



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 2191 OF 1998**

**DOROTHY MARGARET WAMBUI GILL....1ST PLAINTIFF**

**SAID MARLO MUNGAI.....2ND PLAINTIFF**

**SUSAN OESTERRECHER.....3RD PLAINTIFF**

**VERSUS**

**JANE RICHTER.....1 ST DEFENDANT**

**CLIFFORD KURT RICHTER.....2 ND DEFENDANT**

**JUDGMENT**

**Background**

1. The dispute in this suit revolves around the 2nd defendant's entitlement to 1/5 share of the proceeds of the sale of Land Reference Number 37/11/47 situated in Eastleigh Section II, Nairobi ( **the suit property**). The suit property previously belonged to the late Wanjiku Njoroge. Upon her demise, the Public Trustee through an instrument of assent dated 14/1/1976 conveyed the property to her five children, namely , (i) Said Muigai; (ii) John Joseph Kariuki; (iii) Jane Richter; (iv) Dorothy Gill; and (v) Susan Oesterrecher , as tenants in common in equal shares.

2. Subsequent to the conveyance, one of the siblings, John Joseph Kariuki (hereinafter referred to as **the deceased**) died. The 2nd defendant, Clifford Kurt Richter, who is a son to the 1st defendant, contends that prior to his death, John Joseph Kariuki (his uncle), conveyed to him his 1/5 share in the suit property. The conveyance of the 1/5 share was subsequently contested by the original plaintiffs herein, contending that if their brother were to gift away his 1/5 share, they were the likely beneficiaries as opposed to their nephew. The 2nd defendant was however firm and insisted on the 1/5 entitlement to the rental income from the suit property.

3. Consequently, on 2/10/1998, the plaintiffs took out an originating summons under Order XXXVI rule 5 of the then operative Civil Procedure Rules seeking a determination of the following verbatim questions:

***1. Whether the 2nd defendant is or is not a joint owner together with the plaintiffs and the 1st defendant of the property known as LR NO 36/11/47 Eastleigh Section II Nairobi (herein referred to as the "Suit Property").***

***2. Whether the 2nd defendant is entitled to any proceeds or income from the suit property.***

***3. That a declaration be made that the 2nd defendant Clifford Kurt Richter, be and is hereby declared not to be a joint owner and/or joint proprietor together with the plaintiffs and the 1st defendant of the suit property.***

***4. (a) That an order be made restraining the defendants jointly and severally from collecting the rent proceeds of the suit property.***

***(b) That an order be made directing that the rent proceeds accruing from the suit property be deposited in court or in a joint interest earning account as this honourable court may direct until the final determination of this suit.***

***5. That orders be made for:-***

***(a) The taking of accounts.***

*(b) The 1st defendant to account for the plaintiffs for all the rent proceeds collected to date in respect of the suit property.*

*(c) This honourable court do thereafter give directions as to the distribution of rent proceeds collected to date in respect of the suit property.*

*(d) This honourable court do thereafter give directions as to the distribution of the rent proceeds.*

6. *(a) That a declaration be made dissolving the joint ownership/proprietorship of the suit property and the court do order the sale of the suit property.*

*(b) This honourable court do give directions as to the distribution and/or sharing off the proceeds of sale of the suit property.*

7. *This honourable court do give or make other or further orders incidental to the foregoing as may be just and expedient.*

8. *That costs be provided for.*

#### **The 2nd and 3rd Plaintiffs' Case**

4. The 2nd and 3rd plaintiff's case was that the 2nd defendant fraudulently conveyed to himself the deceased's 1/5 share of the suit property. Their position was that the 2nd defendant was not entitled to the deceased's share of rental proceeds. They further contended that the deceased did not have children and therefore his 1/5 share reverted to his siblings who were "joint owners" with him.

#### **The 2nd Defendants' Case**

5. The 2nd defendant opposed the originating summons through a replying affidavit. His case was that the deceased gifted him his 1/5 share as a tenant in common and duly executed a conveyance dated 25/8/1993 which was duly registered on 12/4/1996. He contended that he was a tenant in common entitled to the 1/5 share of the suit property.

