



Wanjohi (Suing as the Legal Representative of the Estate of Wanjohi Ngando) & another v Macharia (Sued as the Administrator of the Estate of Macharia Ng'ang'a - Deceased) & 4 others (Environmental and Land Originating Summons 10 of 2015 & Environment & Land Case 22 of 2015 (Consolidated)) [2024] KEELC 1798 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEELC 1798 (KLR)

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
 ENVIROMENTAL AND LAND ORIGINATING SUMMONS 10 OF 2015
 & ENVIRONMENT & LAND CASE 22 OF 2015 (CONSOLIDATED)**

JM MUTUNGI, J

APRIL 12, 2024

IN THE MATTER OF L.R NUMBER KIINE/RUIRU/35

AND

**IN THE MATTER OF THE ADMINISTRATION OF THE ESTATE OF
 WANJOHI NGANDO (DECEASED) AND MACHARIA NG'ANG'A (DECEASED)**

AND

IN THE MATTER OF SEVERANCE OF COMMON PROPRIETORSHIP

BETWEEN

**ANTONY KAMAU WANJOHI (SUING AS THE LEGAL REPRESENTATIVE OF
 THE ESTATE OF WANJOHI NGANDO) APPLICANT**

AND

**NJERI MACHARIA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF
 MACHARIA NG'ANG'A - DECEASED) 1ST RESPONDENT**

**BERNARD KAMAU WAGAKORU AND JAMES MBUGUA WILLIAM
 (SUING AS THE LEGAL REPRESENTATIVE OF WAGAKORU KAMAU -
 DECEASED) 2ND RESPONDENT**

**AS CONSOLIDATED WITH
 ENVIRONMENT & LAND CASE 22 OF 2015**

BETWEEN



**BERNARD KAMAU WAGAKORU AND JAMES MBUGUA WILLIAM
(SUING AS THE LEGAL REPRESENTATIVE OF WAGAKORU KAMAU -
DECEASED) PLAINTIFF**

AND

**ANTONY KAMAU WANJOHI (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF WANJOHI NGANDO) 1ST DEFENDANT**

**NJERI MACHARIA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF
MACHARIA NG'ANG'A - DECEASED) 2ND DEFENDANT**

LAND REGISTRAR KIRINYAGA COUNTY 3RD DEFENDANT

JUDGMENT

Background

1. The Applicant commenced this suit vide an Originating Summons dated 11th February 2015 seeking for Orders:
 1. That the administration of the estate of Macharia Ng'ang'a (Deceased) in respect of the parcel of land LR No Kiine/Ruiru/35 was contrary to the interest of the estate of Wanjohi Ngando (Deceased) in the suit land to the extent of half share thereof.
 2. That the registration of the 2nd Respondent Wagakoru Ngando as the absolute proprietor of the suit land as a consequence of the administration of the estate of Macharia Ng'ang'a (Deceased) was contrary to the registration of Wanjohi Ngando (Deceased) as a proprietor in common to the extent of half share thereof.
 3. That the register to the suit land be rectified by reinstating Wanjohi Ngando (Deceased) as a proprietor in common with the 2nd Respondent to the extent of half share thereof.
 4. That once rectification of the register to the suit land is effected, the proprietor in common of the suit land be severed by registration of Wanjohi Ngando (deceased) and the 2nd Respondent Wagakoru Kamau as absolute proprietors of the resultant individual shares.
2. The Originating Summons is predicated upon the annexed affidavit of Antony Kamau Wanjohi. He averred that he was the legal representative of the estate of Wanjohi Ngando, his deceased father. He stated that at the time of his death, his father and Macharia Ng'ang'a were the registered co-owners in equal shares of LR Kiine/Ruiru/35. He further averred that Macharia Ng'ang'a predeceased his father and that the suit land in its entirety was distributed to the 2nd Respondent who presently is the registered owner.
3. The 2nd Respondent filed his replying affidavit on 2nd March 2015. He averred that he has been registered for half share of the suit land. He also averred that the jurisdiction of this Court was only limited to the issue of severance of title. He stated that the 1st Respondent and the Applicant are related and that their intention is to dispossess him of the enjoyment of the suit land.
4. Separately, Wagakoru Kamau filed a Plaint dated 18th February 2015 under ELC case No 22 of 2015 seeking for orders that:



