



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL CASE NO. 243 OF 2010**

**PAOLO ROSSI.....1<sup>ST</sup> PLAINTIFF**

**JOANNA SHABIR MUSSANI.....2<sup>ND</sup> PLAINTIFF**

**SHABIR SULEIMAN MUSSANI.....3<sup>RD</sup> PLAINTIFF**

**= VERSUS =**

**CHRISTIAN ROSSI.....1<sup>ST</sup> DEFENDANT**

**DR. IZZO ANNUNZIATA.....2<sup>ND</sup> DEFENDANT**

**J U D G E M E N T**

1. This suit was commenced by a plaint dated 19<sup>th</sup> July 2010 against the defendants. The plaint was later amended on 28<sup>th</sup> April 2016 and filed on 4<sup>th</sup> May 2016. In the amended plaint, the plaintiffs pleaded that on 20/4/1999, the 1<sup>st</sup> plaintiff's father purchased property number Kwale/Galu Kinondo/331 and gifted to the 1<sup>st</sup> plaintiff and her late brother Luigi Rossi. That the property was held by the 1<sup>st</sup> plaintiff and her brother as joint tenants.

2. Following the death of the 1<sup>st</sup> plaintiff's brother on 5<sup>th</sup> October 2008, she transferred the property in her name and obtained a title. The 1<sup>st</sup> plaintiff pleaded that she subdivided the suit title into Kwale/Galu Kinondo/2377, 2378, 2379 and 2380 and sold title No. 2379 to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs. That the defendants on 13/4/2015 wrongfully registered cautions on the new numbers thus preventing the plaintiffs from dealing with the properties quietly. The plaintiffs thus prays for judgment to be entered in their favour in the following terms:

**(a) A declaration that the 1<sup>st</sup> plaintiff is the registered owner of properties title No. Kwale/Galu Kinondo/1453 and Kwale/Galu Kinondo/1454. Kwale/Galu Kinondo 2377, Kwale/Galu Kinondo 2378 and Kwale/Galu Kinondo 2280 whilst the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are the registered owners of properties title No. Kwale/Galu Kinondo/2379.**

**(b) A declaration that the defendants have no beneficiary interest or otherwise over the suit property and should never place restrictions on the properties title No. Kwale/Galu Kinondo/1453 and Kwale/Galu Kinondo/1454. Kwale/Galu Kinondo 2377, Kwale/Galu Kinondo 2378, Kwale/Galu Kinondo 2279 and Kwale/Galu Kinondo 2280.**

**(c) An order directing the Lands Registrar Kwale to withdraw the cautions.**

**(c) (a) General damages for lodging maintaining wrongful cautions over the plaintiffs property.**

**(d) Costs of the suit herein**

**(e) Any other relief that this Honourable Court deems suitable.**

3. The defendants filed a joint statement of defence and counter-claim on 17<sup>th</sup> May 2016. The defendants pleaded that the suit is a nullity because they are sued in their individual capacities and not as administrators of the estate of the late Luigi Rossi who had an equal interest in the property. The defendants pleaded that they were issued with letters of administration of Luigi's estate on 4<sup>th</sup> November 2010.

4. The defendants denied that the property was held as a joint tenancy and they put the plaintiffs to strict proof. The defendants thus counter-

claim for equal share in the suit property and plead that the subdivision undertaken by the 1<sup>st</sup> plaintiff was tainted with glaring illegalities and is void ab initio. In the alternative, the defendants pray that the property Galu Kinondo/2379 transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs be deemed as the 1<sup>st</sup> plaintiff's portion and the defendants be declared as owners of the remaining portion.

5. The plaintiffs filed a list of documents on 23<sup>rd</sup> June 2016 containing 22 documents. The documents included the copies of certificates of titles of the suit properties, the transfers and the cautions registered by the defendants. At the close of pleadings, parties called oral evidence.

6. The 1<sup>st</sup> plaintiff testified as **PW1** on 3<sup>rd</sup> April 2017. She adopted her witness statement as part of her evidence. She stated that her father bought the property Kwale/Galu Kinondo/331 in 1999 and registered it in her name and that of her late brother as joint tenants. Later they subdivided the property in their two names to produce Nos 1453 and 1454. **PW1** continued that when her brother died in 2008 she was advised to register the properties in her name which she did. That the declaration of joint tenancy by his father was made on 14/7/2009.

7. The 1<sup>st</sup> defendant registered a caution on the suit property the 1<sup>st</sup> time on 18/3/2009 but that caution was later removed by the Land Registrar. The second caution was registered on 13<sup>th</sup> April 2015 on all the titles. **PW1** said she is unable to deal with the titles because of the cautions lodged by the 2<sup>nd</sup> defendant. That it was her father's wish the property remains in her name. She urged the court to order the caution be removed as the defendants have no beneficial interest. In cross-examination, **PW1** stated she never consulted the 1<sup>st</sup> defendant before selling the suit properties to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs as she was not obliged. That the property was not held as tenancy in common.