#### **Subsequent Events**

6. A number of developments which have significant legal bearing on this suit took place during the pendency of the suit. Firstly, Dorothy Margaret Wambui Gill, Said Muigai and Susan Oesterreicher all died on diverse dates during the pendency of the suit. Secondly, on 21/7/2016, by consent of the parties, the suit by the 1st plaintiff was marked as abated. Thirdly, the suit against the 1st defendant was withdrawn on 20/7/2017. Fourthly, by consent of the parties, it was ordered that the rent proceeds of the suit property be deposited in a joint interest earning account in the joint names of the parties' advocates pending the hearing and determination of the suit. Fifthly, in 2004, by consent of the parties, the court uplifted Kshs 1,000,000 from the rent proceeds account and the amount was shared equally among the five registered proprietors including the 2nd defendant. Sixthly and most significant, the estates of the three deceased plaintiffs together with the two defendants entered into and executed a sale agreement and jointly sold the suit property to one Surera Jamaa Mohamed at a purchase price of Kshs 40,500,000. They subsequently, by consent, procured a vesting order in favour of the purchaser. The suit property was consequently conveyed to the new proprietor and is therefore not available for distribution. What is now in contest is the 2nd defendant's entitlement to the 1/5 share of the sale proceeds together with any rental income which may be on the rent proceeds account.

7. Arising from the above developments, the only issue remaining for determination in this originating summons relates to question number 2. The question is whether the 2nd defendant is entitled to 1/5 share of the sale proceeds and rental income from the suit property.

#### **Plaintiffs Evidence**

8. Hearing commenced on 23/11/2017. Fred Ali (PW1) testified that he was a son and personal representative of the 2nd plaintiff who is now deceased. He adopted his witness statement dated 17/8/2016 as his sworn evidence in chief. He stated that the three deceased plaintiffs together with the 1st defendant and the late John Joseph Kariuki were siblings. He testified that the five siblings entered into an agreement dated 3/9/1973 on how the suit property was going to be distributed between them. He added that he was not aware that his uncle, John Joseph Kariuki, had gifted his 1/5 share to the 2nd defendant prior to his death. He further stated that they contested the conveyance of the 1/5 share to the 2nd defendant because the conveyance was tainted with fraud. PW 1 stated that the suit property had since been sold and what was remaining was the share that was owned by John Joseph Kariuki. During cross examination, he stated that the late John Kariuki did not have a family and therefore his 1/5 share should have gone back to the co-owners. He added that the administrators of the plaintiffs' estates together with the defendants sold the property to one Surera Jamaa Mohammed through an agreement dated 19/1/2015. He further stated that the 2nd defendant signed the sale agreement as a co-vendor and no one objected to that.

9. Anthony James testified as PW2. He stated that he was the son of the 3rd plaintiff. He adopted his written statement dated 14/8/2016 as his sworn evidence in chief. He stated that the defendants attempted to defraud his mother of her share through a conveyance which was produced as Plaintiff Exhibit Number 3. During cross-examination, he stated that his mother's estate received a 1/5 share of the sale proceeds from the sale of the suit property.

10. Abdul Said Abdullah testified as PW3. He adopted his written statement dated 15/6/2016 as his sworn evidence in chief. He stated that the deceased was his uncle. He added that the deceased complained to him while in hospital that the defendants forcefully took his identification document and driving licence. In cross-examination, he stated that the deceased had a daughter. He further stated that he was not aware that the defendants were offering financial assistance to the deceased. He stated that the suit property should have reverted back to

the siblings of John Joseph Kariuki.