1. An order declaring the cautions registered against the title Kiine/Ruiru/35 as unfounded and directing the 3rd Defendant to cancel the same from the register.
 2. An order for partition and registration of Plaintiff's share of Kiine/Ruiru/35 and a separate title to issue in the name of the Plaintiff.
 3. An order that the 1st and 2nd Defendant do move yield and give vacant possession of Plaintiff's land resultant to the partition failing which an order of eviction shall issue.
 4. An order for costs.
5. The Plaintiff is predicated upon the grounds that he is the registered proprietor of half share of Kiine/Ruiru/35, that he was so registered pursuant to the certificate of confirmation of grant dated 20.08.1993 emanating from the High Court Succession Cause No 14 of 1990. He stated that the 1st and 2nd Defendant were beneficiaries of the half share belonging to Wanjohi Ngango (deceased). He further averred that he had sought for severance of his half share but the land had been impeded by cautions placed against the title by the 1st and 2nd Defendants. He stated that the Defendants have frustrated his efforts to have the caution removed to allow for the partition. He averred that the 2nd Defendant was in occupation of the portion of the land that he was entitled to.
 6. The 1st Defendant filed his Statement of defence on 19th May 2015. He claimed that he occupied his deceased father's portion as a beneficiary. He also claimed that the entire suit property was distributed to the Plaintiff without his knowledge. He contended that he had a legal right to maintain the caution as he was a beneficiary and in occupation of his deceased father's portion of the suit land.
 7. By an order of the Court dated 18th October 2022, the two suits were ordered to be consolidated and to be heard together with file ELC No 10 of 2015 as the lead file.

Parties Evidence

8. The Plaintiff, Anthony Kamau Wanjohi who earlier had testified before Cheron, J was recalled to give his evidence on 3rd July 2023. He testified that Wanjohi Ngando and Macharia Ng'ang'a were the initial co-owners of the suit land. He testified that after the demise of Macharia Ng'ang'a, his family commenced his succession which distributed the entire suit land to Wagakoru Kamau. He stated that his brother Wilson Wanjohi registered a caution against the suit land and that he also registered one claiming beneficial interest in the suit land. He admitted that Wagakoru Kamau had been registered as proprietor of half share of the suit land. He stated that the intention of placing the caution was to prevent the subdivision of the suit land. He averred that he was claiming half a share of the suit land.

DW1 testified on behalf of the 2nd Respondent and stated that Macharia Ng'ang'a (deceased) gifted his father Wagakoru Kamau his portion of the suit land. He stated that upon Macharia's death, his portion of the suit land transmitted to his father, Wagakoru Kamau. He averred that the Plaintiff was in occupation of his father's portion of land and that he prayed that he be ordered to vacate. He further stated that the land had not been partitioned. In cross-examination, he stated that they were not in occupation of the suit land because they wanted to obtain title to their portion of land first.

Parties' submissions

9. Following the close of the Defendant's case, the parties were directed to file and exchange their written submissions. The Plaintiff filed his written submission on 5.11.2023, while the 2nd Defendants filed theirs on 1.09.2023.



The Plaintiff's counsel in his submissions raised concerns that Wagakoru Kamau had been registered as the proprietor of the entire suit land, while in fact the land was jointly owned. He opined that for severance of the common ownership to be effected, the register needed to be rectified to reflect the true position that is joint ownership.

The Counsel also submitted on the issue of adverse possession and stated that the Plaintiff had been in possession of the half belonging to Wagakoru Kamau since the year 1962 when it was sold to Macharia Ng'ang'a. He stated that the possession was not permissive, and was exclusive and hostile against the registered proprietor. He relied on the case of *Iga v Makerere University* (1972) E.A, 65.

On the other hand, 2nd Defendant's Counsel submitted that the Plaintiff admitted that the half share belonging to Macharia Ng'ang'a transmitted to the 2nd Defendant vide Succession Cause 14 of 1990. Counsel for the 2nd Defendant further submitted that the Plaintiff and his brother lodged cautions which impeded the partition and/or severance of the title to separate the two titles. According to the Counsel, the Plaintiff's case was brought in bad faith and is an abuse of the Court's process as no cause of action has been shown by the Plaintiff to warrant the prayers sought. He further submitted that the Plaintiff had not demonstrated any reason to sustain the caution and that he was not opposed to the severance of the title. He prayed for the orders sought to be issued accordingly.

Analysis and Determination

10. I have considered the pleadings proffered by the parties and their rival submissions, and the issues for determination in this suit are two-fold; Whether the Court can sever the tenancy in common in respect of LR Kiine/Ruiru/35 and whether the cautions registered as against LR Kiine/Ruiru/35 should be cancelled.

