prejudicial to her and arguing that it was done without due regard to the legal safeguards to be observed in partitioning of co-tenancies, the applicant urges the court to grant the prayers she seeks in the application herein.

7. In reply and opposition to the application, the 1st respondent swore the replying affidavit filed on **31st January, 2014** wherein he argues that it is not possible to sub-divide or partition the suit property because the estate of Herman Kirigwi has not been administered. He points out that he is a son of the said Herman Kirigwi and that the 2nd respondent is his mother and wife of the late Herman Kirigwi. He further argues that they (his mother and himself) cannot be sued on behalf of the estate of the said Herman Kirigwi because they are not the administrators of his estate.

8. Concerning the contention by the applicant that a portion of her parcel of land and the developments thereon is being taken away from her, he explains that the 2nd respondent has planted new coffee bushes for the plaintiff as agreed in an agreement made on **5th February, 2013** and faults the applicant for failing to raise any objection when the suit property was being sub-divided by the surveyor.

9. Concerning the impugned sub-division, he explains that during sub-division the plaintiff also benefited from tea bushes belonging to other beneficiaries of the co-tenancy.

10. In view of the foregoing, he terms the application malicious and an abuse of the process of the court and urges the court to dismiss it with costs to the respondents.

The plaintiff's case

11. When the matter came up for hearing, the applicant informed the court that the suit property is registered in her name and in the name of Herman Kirigwi Mwangi and Stanley Maina and 6 others. She produced a certificate of search in respect of the suit property as Pexbt1.

12. The court heard that the name of the applicant was included in the title after she was appointed administrator of the estate of her deceased husband, Kamau Mwangi and that she owns the property alongside the other registered proprietors thereof. She stated that the respective entitlements of the registered proprietors was determined traditionally by elders in 1965; that ever since that time each family entitled to the suit property has been utilizing its identified parcel. She explained that as early as 1965 she planted 6000 tea bushes.

13. The court further heard that the process of sub-dividing the suit property began in 2012. In this regard the co-tenants went to the Land Control Board and obtained a consent to sub-divide the land.

14. Despite having been party to the foregoing, the applicant stated that when the surveyor came to carry out the intended sub-divisions she did not agree with the sub-division carried out because it alienated 3480 bushes from her portion to Wambui's portion.

15. She stated that she did not sign the transfer forms to sanction the intended registration because she did not agree with the sub-division effected by the surveyor.

16. The court further heard that after sub-division, the respondents started using a portion of her parcel and uprooted her crops (arrow roots and potatoes) to access about 2 acres of the parcel that belonged to her. She also stated that she lost a quarter an acre of her parcel of land to Stanley Maina.

17. Reacting to reference to an agreement allegedly signed between the co-tenants requiring the respondents to plant for her the lost tea bushes, she stated that she was not party to that agreement.

18. Contrary to the allegations that she did not raise objection to the proposed sub-division, she stated that she rejected the proposal and insisted that each person utilize the portion they had developed because the tea bushes were not of the same quality. She urged the court to order maintenance of the status which obtained before the impugned sub-divisions.

19. On cross-examination, she admitted that she did not sue all the parties affected by the sub-division. She explained that she did not sue the other interested parties because it is the respondents who are utilizing her portion. She admitted that she benefitted with 700 bushes from Francis Chege.

20. Concerning her claim for compensation at Kshs. 2,000,000/=, she explained that she based the claim on the estimate of Kshs. 600/= per Coffee bush paid by KPCU. She conceded that she had not obtained a valuation from an Agricultural Officer to confirm the alleged loss.

21. The court further heard that the applicant lodged her objection at the Murang'a Lands Office. The applicant denied having knowledge that her daughter signed the agreement reached between the parties herein concerning the sub-divisions on her behalf but stated that there had never been any dispute concerning ownership of the tea bushes before the sub-divisions effected by the surveyor.

The Defence case

22. D.W.1 Stanley Maina Waiharo, informed the court that the entire portion of land comprised in the co-tenancy among the applicant and the other registered proprietors has been sub-divided by a surveyor. He explained that after sub-division, the applicant lodged a claim before the Land Registrar and as a result, all parties involved in the dispute held a meeting at the office of the Land Registrar where it was agreed that the 2nd respondent (Bilha Wambui) should plant for the applicant the 2035 bushes which went to her portion. He produced minutes of that meeting as Dexbt 2. He further explained that as a result of the sub-division, the applicant also benefitted with tea bushes from Francis Chege and Paul Kamau.

23. Concerning the orders sought, he stated that if granted, the orders will affect persons not enjoined in the suit. He wondered why the applicant had failed to enjoin all the persons affected by the sub-division to this application.

24. He also contended that the orders sought cannot issue against the 2nd respondent because she is not the administrator of her deceased husband's estate.

25. He denied having taken any tea bushes from the applicant but conceded that before sub-division, each of the parties affected by the sub-division were using the parcels identified to them by their predecessors in title or entitlement.

26. He further admitted that the surveyor did not take into account the portion each of the families represented in the co-tenancy were using.