11. Mackenzie Mweu testified as PW 4. He stated that he was a documents examiner. He adopted his written statement dated 19/8/2016 as his sworn evidence in chief. He testified that he authored the document examination report in the plaintiffs' bundle of documents. He stated that he was requested to compare and examine two signatures marked as "E" which was contained in a conveyance dated 25/8/1993 and "B" which was contained in an instrument of assent dated 14/1/1976. He stated that his duty was only to compare the two signatures as he did not know the authors. He contended that there were differences in letter formation, writing pressure, speed of writing and quality of writing movement. He concluded that the two signatures were not produced by the same person. During cross-examination, he stated that the documents he examined were copies. He added that photocopies would reveal different results from the original copies. He further stated that handwriting changes over a period of time and since he examined the signatures 40 years after they were signed, there was a possibility of change of handwriting. He also stated that an individual's signature changes with time due to old age, sickness, injury to the hand, and effect of alcohol.

12. The 2nd defendant testified as DW1. He stated that his late uncle gifted him 1/5 of his share out of free will. He stated that the conveyance to him was registered in 1996 before his uncle passed on. He added that his lawyer, Mr Kamere, was present when the gift was presented to him. He further stated that the unexecuted conveyance referred to by the plaintiffs was not fully executed because the 3rd plaintiff needed to seek a second opinion before executing it. He stated that his mother cancelled her signature in the said conveyance because she changed her mind.

### **2nd and 3rd Plaintiff's Submissions**

13. The 2nd and 3rd plaintiff filed written submissions on 2/10/2018. It was their submission that they had *locus standi* to continue with the pending suit upon the death of the plaintiffs. It was their further submission that they had taken out letters of administration and were acting as administrators of the estates of the deceased plaintiffs. They also submitted that the conveyance registered on 12/4/1996 was not properly attested because it was attested by one witness instead of two witnesses as required by Section 123 of the Transfer of Property Act. They added that no one from Kamere's office was called to testify that they witnessed the signing of the conveyance. The 2nd and 3rd plaintiffs further submitted that the 2nd defendant could not explain the cancellation of some signatures on the contested conveyance.

14. The 2nd and 3rd plaintiffs further submitted that the conveyance was tainted with fraud and therefore, the registration should be cancelled. They added that they had proved that the 2nd defendant had the intention to defraud all the owners of the suit property and therefore his title cannot stand. Reliance was placed on **Arthi Highway Developers Limited vs West End Butchery Limited & 6 others, Court of Appeal No. 246 of 2013**. It was also submitted that the 2nd defendant did not challenge the evidence of PW 4 who examined the signatures and concluded that the two signatures were different.

15. Lastly, the 2nd and 3rd plaintiffs submitted that the 2nd defendant was not entitled to the proceeds of the sale from the suit property. They added that it was in agreement that the sale would proceed subject to preservation of the 1/5 of the contested share. It was further submitted that the 2nd defendant was not entitled to any proceeds because his title was acquired illegally.

### **2nd Defendant's Submissions**

16. The 2nd defendant filed his submissions dated 25th February 2019 in which he reiterated his case. He argued that the plaintiffs did not have the *locus standi* to institute this suit because they were not the legal representatives of John Joseph Kariuki. He quoted Section 91(5) of the Land Registration Act which relates to devolution of the interest of a deceased tenant in common.

17. He further submitted that he was the legal owner of the 1/5 share in the suit property and that the issue of fraud had not been proved by the plaintiff. He relied on the case of **Dr Joseph N K Arap Ng'ok v Justice Moijo Ole Keiwua and others Nairobi Civil Application No. NAI 60 of 1997(unreported)** where the Court of Appeal held that ownership of land can only be challenged on the grounds of fraud or misrepresentation. Reliance was also placed on **Evans Otieno Nyakwana v Cleophas Bwana Ongaro[2015] eKLR** where the court held that the defendant having alleged forgery, it was his duty to prove the same. Finally, he submitted that he was entitled to the deceased's share as a co-tenant in common.

### **Analysis & Determination**

18. As observed in paragraphs 6 and 7 of this judgment, the events which took place during the pendency of this suit rendered most of the questions in the originating summons moot. The only outstanding question is question number 2. The question is whether the 2nd defendant is entitled to 1/5/ share of the sale proceeds and rental income from the suit property. I have considered the parties' evidence and submissions. I have also considered the relevant legal framework and jurisprudence.

