



**REPUBLIC OF KENYA**

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

**ELC CIVIL CASE NO. 378 OF 2017**

**CONSOLIDATED WITH**

**ELC CIVIL CASE NO. 345 OF 2017**

**CORNELLA NABANGALA NABWANA.....PLAINTIFF**

**VERSUS**

**EDWARD VITALIS AKUKU.....1<sup>ST</sup> DEFENDANT**

**ELIZABETH MUGO AKUKU.....2<sup>ND</sup> DEFENDANT**

**MARTIN MUSE JUMA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. This consolidated cause relates to Land Reference Number 209/15469 (Original Number 209/10585/43) comprised in Title Number I.R. 98172 (the suit property). The suit property is situated in Akila 1 Estate in Nairobi City County. On it is a dwelling house. The 3rd Defendant, Martin Muse Juma, and the plaintiff, Cornella Nabangala Nabwana, are the registered proprietors of the suit property, owning a leasehold interest therein as joint tenants.

2. The plaintiff, Cornella Nabwana Nabangala, and the 3rd defendant, Martin Muse Juma, are husband and wife. They both contend that the suit property is their Nairobi matrimonial home. They also both contend that they have a rural matrimonial home in Kimilili, Bungoma County.

3. Up to the year 2012, the couple lived in the suit property with the children of the union. One of the children of the union is said to suffer from a medical condition known as cerebellar atrophy whose symptoms include reduced vision, body balance disorder, reduced muscular strength and oral muscle toning resulting into incoherence in speech.

4. In the year 2012, the plaintiff who is a civil servant working in the Department of Immigration was posted to Stockholm, Sweden. The couple decided to rent out the matrimonial home to the 1st and 2nd defendants (the 1st and 2nd defendants are also husband and wife). The couple then relocated temporarily to Stockholm, Sweden, where they lived during the plaintiff's tour of duty.

5. Towards the end of the plaintiff's tour of duty in Sweden, she sought a termination of the tenancy with a view to moving into the suit property upon her arrival in Nairobi. There was no concurrence from the 3rd defendant who had earlier left Stockholm and was residing in the couple's rural matrimonial home in Kimilili, Bungoma County. The plaintiff nonetheless proceeded to issue a notice of termination of

tenancy dated 31/5/2016 notifying the 1st and 2nd defendants to move out of the suit property on 30/6/2016. The 1st and 2nd defendants did not comply with the notice. This prompted the plaintiff to issue a second notice dated 16/5/2017 requiring the 1st and 2nd defendants to move out of the suit property within seven days. When the plaintiff insisted in her endeavours to get the 1st and 2nd defendants out of the suit property, the 3rd defendant instituted Nairobi ELC Civil Case No. 345 of 2017, principally seeking to restrain the plaintiff against dealing with the suit property. On her part, the plaintiff instituted Nairobi ELC Case No. 378 of 2017, principally seeking a mandatory injunction compelling the 1st and 2nd defendants to vacate the suit property. The two suits constitute this consolidated cause, now designated as ELC Case No. 378 of 2017. Up to 1/8/2017 when the court directed that rental income from the suit property be deposited in court, the 3rd defendant was the sole recipient of rent from the 1st and 2nd defendants. The 1st and 2nd defendants pay monthly rent of KShs.70,000/-.

6. There are two key issues to be determined in this consolidated cause. The first issue is whether, in the absence of concurrence from the 3rd defendant, the plaintiff as a joint tenant has the legal capacity to issue an effectual tenancy termination notice. The second issue is whether an action by one joint tenant founded on the tort of trespass would lie against another joint tenant.

7. The plaintiff's case is that the suit property is their Nairobi matrimonial home and she needs it as a dwelling home for the family. The plaintiff further contends that because of their daughter's cerebellar atrophy condition, she is in dire need of the matrimonial home in order to provide shelter for the sick daughter.

8. The defence of the 1st and 2nd defendants is that the plaintiff has without any colour nor right or justification whatsoever unlawfully trespassed into the suit property and purported to terminate the tenancy agreement without the co-owner's consent.

9. The 3rd defendant's case (in ELC Case No. 345 of 2017) against the plaintiff is that the plaintiff has, without any colour of right or justification whatsoever, unlawfully trespassed into the suit property and purported to interfere with the tenants' quiet possession of the suit property. He further contends that the plaintiff has no right in law to terminate the tenancy without the 3rd defendant's consent.

10. I have carefully considered the parties' respective pleadings. I have also considered the oral evidence of the plaintiff and the 3rd defendant together with their written witness statements which they adopted as part of their respective evidence in chief. I have similarly considered the relevant law and the parties' respective submissions.