27. He stated that he would have no problem if the suit properties are sub-divided as proposed by the applicant provided the applicant gets the 3.16 acres she is entitled to, as opposed to the 4 acres she was using before the sub-division.

28. On her part, D.W.2 Bilha Wambui, informed the court that the applicant like herself, is entitled to 3.16 acres of the suit property. Her entitlement flows from her deceased husband Herman who passed on in 2011.

29. Concerning the impugned subdivisions, she stated that after the surveyor put beacons, the applicant and her children removed them. She explained that the applicant did not object at the time of sub-division but complained later. The court heard that no part of her portion went to the applicant but she benefited from a portion of the applicant's land.

30. She explained that after the dispute was taken to the Land Registrar, she planted for the applicant the tea bushes she lost as ordered by the Land Registrar. She informed the court that it had been agreed that the applicant would continue picking her tea bushes for three years to allow the bushes she had planted for the applicant grow. Thereafter she would take over the applicant's tea bushes.

31. Like the applicant, she stated that they had no problem before the surveyor came.

32. With regard to the fact that she got a portion of the applicant's developed portion, she explained that the applicant was compensated with another portion with tea bushes.

33. Like D.W.1, she stated that she has no problem if the suit property is sub-divided in the manner proposed by the applicant provided that the applicant got the 3.16 acres she is entitled to.

Analysis and determination

34. It is not in dispute that before the impugned sub-divisions of the suit property, all the persons entitled to it held distinct portions thereof. When the surveyor undertook the sub-divisions, he failed to take into account the co-tenants respective interests thereof and instead did the sub-divisions on account of the acreage the co-tenants were entitled to. It is that method of sub-division which aggrieved the applicant.

35. The applicant's grievance is that she lost a lot of her investment (tea bushes) and also land. That fact is acknowledged by the respondents in their testimonies, hence not in contention. It is also not in dispute that the impugned sub-divisions also affected other co-tenants or beneficiaries of the co-tenancy who are not parties to the suit. The orders sought also touch on the estate of Herman Kibirigwi which has not been succeeded to in accordance with the law.

36. The issues which arise from the foregoing situation is whether the orders sought can issue in favour of the applicant, yet they will affect persons who are not parties to the suit. In answering this question, I take note of the decision in **Pashito Holding Ltd & another v. Paul Nderitu Ndungu & 2 Others** Civil Appeal No. 138 of 1997, where the Court of Appeal held:-

“It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him.”

37. Although in the circumstances of this case nothing is urged against the co-tenants who are not parties to this suit, I note that granting the orders sought will affect them without having been afforded an opportunity to give their views on the orders sought. Such a move will, in my view, be prejudicial to the other co-tenants who like the applicant, have a right to participate in deliberations concerning how the suit property should be sub-divided.

In this regard see the case of **Josiah Kangogo & 6 others v. Ngobitwa FCS Ltd & 5 others (2007)e KLR** where faced with a near similar situation **Kaburu Bauni J.** Stated:-

“It was not in dispute that the first respondents have a membership of over 150 people. Applicants are only six and they have not stated if they are bringing this suit on their own behalf and on that of all the other members. Court has not been told whether the other members have the same interest as the applicants or if the others have authorized the applicants to sue on their behalf in which case provisions of order 1 rule 12 CPR should have been complied with. There are no doubts if orders sought are granted they will certainly affect another 139 members of the society and their interest in the parcels of land. I do concur with my brother in his holding in case of JOSEPH KIBUNGEI KUNGUN VS GILBERT KIPKOECH SUM & ANOTHER HC.CC.NO.18 OF 2005, who faced with similar circumstances he held:-

“The plaintiffs want to change situation and the same will certainly have implication on the unnamed persons. It is my view that any grant of any of the orders in the application would amount to a gross and blatant violation of the cardinal’s principles of natural justice. This is aggravated by the fact that the undisclosed seven others have not been named in the suit.”

In this suit the undisclosed others are 139 and are not named in the suit. As shareholders they must be eagerly awaiting to be issued with title deeds. It would be unjust to issue orders which would affect them when they are not parties to the suit The land is not currently registered in the applicants names and they are in occupation of their shares. They too want to be issued with the title deeds....

From the above therefore I find the application lacks merit.”

38. It would also be against the law to deliberate on the estate of Herman Kibirigwi, which forms part of the co-tenancy before it is properly administered in accordance with the law. Besides, it has not been demonstrated that the respondents were responsible for the impugned actions of the Surveyor.

39. In view of the foregoing, despite the issues raised by the applicant being quite germane and justiciable, having found that granting of the orders sought will affect persons who are not parties to the suit, like Francis Chege, I decline to grant the orders sought.

40. This being a family dispute each party shall bear their own costs.

Dated, signed and delivered at Nyeri this 12th day of May, 2015

L. N. WAITHAKA

JUDGE

In the presence of:

Mr. Kingori for the plaintiff.

Stanley Maina Waiharo – 1st respondent

Representative of Bilha Wambui Kirigwi – 2nd respondent

Nathan Mwangi

Lydia – Court Assistant