8. Kevin McCourt gave evidence as **PW2**. He is an advocate of the High Court of Kenya. **PW2** stated that Bruno Rossi purchased the property in Kwale in the names of his two children. That Bruno swore the declaration produced as Pex 5 in Italy which has been translated into English. **PW2** said he witnessed the execution of the transfer dated 20/4/1999 produced as Pex 2. That under joint tenancy, the doctrine of survivorship rests on the surviving party thus when Luigi died, the 1<sup>st</sup> plaintiff became the bonafide owner. **PW2** denied witnessing a transfer form filed with the defendants' list.

9. Shabir Suleiman Mussa testified as **PW3**. He is the 3<sup>rd</sup> plaintiff and stated that they (2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs) bought the suit title Kwale/Galu Kinondo/2379 in 2014 from the 1<sup>st</sup> plaintiff. That before buying, they did a search and confirmed that the properties 1453 and 1454 was registered in the name of the 1<sup>st</sup> plaintiff. He prayed that the caution registered in their title be lifted. That he has constructed a house on the plot they had bought. That while they were constructing, everything was in order as the property belonged to the plaintiff.

10. The 2<sup>nd</sup> defendant gave her evidence on 14/6/2017. She is a resident of Italy, 93 Mabiriot Street. The 1<sup>st</sup> plaintiff is her sister-in-law. That she got married to Luigi in 1973 and Luigi died in October 2008. The 1<sup>st</sup> defendant is her son. **DW1** said she is the administrator of her late husband's estate - Dex 2. That after the death of Luigi, **DW1** came to Kenya to inquire about their property in Kwale. She was shocked to find the property was solely registered in the name of the 1<sup>st</sup> plaintiff yet they owned the plot with Luigi as tenants in common. That on realising this **DW1** was advised and she lodged a caution on 18<sup>th</sup> March 2009. Thereafter her lawyer sent a letter of complaint to the provincial administration dated 15/2/2010 – Dex 20.

11. That in the year 2015, she again visited the suit property and found a building constructed on it so she lodged the 2<sup>nd</sup> caution dated 13/4/2015 – Dex 13. She urged the Court to find that her husband also owned the suit property and had an intention of setting up a clinic on it. **DW1** admitted Mr. McCourt was their advocate when the property was registered into the names of Luigi and Paolo's name. **DW1** was not present but saw the documents at home. All she wanted is their share of the property.

12. **TAFFERE ABRAHA** testified as **DW2**. He is 74 years old and lives in Malindi. **DW2** said he was aware Dr. Izzo Annunziata held letters of administration of the estate of Luigi Rossi. That the defendants lodged the caution to preserve their interest in the suit properties. According to **DW2**, the defendants are entitled to equal share in the suit properties.

13. Dick Safari who is currently the Land Registrar testified as **DW3**. He said that his record showed the transferees held the leasehold as joint proprietors. He was not present at Kwale when the transfer was registered. He produced a certified copy of the transfer as exhibit. In re-examination, **DW3** said he only had one transfer relating to the 1999 transaction. This marked the close of the defence case.

14. The plaintiffs filed their written submissions and list of authorities on 12<sup>th</sup> March 2019. The defendants filed theirs on 6<sup>th</sup> June 2019. I have read and considered both.

15. From the pleadings and the evidence, it is not in dispute that the land title No. Kwale/Galu Kinondo/331 was registered in the names of the 1<sup>st</sup> plaintiff and the late Luigi Rossi. The land was subsequently divided into two i.e. Galu Kinondo/1453 and 1454 and certificates of lease issued in the two names (Paola Rossi and Luigi Rossi) on 1<sup>st</sup> February 2000. Parcel No. 1453 measuring 0.396ha while 1454 measuring 2.610 hectares. The 1<sup>st</sup> plaintiff stated that upon the demise of Luigi Rossi, she obtained registration in her name because under the principle of joint tenancy, the property became hers. The defendants do not agree, claiming equal share for Luigi Rossi-deceased.

16. For my determination is:

(i) *Whether or not the interest of Luigi Rossi in the suit properties was transferrable to his beneficiaries or the 1<sup>st</sup> plaintiff.*

(ii) *Whether or not the prayers in the plaint are available to the plaintiffs.*

(iii) *Who bears the cost of this suit?*

17. The 1<sup>st</sup> plaintiff in her evidence stated that it was the intention of her father Bruno Rossi who gifted them the suit property that either of them would inherit the property wholly on the death of their sibling. She produced the declaration made by Bruno Rossi to express this intention as Pex 5. The declaration was made in the year 2009. The transfer to the 1<sup>st</sup> plaintiff and Luigi Rossi was registered on 12<sup>th</sup> May 1999. In this transfer document, what was transferred to Paolo and Luigi was the interest of the deceased (through the administrators who were the vendors) comprised in the above mentioned title. The transfer was witnessed by Kevin McCourt (PW2) on 20/4/1999.