19. The plaintiffs contend that the conveyance of the 1/5 share of the late John Joseph Kariuki's interest in the suit property to the 2nd defendant was fraudulent and is therefore null and void. Secondly, it is contended that the deceased plaintiffs together with the 1st defendant and the late John Joseph Kariuki were "joint owners" hence the 1/5 share interest of the late John Joseph Kariuki should devolve to the joint owners who survived him. On his part, the 2nd defendant contends that the late John Joseph Kariuki conveyed to him his 1/5 share during his life time and he is properly entitled to the 1/5 share. The 2nd defendant's position was supported by the 1st defendant through her affidavit sworn on 28/10/1998 and filed on the same day in response to the originating summons.

20. I have considered the allegation of fraud in relation to the conveyance in favour of the 2nd defendant. Firstly, there is evidence that the Directorate of Criminal Investigations (the CID) was seized of the allegation of fraud prior to the filing of this suit. The CID duly investigated the allegation and concluded that there was no evidence of fraud in relation to the impugned conveyance. Secondly, the estate of the late John Joseph Kariuki did not and has not complained about any fraud on part of the 2nd defendant in relation to the impugned conveyance. Thirdly, PW 4 stated that what he was shown to compare were photocopies of signatures. He added that photocopies often reveal different results from originals. He further stated that an individual's signature often changes due to old age, sickness, injury and

alcohol effect. Fourthly, the estates of the deceased plaintiffs together with the two defendants entered into a binding sale agreement and sold the suit property. By inviting the court to find that the 2nd defendant's tenancy in common is tainted with fraud and is null and void, the plaintiffs are in essence inviting the court to nullify the joint sale and vacate the vesting order. In my view, the proposed finding is not compatible with the legal steps which the five tenants in common have jointly taken in relation to the suit property and will be prejudicial to the current proprietor of the suit property. The totality of the above evidence is that there is no proof of the allegation of fraud on part of the 2nd defendant in relation to the impugned conveyance.

21. I have similarly considered the issue of locus of the plaintiffs to challenge the 2nd defendant's entitlement to the 1/5 share of the sale proceeds and rental income. The five siblings owned the suit property as tenants in common. They were not joint tenants as contended by the plaintiffs. The tenor and import of tenancy in common is that the share of a deceased tenant in common devolves to the estate of the tenant in common. The tenor and import of joint tenancy is that the joint interest of the deceased joint tenant devolves to the surviving joint tenant (s).

22. The legal implication of the tenancy in common in the present suit is that only the personal representative(s) of the late John Joseph Kariuki would be entitled to maintain a claim in respect of the 1/5 share which the plaintiffs contend was not properly conveyed to the 2nd defendant. The plaintiffs in this suit have not demonstrated that they are the duly appointed personal representatives of the late John Joseph Kariuki. For this reason, they cannot maintain a cause of action in relation to the 1/5 share previously held by the late John Joseph Kariuki as a tenant in common and was conveyed to the 2nd defendant through the impugned conveyance.

23. In light of the foregoing, it is my finding that the 2nd and 3rd plaintiffs have failed to prove fraud on part of the 2nd defendant in relation to the impugned conveyance. It is my further finding that the 2nd and 3rd plaintiffs have failed to prove that they have *locus standi* to maintain a claim in relation to the 1/5 share which hitherto belonged to the late John Joseph Kariuki and was subsequently conveyed to the 2nd defendant through the impugned conveyance.

24. The net result of the above findings is that there is no proper basis for denying the 2nd defendant entitlement to the 1/5 share of the sale proceeds and rental income in respect of the suit property. My answer to the only outstanding question in the originating summons under consideration therefore is that the 2nd defendant, Clifford Kurt Richter, is entitled to 1/5 share of the total sale proceeds of the suit property and 1/5 share of the accrued total rental income from the suit property. The same should be released to him through his advocates forthwith.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF JUNE 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Kamau holding brief for Mr Njagi for the plaintiff

Ms Too holding brief for Mr Kamere for the defendant

Court Clerk - June Nafula