11. At this point, it is important to point out that although the 1st and 2nd defendants filed a written statement of defence dated 27/7/2017, they did not lead any evidence to support their joint statement of defence. Their pleadings therefore remain evidentially unsupported.

12. The common position of the plaintiff and the 3rd defendant is that they are husband and wife. Second, they both affirm that they jointly own the suit property. Thirdly, they contend that the suit property is their Nairobi City matrimonial home which they rented out in 2012 when the plaintiff was posted to Stockholm on a tour of duty. Fourth, they both contend that they also have a rural matrimonial home in Kimilili, Bungoma County, where the 3rd defendant currently resides. Fifth, they both contend that they resided in the suit property prior to their joint departure to Stockholm, Sweden, for the plaintiff's tour of duty.

13. The 3rd defendant's position is that he withheld his consent to the termination of tenancy because the plaintiff removed some documents from their rural matrimonial home in Bungoma and is holding them. The 3rd defendant does confirm that he alone has been receiving the rental income from the suit property and has been utilizing the rental income to the exclusion of the plaintiff.

14. The suit property is jointly owned by the plaintiff and the third defendant as joint tenants. The legal framework on the scope of the rights of a joint tenant and the statutory features of a joint tenancy are contained in **Section 91 (4) of the Land Registration Act** which provides as follows:

***“If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently***

***(a) disposition may be made only by all the joint tenants,***

***(b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly, or***

***(c) each tenant may transfer their interest inter vivos to all the other tenants but to no other person and any attempt to so transfer an interest to any other person shall be void.”***

15. Joint tenancy as a land ownership concept was imported into Kenya’s land law regime from the United Kingdom. A brief outline of the key distinguishing features of the concept of joint tenancy is important in making the parties to this suit understand the scope of their rights. Invariably, an examination of the key features of joint tenancy would be complete only when the concept of joint tenancy is contrasted with its sister concept known as **tenancy in common**. Before I outline these key features, I must acknowledge the insightful work of **The Right Hon. Sir Robert Megarry** and **Sir William Wade** entitled **The Law of Real Property; Sweet & Maxwell, Eighth Edition Pages 496 to 503** which has greatly illuminated my thoughts and views on the two concepts.

16. The key distinguishing features of joint tenancy are the right of survivorship and the **“four unities”**. The right of survivorship implies that upon the death of one joint tenant, his interest in the land passes to the other joint tenants by the right of survivorship (*jus accrescendi*). This also implies that an interest held by a joint tenant cannot pass to another person through a will or through intestacy. It automatically passes to the surviving joint tenant(s).

17. The four unities of a joint tenancy are the unities of possession, interest, title and time. The unity of possession implies that each joint tenant is as much entitled to possession of any part of the land as the others. He cannot point to any part of the land as his own to the exclusion of the others. No one joint tenant has a better right to the property than another, **so that an action for trespass or for rent or for money had and received or an account will not normally lie.**

18. The unity of interest implies that the interest of each joint tenant is the same in extent, nature and duration because they are deemed to hold one estate. In this regard, any legal act e.g. a conveyance or lease of land requires the participation of all the joint tenants. Commenting on this, Megarry & Wade in their work **The Law of Real property** have outlined the following relevant exemptions to this general rule:

***“But exceptions are found in the cases of personal representatives and of the determination of periodic tenancies (eg weekly or monthly tenancies), which are determinable on the usual notice given by one of the joint landlords or one of the joint tenants. A periodic tenancy continues only so long as it is the will of both parties that it should continue, and there is a notional renewal of the term at the end of each period which requires the consent of all the parties. A co-owner who gives notice without the consent of the others does not commit a breach of the trust that applies in the cases of co-ownership because the interest which is subject of the trust would in any event terminate at the end of the period of the notice. The notice does not therefore operate as a disposition of the property and does not need the consent of all of the joint tenants.”***

19. In **PARSONS V PARSONS & OTHERS, (1983) 1 W.L.R.**, two out of four joint tenants served a notice of termination of tenancy. One of the key questions before court was whether the notice issued and served by only two out of four joint tenants, without the concurrence of the other two joint tenants, was legally effectual. The court held that since the periodic tenancy could only continue at the wish of all the joint owners, a notice to quit served by one of the several joint owners was valid without the concurrence of the other joint owners.

20. The unity of title implies that each joint tenant must claim his title to the land under the same act or

document e.g. same instrument of transfer (conveyance or simultaneous act of adverse possession.)

21. Lastly, unity of time implies that the interest of each joint tenant must vest at the same time.

22. In contrast, tenants in common hold their respective interests in undivided shares and each tenant in common has a distinct share in the property which has yet to be divided among the co-tenants. Secondly, in tenancy in common, there is no right of survivorship. This implies that when a tenant in common dies, his interest in the land passes under his will or intestacy.

23. The plaintiff and the 3rd defendant hold the suit property as joint tenants. Their interest in the suit property is subject to the above key statutory and common law features of joint tenancy. It is clear from the above outline of the key statutory and common law features of a joint tenancy that one joint tenant can properly issue an effectual termination notice in respect of a periodic tenancy because a periodic tenancy is deemed to be tenancy for the period for which rent is paid. It is also clear from the foregoing that at law, a periodic tenancy subsists only so long as it is the will of all the joint tenants that it should continue. Thirdly, it is also clear from the above outline that an action by a joint tenant founded on trespass would not lie against another joint tenant.

24. The only instrument of tenancy presented to the court is the Tenancy Agreement dated 1/8/2012. It was signed by the 1st, 2nd and 3rd defendants. It was not signed by the plaintiff. The plaintiff does not however dispute the fact that she consented to the renting of the suit property for a term of 2 years. She also does not dispute the fact that she agreed to the extension of the tenancy by a further term of two years, which in her evidence, lapsed in 2016. There is no evidence of any written lease or tenancy agreement signed by the joint tenants in favour of the 1st and 2nd defendants. The parties who would be best placed to place that evidence before the court are the 1st and 2nd defendants because the plaintiff's claim is against them. They chose not to tender any evidence.

25. In my view, in the absence of a written lease or tenancy agreement jointly executed by the joint tenants leasing or renting the suit property to the 1st and 2nd defendants, they (1st and 2nd defendants) are in law periodic tenants and their periodic tenancy is determinable by notice by either of the joint tenants or by both joint tenants within the framework of **Section 57 (2) and (3) of the Land Act**. Secondly, because the 1st and 3rd defendants are monthly periodic tenants, their periodic tenancy is determinable by either party giving one month notice to the other within the framework of **Section 57 (4) of the Land Act**.

26. Similarly, without a valid lease or tenancy agreement jointly executed by the joint tenants (as landlords), there would be no legal basis for issuing an order restraining the plaintiff against accessing the suit property which she jointly owns with the 3rd defendant. In any event, the 3rd defendant is not the proper person to bring such action. As observed in the preceding paragraph, a joint tenant cannot be a trespasser on a jointly owned property, more so when the property is a matrimonial home to the joint tenants.

27. It is not disputed that the plaintiff duly served the 1st and 2nd defendants with a notice of termination of tenancy dated 31/5/2016 and a second notice dated 16/5/2017 requiring them to vacate the suit property. The 1st and 2nd defendants chose to ignore the notices.

28. In light of the foregoing, I am satisfied that the notice of termination of tenancy dated 31/5/2016, issued by the plaintiff to the 1st and 2nd defendants was and remains a lawful and effectual notice of termination of tenancy. Secondly, taking into account the law as set out in the preceding paragraphs, I hold that a claim founded on the tort of trespass to a jointly owned property by one joint tenant against another joint tenant is untenable at law in the circumstances of this case.

29. Consequently, I make the following orders in disposing this Consolidated Cause [*Nairobi ELC Case No. 378 of 2017 consolidated with Nairobi ELC Case No. 345 of 2017*]:

**(a) The 1<sup>st</sup> & 2<sup>nd</sup> Defendants (Elizabeth Mugo Akuku and Edward Vitalis Akuku) shall vacate**

*the suit property, Land Reference No. 209/15469 (Original Number 209/10585/43), House No. 38 Akila 1 Estate on or before 19/10/2017 and shall before the effective date restore the suit property to the same state of repair as it was at the time they entered the property.*

*(b) The rent deposited in court pursuant to orders of this court shall be released to Cornella Nabwana Nabangala to be shared between her and the 3<sup>rd</sup> defendant.*

*(c) The suit by the 3<sup>rd</sup> defendant [Martin Muse Juma] against the plaintiff [Cornella Nabwana Nabangala] is hereby dismissed.*

*(d) Because the dispute in this suit involves a couple there shall be no order as to costs.*

**Dated, signed and delivered at Nairobi on this 19<sup>th</sup> day of September, 2017.**

**B. M. EBOSO**

**JUDGE**

**In the presence of:**

Mr Ayieko & Dr Linda Musumba: Advocates for the Plaintiff

Mr Kiprotich & Ms Makori: Advocates for the Defendants

Halima Abdi: Court Clerk