18. On the face of the transfer document dated 20/4/1999 it is indicated that the two people held the leasehold interest as joint proprietors. A copy of the same transfer form was annexed by the defendants as TA-10 in the replying affidavit sworn on their behalf by Taffere Abraha on 23<sup>rd</sup> February 2016. The same copy now certified was also produced by the Land Registrar who testified as DW3.

19. The plaintiff submitted that Section 91(4) (b) of the Land Registration Act 2012 provides that:

**“On the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly”.** The plaintiff cited the holding in *Isabel Chelangat Vs Samuel Tiro (2012) eKLR* which stated thus;

***“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. A joint tenancy cannot pass under will or intestacy of a joint tenant as long as there is a surviving joint tenant as the right of survivorship takes precedence”.***

20. The defendants on their part submitted that the nature of ownership of the suit property between the 1<sup>st</sup> plaintiff and her brother was one of **“tenants in common”**. They cited the provisions of Section 119 of the Registered Land act Cap 300 (repealed) which governed properties registered under tenants in common. That the defendants have proved that they are entitled to a share in the suit property. The defendants also put reliance on the transfer documents dated 20/4/1999 which had the part **“tenants in common”** crossed out and below it was inserted **“joint proprietors”**. The defendants cited the Case of *CMC Aviation Ltd Vs Crusair Ltd NBI Civil Application No. 12 of 1978* where Madan JA had this to say:

***“The pleadings contain the averments of three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is founded on evidence. As stated in the definition of “evidence” in Section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or is disproved. Averments are matters of truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven ... The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend on the evidence for proof of their contents”.***

21. From the evidence adduced and the submissions rendered, it appears the defendants do admit that in case of joint tenancy, the interest of one tenant is passed on to the surviving party in case of death. Their only contention that in this case, the registration was as tenants in common and not joint tenants. To prove that the property was commonly held, the defendants relied on the evidence of the Land Registrar (DW3) which according to him proved that the registration was in common.

22. The defendants was hanging on the statement of DW3 when he said that he was not present in May 1999 so he could not ascertain what transpired at the time of the initial registration of the suit property in the name of 1<sup>st</sup> plaintiff and the late Luigi. The defendants rely on the provisions of Section 112 of the Evidence Act Cap 80 which provides thus: ***“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”***

23. However it is the defendants who are imputing that the registration was in common and not joint as the record presented by the 1<sup>st</sup> plaintiff and the Land Registrar now show. The burden of proof was upon them to show that indeed there was alteration of the land records to disinherit him. This is the principle of evidence enunciated in Section 107, 108 and 109 of the Evidence Act thus:

**“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

**109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

24. The defendants did not discharge this burden. The Court is persuaded to find that the property Kwale/Galu Kinondo/331 was registered in the names of Paolo Rossi and Luigi Rossi as joint tenants. This is confirmed by the transfer document executed on 20/4/1999 and the declaration made by Bruno Rossi in 2009. Consequently, as joint tenants, the interest of Luigi Rossi vested in Paolo Rossi who was the surviving tenant. The defendants’ claim for equal share does not lie in law.

25. In the absence of any other interest the defendants are claiming beside the interest of Luigi which vested in the 1<sup>st</sup> plaintiff I find no basis why the caution lodged by the defendants on 13<sup>th</sup> April 2015 should be sustained. I hold that the 1<sup>st</sup> plaintiff property acquired registration of the suit titles under her name and was at liberty to deal with the land in whatever manner she wanted as a registered owner within the rights given in Section 24 and 25 of the Land Registration Act.

26. Accordingly, I enter judgment for the plaintiffs under paragraphs:

**(a) That the 1<sup>st</sup> plaintiff is the registered owner of properties title No. Kwale/Galu Kinondo/1453 and Kwale/Galu Kinondo/1454. Kwale/Galu Kinondo 2377, Kwale/Galu Kinondo 2378 and Kwale/Galu Kinondo 2280 whilst the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are the registered owners of properties title No. Kwale/Galu Kinondo/2379;**

**(b) That the defendants have no beneficiary interest or otherwise over the suit property and should never place restrictions on the properties title No. Kwale/Galu Kinondo/1453 and Kwale/Galu Kinondo/1454. Kwale/Galu Kinondo 2377, Kwale/Galu Kinondo 2378, Kwale/Galue Kinondo 2279 and Kwale/Galu Kinondo 2280;**

**(c) And an order directing the Lands Registrar Kwale to remove the cautions registered on all the above titles.**

27. I shall not award damages as sought in paragraph c(a) of the amended plaint because no loss was proved to have been caused by the registration of the cautions on the suit titles. I order that each party meets their respective costs of the suit.

**Dated and signed at Busia this 12<sup>th</sup> day of November, 2019.**

**A. OMOLLO**

**JUDGE**

**Delivered and Read at Mombasa this 25<sup>th</sup> day of November, 2019**

**C.YANO**

**JUDGE**

**In the Presence of:**

Counsel for the Plaintiff:

Counsel for the Defendants: