



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 1076 OF 2014(O.S)**

**MUHURI MUCHIRI.....APPLICANT**

**VERSUS**

**HANNAH NYAMUNYA (Sued as the administrator**

**of the Estate of NJENGA MUCHIRI also known**

**as SAMUEL NJENGA MUCHIRI (DECEASED).....RESPONDENT**

**JUDGMENT**

The Applicant instituted this suit vide an originating summons dated 6<sup>th</sup> August 2014 and sought orders that:

1. The tenancy in common in respect of L.R. No. 1049/18 be severed.
2. The Deputy Registrar be empowered to sign any documents that the Respondent may refuse to sign.
3. An order does issue declaring that the Applicant is entitled to eighty three point three per cent (83.33%) of the twenty eight point eight (28.8) acres in L.R. No. 1049/18, the Applicant having contributed Kshs. 15,540/- towards its purchase on 28<sup>th</sup> January 1968.
4. An order does issue declaring that the Respondent/Estate of the deceased is entitled to sixteen point six percent (16.66) of the twenty eight point eight (28.8) acres in L.R. No. 1049/18 the Applicant having contributed Kshs. 3,060/- towards its purchase on 28<sup>th</sup> January 1968.
5. An order does issue declaring that the Applicant is entitled to twenty three decimal nine nine (23.99) acres of the twenty eight point eight (28.8) acres in L.R. No. 1049/18 based on the ratio of contribution towards its purchase.
6. An order does issue declaring that the Respondent/Estate of the deceased is entitled to four decimal seven nine (4.79) acres of the twenty eight point eight (28.8) acres in L.R. No. 1049/18 based on the ratio of contribution towards its purchase.
7. The Court be pleased to grant such further or other relief as may be just in the circumstances.
8. The Respondent be condemned to pay the costs of the suit.

The summons is premised on grounds outlined in the application and supported by an affidavit sworn by the Applicant. He deponed that the deceased Samuel Njenga Muchiri (hereinafter referred to as "the Deceased") was his brother, and that on 28<sup>th</sup> January 1968 they purchased the suit property at a consideration of Kshs. 28,600/- whereby he contributed Kshs. 15,450/- and the deceased paid Kshs. 3,060/-.

The Applicant referred the Court to an annexed search and copy of title of L.R. No. 1049/18 and deponed

that they were registered as tenants in common. Further, that based on the ratio of contribution, the deceased is entitled to 4.79 acres whilst he is entitled to 23.99 acres. However, that the deceased bequeathed 14.25 acres of the suit property in his will dated 15<sup>th</sup> January 2004. The Applicant maintained that his share of the suit property does not form part of the deceased's estate and should not be made subject of succession. The Applicant urged the Court to determine the summons to enable the Succession Court reach an informed decision in determining the issue of distribution of the Deceased's estate.

The Applicant filed a Further Affidavit he swore on 28<sup>th</sup> January 2015 wherein he asked the Court to expunge from the record a copy of a conveyance dated 10<sup>th</sup> December 1973 , which he stated has erroneously been presented as an exhibit, and averred that the correct title deed and conveyance was the one dated 23<sup>rd</sup> July 1968. He attached a copy of entries to the said title showing that the conveyance dated 10<sup>th</sup> December 1973 had been cancelled by a court decree dated 27<sup>th</sup> April 2001 in Civil Case Number 3262 of 1994.

Despite service having been effected upon the Respondent, she failed to enter appearance and/or file a reply to the Applicant's Originating Summons. The Counsel for the Applicant filed written submissions dated 10<sup>th</sup> December 2014 in further support of his application, wherein he argued that the contribution of each tenant in common had been proved in the instant case , and therefore each tenant is entitled to his share as per the ration of contribution.

He cited the decision in **Alice Wanjiru Mwaura vs Peter Njuguna Mwaura & Another, (2013) eKLR** that a presumption of an equitable joint tenancy or tenancy in common would arise depending on the contribution to the purchase price made by each co-owner. He also relied on the decision in **Shantaben Ramniklal Parmar & Another vs Beatrice Waruguru Gitutu, (2007) e KLR** for the position that a tenancy in common can be terminated by sale of the same.

### **The Issues and Determination**

The Applicant sought judgment based on the affidavits filed and submissions. Arising from the pleadings and submissions filed, this Court finds that the issues that are before the Court for determination are as follows:

1. Whether the Court can sever the tenancy in common in respect of L.R. No.1049/18
2. What are the Applicant's and Respondent's respective entitlements to and share in L.R. No. 1049/18
3. Whether the Applicant is entitled to the reliefs sought

### **Whether the Court can sever the tenancy in common in respect of L.R. No.1049/18**

This Court notes that the key features of a tenancy in common are that each tenant has a distinct share in the common property which has not yet been divided among the co-owners , and there is no right of survivorship as among the co-owners. Therefore the size of a tenant's share is not affected by the death of the other co-owners, and when a tenant dies, his interest in the property passes on to his or her beneficiaries under a will or intestacy.

Section 61 of the Land Registration Act now provides for the procedure for dealing with a tenancy in common where the proprietor has died. It provides that the personal representative is entitled to be registered by transmission as proprietor in the place of the deceased, and further, that such registration relates back to and takes effect from the date of the death of the proprietor.

