



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC MISC APPLICATION NO. 39 OF 2016

SAMUEL NJIRAINI MURAGE.....APPLICANT

VERSUS

JOSEPH KARUBIU MURIITHI.....1ST DEFENDANT

GRACE KAGUU MURIITHI.....2ND DEFENDANT

RULING

In a Notice of Motion dated 13th November 2017, the applicant sought for the following orders:

(1) That an order do issue for partition of Plot Number INOI/KERUGOYA/250/92 into two equal portions, one partition to go to SAMUEL NJIRAINI MURAGE and the other portion to be registered in the names of JOSEPH KARUBIU MURIITHI in trust for the family of MURIITHI MURAGE (deceased).

(2) Costs of this application be provided for.

The application is supported by an affidavit by the applicant sworn the same date and grounds apparent on the face of the said application. The applicant also filed a further affidavit with annexures thereto sworn on 21st November 2018.

The application is opposed with a replying affidavit sworn by Joseph Karubiu Muriithi, the 1st interested party. The 1st interested party filed a further replying affidavit sworn on 16th January 2019.

APPLICANT'S CASE

According to the applicant, this Court in a judgment in J.R No. 2 of 2015 delivered on 22nd April 2016 held inter alia that the plot in question is held in a joint tenancy and in another ruling delivered on 8th December 2016, the Court ordered that the name of Muriithi Murage (deceased) be deleted from the register of the leasehold of the plot and another certificate of lease be issued in the name of Samuel Njiraini Murage. The plaintiff further contends that in yet another application filed in J.R No. 2 of 2015 which ruling was delivered on 21st July 2017, this Court clarified that proprietorship of Plot No. INOI/KERUGOYA/250/92 between Muriithi Murage (deceased) and Samuel Njiraini Murage shall be ownership as tenants in common in equal shares. He stated that the applicant has been pushing for the sub-division of the plot into 2 equal portions but the family of the late Muriithi Murage has totally refused to co-operate for reasons that they are in exclusive occupation of the plot which is fully developed and has commercial and residential houses. The applicant stated that the interested parties have been issued with limited letters of Administration Ad Litem and that they have the capacity to collect and preserve the properties of the deceased, pending filing of a full succession cause. He stated that though the Court had in its ruling delivered on 8th December 2016 directed that he be the sole proprietor of the plot and another lease had been issued in his favour, he decided to have the plot sub-divided into two (2) equal portions, one portion to be his and the other for the family of his brother. He stated that he reached that conclusion since he did not want to be selfish as they had developed the plot through the joint efforts and contributions by him and his late brother. He stated that he made an application to sub-divide the plot and the office of the Physical Planner informed the Coordinator, National Land Commission. He stated that all the necessary offices were informed about the sub-division process and approvals were sought. By 28th August 2017, he had received the provisional approval from the National Land Commission and the proposed partition of the plot into A and B approved. He decided to inform the family of his late brother of his intention after the ruling delivered by this Court on 21st July 2017 clarifying that the plot is owned by the two as tenants in common with equal shares. He stated that by a letter dated 28th August 2017, the interested parties through their advocate on record replied to the effect that he approaches the interested parties so that they can agree on the issue of sub-division. He stated that he responded to the effect that due to the strained relations, it may not be practically possible to agree. He decided to seek an opinion as to the mode of sub-division. He also sought advice of the Land Registrar in view of **Section 92 (2) of the Land**

Registration Act and the various correspondences and was informed that since the matter was pending in Court, he was not going to comment on it.

In his further affidavit sworn on 21st November 2018, the applicant stated that on 11th February 1972, his late brother Muriithi Murage applied to add him as a partner in the suit plot. By then the plot was not developed. That application was approved and the two were issued with a letter of allotment jointly on 16th April 1973. On 15th September 1973, they were issued with a certificate of lease. In November 1973, they decided to charge the property to enable them develop the same. In May 1975, they approached the same financial institution for a further advancement of loan to continue developing the plot. While all those were happening, they opened a joint account at KCB where the money intended for developing the plot was deposited which they could withdraw. They were both signatories and neither could transact business e.g. withdraw without the other.

On 30th September 1975, they approached their sister to assist them with Ksh. 20,000/= to complete the remaining part of the plot where they agreed she was to get one (1) shop. They later refunded her the money. In 1988, they discharged the property. He stated that he has not been able to enjoy the proceeds of rent from the plot which has all along been collected by the family of his late brother. He contends that he is entitled to half share of the plot in its developed state and that the respondent has an option to refund him and equivalent of the current value of the plot at Ksh. 7,850,000/=.

RESPONDENTS CASE

The interested parties stated that they have filed a Notice of Motion dated 16th February 2017 seeking to be enjoined in this case and to reinstate the name of Muriithi Murage as tenant in common with Samuel Njiraini Murage on the register of leasehold number INOI/KERUGOYA/250/92. They stated that the application for sub-division is therefore pre-mature, incompetent and improperly before the Court. The interested parties stated that the plot in dispute was fully developed by the late Muriithi Murage without any participation by the applicant. They also stated that the proceedings herein were commenced by way of a Miscellaneous Application and do not contain any pleadings upon which the orders of partition of Plot No. INOI/KERUGOYA/250/92 would be granted. The interested parties contend that on the plot INOI/KERUGOYA/250/92 stands a commercial development valued at Ksh. 16,500,000/= and that in the event that this Honourable Court is inclined to order the partition of the plot, the applicant be ordered to pay the Estate of the late MURIITHI MURAGE the value of the commercial development or half share of Plot No. INOI/KERUGOYA/250/92. The interested parties further stated that in the event the applicant is not prepared to pay the Estate of the late MURIITHI MURAGE the value of the developments or the half share of the plot, the family of the deceased be allowed to pay the applicant the value of half share of the undeveloped plot INOI/KERUGOYA/250/92 for his name to be removed from the ownership of the plot. The interested parties filed a further replying affidavit in which they stated that the suit plot was wholly and exclusively developed by the late Muriithi Murage and its construction commenced even before the applicant was invited to become a partner.