The key features of a tenancy in common are that each tenant has a distinct share in the common property which is undivided and there is no right of survivorship as among the co-owners. The law on the termination of a tenancy in common permits co-owners to sever the co-ownership by partition; by acquiring the interests of another co-owner; or by the sale of the common property and division of the proceeds of the sale.

Section 94 of the [Land Registration Act](#) 2012 provides for a severance, of a common tenancy by way of partition of the land. It provides 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.



Similarly, *Halsbury's Laws of England*, Fourth Edition (Reissue) Volume 39(2) at paragraphs 214-215 states that:

“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.”

11. In the case of *Muburi Muchiri v Hannab Nyamunya (Sued as the Administrator of the Estate of Njenga Muchiri (Deceased))* (2015) eKLR the Court held that: -

“The law on termination of a tenancy 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.”

A scrutiny of the abstract of title produced by the Applicant indicates that Wagakoru Kamau was registered as a sole proprietor of the suit land on 13.10.1993, which contradicts the abstract of title issued on 26.11.2014 produced by the 2nd Respondent and which indicate that Wagakoru Kamau and Wanjohi Ngango held the suit land in common in equal shares. The certificate of official search indicates that Wagakoru Kamau holds half share of the suit land and so does Wanjohi Ngango. Similarly, both parties in their pleadings and evidence agree on severance of the title. Section 94 of the *Land Registration Act*, 2012 empowers the Land Registrar to order partition of land held by tenants in common having regard to the parameters set out under Section 94 (3) (a-j) of the Act.

12. In the present case, the uncontroverted position is that Macharia Nganga (deceased) and Wanjohi Ngango (deceased) were both registered as tenants in common each holding $\frac{1}{2}$ share of Land Parcel Kiine/Ruiru/35 in 1962. Following succession in 1993, Wagakoru Kamau and Wanjohi Ngango were registered as the tenants in common. There is no dispute that the common tenancy was never severed so that the respective beneficiaries get their portions. The Applicant (Anthony Kamau Wanjohi) apparently is in occupation of the whole interest including the share that belongs to the Plaintiff (Wagakoru Kamau, ELC No 22 of 2015). In his submissions, the Applicant took the position that since he had been in occupation of the suit land since the 1960's, the Defendants' claim of a portion thereof is barred by Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
13. With respect, it is my considered view that the doctrine of adverse possession would not be applicable in cases of common tenancy by one tenant as against the other where there has been no severance and/or partition of the land to separate the common interests. In common tenancies where there has been no partition, no tenant is entitled to any specific portion of the whole and each of the tenants have a right to occupy any portion of the land pending the partitioning of the same. Therefore, the occupancy of the suit land by the Applicant over a long period cannot operate to extinguish the Defendants' rights over the suit land.
14. The Defendant (Wagakoru Kamau) in his evidence explained that he had not been able to have the partition carried out owing to cautions. The Plaintiff, his brother and Njeri Macharia had placed



cautions against the title of the suit land. The partition cannot be carried out when there are existing restrictions. The beneficiary interest claimed by the cautioners relate to the interest in the property held by Wanjohi Ngango (deceased) as a common tenant of the suit property and consequently would be taken care of, if and when, the property is partitioned.

15. As both the Plaintiff and the Defendant agree, Land Parcel Kiine/Ruiru/35 was indeed held in common by Wagakoru Kamau and Wanjohi Ngango (both now deceased). The Court is satisfied there are no valid reasons to impede an order for partition of the suit property. The cautions that are lodged against the title lack any justification as the cautioners will get their entitlement after the property is partitioned and the respective half (½) shares transmitted to the rightful beneficiaries of the deceased estates.

I accordingly enter judgment in the following terms: -

1. The common tenancy of Wagakoru Kamau (½ share) and Wanjohi Ngango (½ share) of Land Parcel Kiine/Ruiru/35 is ordered to be severed.
2. The Land Registrar, Kirinyaga is ordered to cause the sub-division/partition of Land Parcel Kiine/Ruiru/35 into two equal portions to be registered in the names of Wagakoru Kamau (deceased) and Wanjohi Ngango (deceased) pending distribution to beneficiaries of the deceased pursuant to succession.
3. The cautions registered by Njeri Macharia and Anthony Kamau Wanjohi and/or any other person are ordered to be cancelled.
4. Each party to bear their own costs of the consolidated suits.

**JUDGMENT DATED, SIGNED AND DELIVERED VIA VIDEO LINK AT KERUGOYA THIS
12TH DAY OF APRIL, 2024.**

J. M. MUTUNGI

ELC - JUDGE

