



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC SUIT NO. 1296 OF 2014**

**CYRUS KOMO CHEGE.....PLAINTIFF**

**VERSUS**

**KARINGA NJOROGE GACHOKA.....1<sup>ST</sup> DEFENDANT**

**MARY WAHU CHEGE.....2<sup>ND</sup> DEFENDANT**

**KAREN WANGARI NJAU.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

The suit herein was commenced by way of a Plaint dated 6<sup>th</sup> October 2014 wherein the Plaintiff averred that he together with the 1<sup>st</sup> Defendant, Chege Njoroge and Muriithi Njoroge were joint registered owners of 1/6, 1/2 and 1/6 share respectively of LR No. Ndumberi/Ndumberi/18(herein after referred to as the suit property). The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were sued as the intended legal representatives of Chege Njoroge and Muriithi Njoroge respectively.

It is the Plaintiff's case that he had all along desired to have his own title deed and that efforts to persuade the Defendants to seek Land Control Board consent to have the suit property partitioned had been futile rendering the instant suit inevitable. The Plaintiff has sought the following orders against the Defendants:-

- a. An order authorizing the Deputy Registrar to sign all relevant forms to facilitate partitioning of the suit property in place of the 1<sup>st</sup> Defendant, Chege Njoroge and Muriithi Njoroge.
- b. Costs of the suit.
- c. Any further relief this Court may deem fit to grant.

Summons to enter appearance were issued on 20<sup>th</sup> March 2014. The Plaintiff filed an affidavit of service sworn by David Jod K. on 29<sup>th</sup> January 2015 where he stated that on diverse dates, he effected service of the plaint and summons upon the Defendants. The Defendants did not enter appearance or file Defence and upon request for judgement brought under Order 10 Rule 6, the Plaintiff sought to have interlocutory judgement entered against the Defendants. Interlocutory judgment was entered in favour of the Plaintiff against the Defendants on 23<sup>rd</sup> February 2015.

The suit was fixed for formal proof on 15<sup>th</sup> June 2015. The Plaintiff (PW1) testified that he resided in Kiambu. He averred that he bought the suit property from the 1<sup>st</sup> Defendant who had 2/6 share in the property. PW1 stated that they were all registered as shareholders in defined shares. He made reference to a certificate of official search dated 30<sup>th</sup> September 2014 filed in his list of documents dated 6<sup>th</sup> October 2014. The Plaintiff informed the Court that he was seeking an order for the partitioning of the suit property to enable each share holder obtain individual titles. PW1 sought to have his witness statement dated 6<sup>th</sup> October 2014 adopted as part of his evidence.

### **Determination**

The issue for determination is whether the Plaintiff has proved his case on a balance of probabilities and if so, whether he is entitled to the orders sought. From the evidence adduced, there exists a co-tenancy among the parties within the meaning of section 91(1) of the Land Registration Act which provides as follows:-

**"In this Act, co-tenancy means the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common.**

In considering whether the co-tenancy among the tenants herein was a joint tenancy or tenancy in common, the court is guided by section 91 (8) of the Land Registration Act which provides as follows:-

**"On and after the effective date, except with leave of a 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.**

Since the commencement date of the aforesaid Act was 2<sup>nd</sup> May 2012, and in the absence of evidence that leave of court was procured prior to registration of parties as registered proprietors on 28<sup>th</sup> September 2012, this court takes the view that the tenancy herein was in common.

The law on severance of tenancy in common is found at section 94 of the Land Registration Act which states as follows:-

**" 94 (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 procedure to be followed by tenants in common in seeking partitioning is well laid out. The applicant must make an application in the prescribed form to the Registrar even without the consent of other tenants in common. Section 96 provides a leeway for a tenant in common to approach the court for an order of sale as follows:-

**" 96. (1) 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,

(2) The court shall, in exercising its powers under paragraphs (b) and (c), have regard to any of the matters set out in section 94 (3) (a) to (f) that may be relevant in the circumstances.

(3) A tenant in common shall be entitled to purchase the land or any share of it that is offered for sale, either at an auction or at any time by private sale.

The Plaintiff herein has not sought an order for sale. His recourse therefore lies in making an application for partition to the Registrar as envisaged by section 94 of the Land Registration Act. The principle that where the Constitution and or statute has provided a dispute resolution procedure, then that procedure must be strictly followed is well established. The Court of Appeal in the case of Speaker of National Assembly vs. Njenga Karume (2008) 1 KLR (EP) 425, where it held inter alia that:-

" There was considerable merit in the submission that where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament, that procedure should have been strictly followed.

See also Jaldesa Tuke Dabelo vs. Independent Electoral & Boundaries Commission & another Nyeri CA No. 37 of 2014. The Plaintiff must therefore exhaust the remedy stipulated by the Land Registration Act. The plaintiff has recourse under Section 94 of the Land Registration Act for the partition of the subject land that he holds in common with other tenants. Under the provision the other co-tenants need not consent to the partition. The upshot of the foregoing is that the suit herein is dismissed with no orders as to costs.

**Judgment dated, signed and delivered this 30<sup>TH</sup> day of JULY 2015.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... For the Plaintiff

..... For the Defendants