It is also noted by the Court that the law on the termination of a tenancy in common allows co-owners to by agreement sever the co-ownership by partition; by acquiring the interests of another co-owner and thus become solely entitled; or by the sale of the common property and division of the proceeds of the sale as shown in the decision in **Shantaben Ramniklal Parmar & Another vs Beatrice Waruguru Gitutu, (2007) e KLR**. It is also provided in **Halsbury's Laws of England, Fourth Edition (Reissue) Volume**

**39(2)** at paragraphs 214-215 as follows in this regard:

**“214. Determination of union of interests in one person. A tenancy in common may be determined by the union of the various interests, whether by acquisition inter vivos or by testamentary disposition, in the same person, who therefore holds the entirety of the land.**

**215. Determination by partition. A tenancy in common may be determined by partition. The legal term ‘partition’ is applied to the division of land, tenements and hereditaments belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership between some or all of them.”**

Sections 94 and 96 of the Land Registration Act also now provides for a severance of a common tenancy by way of partition or sale of the land. As regard partition, the procedure is provided for under section 94 as follows:

**(1) Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a sub-division of land and of any covenants or conditions in a certificate of a land, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.**

**(2) An application, may be made to the Registrar, in the prescribed form, for an order for the partition of land owned in common by—**

**(a) any one or more of the tenants in common without the consent of all the tenants in common; or**

**(b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree.**

The section provides the factors that a Registrar needs to consider including the respective shares of the common tenants and that he or she may make the order for partition subject to such limitations and conditions, including conditions relating to the payment of compensation to those tenants in common who have not agreed to the partition by the tenants in common who have applied for the partition, and how the expenses and costs of the partition are to be borne.

Under section 96 of the Land Registration Act, if for any reason the land sought to be partitioned is incapable of being partitioned, or the partition would adversely affect the proper use of the land, and the applicant for partition or one or more of the other tenants in common require the land to be sold, and the tenants in common cannot agree on the terms and conditions of the sale or the application of the proceeds of the sale, the tenants in common may make an application to the court for an order for sale and the court may—

**(a) cause a valuation of the land and of the shares of the tenants in common to be undertaken; and**

**(b) order the sale of the land or the separation and sale of the shares of the tenants in common by public auction or any other means which appears suitable to the court; or**

**(c) make any other order to dispose of the application which the court considers fair and reasonable,**

It is therefore the case that as the Applicant in this suit is not asking for sale of the suit property, the alternative that is available to him under the law is that of partition, and he is required to follow the procedure laid down in section 94 of the Land Registration Act in this regard. Under the section the power to partition land held under common tenancy is given to the Registrars appointed under section 12 and 13 of the Land Registration Act, and this Court therefore finds that it cannot grant the order sought of

severing the common tenancy in respect of L.R. No. 1049/18 as the procedure provided by law has not been followed.

**What are the Applicant's and Respondent's respective entitlements to and share in L.R. No. 1049/18?**

The Plaintiff annexed a copy of an official search carried which disclosed that as at 27<sup>th</sup> March 2014, L.R. No. 1049/18 measuring 28.8 acres was registered in the names of Njenga Muchiri and Muhuri Muchiri as tenants in common in equal shares. However, the Plaintiff maintained that he contributed the lion share towards the purchase price and he therefore is entitled to 23.99 acres of the property. In support of this submission, the Plaintiff annexed copies of the original and translated copies of agreements entered into on 11<sup>th</sup> September 1967 and 28<sup>th</sup> January 1968 which shows the amount of contribution made by each purchaser, being Kshs.15,450/- by the Plaintiff and Kshs. 3,060/- by the Deceased.

The Court notes that the Applicant did not present in evidence the conveyance entered into by the parties dated 23<sup>rd</sup> July 1968, which would have clearly shown if indeed the shares held by the parties herein in L.R. No. 1049/18 are as the Applicant alleges. In addition the court also notes that the entries in the evidence of title that the Applicant presented as an annexure to the further affidavit he swore on 28<sup>th</sup> January 2015, and which was filed in court on 29<sup>th</sup> January 2015, clearly shows that the Applicant and the Deceased were registered as tenants in common of L.R. No. 1049/18 in equal shares. It also shows the acreage of L.R. No. 1049/18 to be 28.8 acres. Likewise, the certificate of official search also shows the shareholding of the Applicant and the Deceased to be equal.

The agreement relied on by the Applicant to show payment of his share of Kshs 15,450/= was not the agreement of sale for L.R. No. 1049/18, but an agreement between the Applicant and the Deceased as to the respective amounts they paid for L.R. No. 1049/18. The Applicant did not bring any evidence to corroborate the statements therein, particularly in light of the fact that the said agreements are shown to have been witnessed. In addition, these agreements cannot be evidence that the said money was actually paid, as there is no evidence of any receipt of the same by the seller. The evidential value of the said agreement is therefore minimal.

Lastly, the said agreement cannot override the clear statement in the documents of title that the share of the Applicant and the Deceased in L.R. No. 1049/18 were equal. The decision in **Alice Wanjiru Mwaura vs Peter Njuguna Mwaura & Another, (2013) eKLR** relied on by the Applicant is also distinguished on this basis, as the land in that case was not registered to the Plaintiff therein under a common tenancy.

**Whether the Applicant is entitled to the reliefs sought**

Arising from the findings in the foregoing, the orders and declarations sought by the Applicant in his Originating Summons cannot be granted by this Court. On the issue of costs, each party shall bear their own costs of the suit since the Applicant has not succeeded in his claim and given that there was no participation in these proceedings by the Respondent.

This Court accordingly orders as follows:

1. The Applicant and Estate of Njenga Muchiri are each entitled to a 50% share in L.R. No. 1049/18, which translates to respective shares of 14.4 acres each in the said property.
2. Each party shall bear their respective costs of the suit.

Dated, signed and delivered in open court at Nairobi this 7<sup>th</sup> day of May, 2015.

**P. NYAMWEYA**

**JUDGE**