They contend that the materials for the construction of the premises were bought by the late Muriithi Murage through MUTIRA FARMERS CO-OPERATIVE SOCIETY. The interested parties stated that the applicant has failed to disclose that in August 1980, I.C.D.C through Samburu Auctioneers advertised the plot for sale by public auction for non-payment of the loan and that the plot was redeemed and the loan arrears repaid by the late Muriithi Murage. They also stated that the loan advanced by Grace Kaguu was also repaid by the late Muriithi Murage.

ISSUES FOR DETERMINATION

From the Notice of Motion, the affidavits in support and the replying affidavits, the following in my view are the appropriate issues for determination:

- (1) Whether the application is properly before Court?**
- (2) Whether the order sought is anchored on any pleading upon which such orders can be granted?**
- (3) Whether the interested parties are trustees for the Estate of Muriithi Murage (deceased)?**
- (4) Whether the applicant has proved his case on the required standard?**
- (5) Who shall bear the costs of the application?**

LEGAL ANALYSIS

I have considered the affidavit evidence and the documents attached thereto. I have also considered the submissions by the parties. It is not in dispute that the suit property Plot No. INOI/KERUGOYA/250/92 was registered in the joint names of Samuel Njiraini Murage (applicant) and Muriithi Murage (deceased). It is not also in dispute that in a Judicial Review proceedings in J.R No. 2 of 2015 (Kerugoya), this Court on 22nd April 2016 ruled that the suit plot was held by the deceased and the applicant in a joint tenancy. It is not also in dispute that in a subsequent Notice of Motion application by the interested parties herein dated 17th February 2017, the interested parties sought to review the orders of this Court issued on 22nd April 2016 to the effect that the suit plot was held in a joint tenancy. The interested parties herein sought an order that the suit plot was co-owned by Muriithi Murage (deceased) and Samuel Njiraini Murage (applicant). That application was dismissed on 21st July 2017. The applicant instituted these Miscellaneous proceedings initially by way of a Notice of Motion dated 3rd November 2016 under **Section 102 (1) (b) of the repealed Registered Land Act and Section 91 (4) (b) of the Land Registration Act** seeking an order that the name of Muriithi Murage (deceased) be deleted from the Register of leasehold number INOI/KERUGOYA/250/92 and another certificate of lease do issue in the name of Samuel Njiraini Murage (applicant). In a ruling delivered on 8th December 2016, this Court allowed the application and observed as follows:

“It is clear from the above therefore that the applicant is by operation of the law entitled to the orders sought”

In the ruling delivered on 21st July 2017, this Court clarified that the proprietorship of the suit property Plot No. INOI/KERUGOYA/250/92 as between Muriithi Murage (deceased) and Samuel Njiraini Murage shall be ownership as tenants in common in equal shares. The import of the proprietorship between the parties in the suit land is governed under **Section 103 of the Registered Land Act (Repealed)** which is equivalent to **Section 91 (8) of the current Land Registration Act No. 3 of 2012. Section 103 of the repealed Registered Land Act** provides as follows:

“103 (1) Where any land, lease or charge is owned in

common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor, his share shall be administered as part of his estate.

(2) No proprietor in common, shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietor of the land, but such consent shall not be unreasonably withheld”.

The **Land Registration Act (No. 3 of 2012)** which replaced the repealed Act does not approve joint proprietorship. It effectively bans them unless the proprietors are spouses or by an order of Court. The operative **Section is 91 (8)** which provides thus:

“91 (8) On and after the effective date, except with leave of Court, the only joint tenancy that shall be capable of being created shall be between spouses, and any joint tenancy other than that between spouses that is purported to be created without the leave of a Court shall take effect as a tenancy in common”.

The affidavit evidence indicates that though the applicant and the interested parties are close relatives, they are not able to resolve this matter amicably. The applicant and Muriithi Murage (deceased) are brothers and the interested parties are nephews to the applicant. The valuation reports filed by the two protagonists shows that the plot in dispute is constructed with commercial and residential buildings occupied by tenants who pay approximately Ksh. 144,000/= per month.

Having determined that the proprietorship of the suit plot is held in common and having found that the tenancy between the two proprietors has irretrievably broken down, I am of the view that like a marriage between spouses, a dissolution is inevitable. The long and short of it is that the Notice of Motion application dated 13th November 2017 is allowed in the following terms:

(1) That an order be and is hereby issued for partition of Plot No. INOI/KERUGOYA/250/92 into two equal portions, one portion to go to SAMUEL NJIRAINI MURAGE and the other portion to be registered in the name of JOSEPH KARUBIU MURIITHI to be held in trust of the Estate of MURIITHI MURAGE (deceased).

(2) In view of the close family ties between the two families, I order each party to bear her own costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 13th day of December, 2019.

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E.C. CHERONO

ELC JUDGE

13TH DECEMBER, 2019

In the presence of:

- 1. Mr. Maina Kagio for Applicant*
- 2. Mr. Munene holding brief for Mr. Muchira for Respondents*