



**Mulli v Mulli (Environment & Land Case 205 of 2019)  
[2023] KEELC 124 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 124 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 205 OF 2019  
EK WABWOTO, J  
JANUARY 19, 2023**

**BETWEEN**

**ANNA ITUMBI MULLI ..... PLAINTIFF**

**AND**

**BENEDETTA MUTUNDE MULLI ..... DEFENDANT**

**JUDGMENT**

1. This suit was instituted by the Plaintiff vide a plaint dated June 18, 2019 wherein the Plaintiff sought for the following orders: -
  - i. An order declaring the Plaintiff as the Absolute owner of LR 37/254/33 and LR 3734/389
  - ii. A permanent injunction against the defendant and/or his agents/servants/employees restraining them from entering, trespassing, selling and/or in any way dealing with LR 37/254/33 situated in Nairobi West area and LR 3734/389 situated in Lavington area.
  - iii. Costs of the suit.
  - iv. Any other just relief that the court may deem fit to grant.
2. The Defendant upon being served filed a statement of defence dated October 22, 2019, together with the defendants bundle of documents dated November 19, 2019 and the Defendant's witness statement sworn on November 19, 2019.

**The Plaintiff's case**

3. It was the Plaintiff's case that she is the registered owner of Land Reference Number 37/254/33 and 3734/389 situated at Nairobi West and Lavington area respectively both within Nairobi County which



LR 3734/389 is her matrimonial home. The said properties were registered in the names of the Plaintiff and her late husband Henry Nzioka Mulli and that upon the death of the Plaintiff's husband she registered his death certificate against the two titles.

4. The Plaintiff also averred that the Defendant has obtained a temporary injunction on the assets of the deceased including the suit properties yet the above said properties are not part of the estate.
5. During hearing on October 28, 2021, and March 21, 2022, the Plaintiff reiterated the contents of her witness statement dated June 18, 2019 which was adopted as her evidence in chief and prayed for the court to grant the prayers sought in her plaint.
6. On cross-examination, she stated that she was married in 1975 though the marriage certificate was not part of the bundle of documents that was produced in evidence. She also stated that she was not among the administrators. She also stated that she currently collects rent from the Nairobi West property. She further stated that she did not know when the Defendant got married to her husband and also doesn't remember when her husband divorced his first wife.
7. On further cross-examination, she stated that L.R. No. 37/254/33 was acquired when she was the only wife to the deceased and the same had been registered in the joint names of her and the deceased. She also stated that the Defendant did not live in that property since 1972.
8. During further cross-examination, she also stated she was aware of the Milimani High Court Commercial Case No. E057 of 2019 Tamani Construction Company Limited –Vs- Annah Itumbi Mulli though she never defended herself in that case. She also stated that property L.R. 3734/389 was bought when she was already managed and she contributed to the purchase of both properties. According to her the said properties had not been sold.
9. On re-examination she stated that the deceased had other wives. The current suit properties were registered in the joint names of her deceased husband and herself and that she had given power of attorney to her son Ben Mulli and the said properties were yet to be sold.

#### **The Defendant's Case**

10. The Defendant testified on March 26, 2022. She adopted her witness statement dated November 19, 2019 and the bundle of documents dated the same day as her evidence in chief and she requested the court to dismiss the Plaintiff's case.
11. On cross-examination, she conceded that the two properties had been registered jointly, in the names of the Plaintiff and her late husband. She also stated that she is staying in the Nairobi West property but had no issue with the Lavington property. She also stated that the death certificate of the late Mulli had been registered against the titles of the two properties. She also stated that she is not sure if the same was registered fraudulently.
12. On re-examination, she stated that she did not know exactly when the first wife was divorced from the late Mulli. She also stated that the Plaintiff was a trustee on behalf of the whole family and the Nairobi West property was not intended for her since she has been in Nairobi West property for over 40 years.

#### **The Plaintiff's submissions**

13. The Plaintiff filed written submissions dated April 7, 2022 through Mutisya & Company Advocates. Counsel outlined the following issues for consideration by the court: -
  - a. Who is the current registered owner of the suit property?



- b. What is the legal position in respect to a property held in joint tenancy?
  - c. Whether the doctrine of survivorship applied to the suit property.
  - d. Whether the defendant has managed to demonstrate the existence of any trust between the estate of Henry Nzioka Mulli (deceased) and the Plaintiff Annah Itumbi Mulli in respect of the suit property.
  - e. Whether the Defendant has managed to prove that the suit property belongs to the Estate of Henry Nzioka Mulli (Deceased)
14. Counsel submitted that the suit properties were acquired and registered in the joint names of Henry Nzioka Mulli and Anna Itumbi Mulli and as such upon the demise of Henry Nzioka Mulli, the suit properties automatically devolved upon the Plaintiff as the surviving owner following her registration of the death certificate against the titles on May 24, 2018. Reliance was made to section 60 of the [Land Registration Act](#) and further emphasis made to the effect that the suit properties ceased to form part of the estate of the deceased and was not available for immediate distribution. Counsel also submitted that the said registration has never been cancelled nor challenged.
  15. On the issue of joint tenancy, Counsel made reference to Section 91(4) (6) of the [Land Registration Act](#) and submitted that where land is occupied jointly, no tenant is entitled to a separate share in the land and consequently on the death of a joint tenant, that's interest shall vest in the surviving tenant.
  16. On whether the doctrine of survivorship applies to the suit property, Counsel contended that upon the demise of the late Henry Nzioka Mulli, the principle of jus accrescendi applied and the deceased's interest in the suit property merged or united with that of the Plaintiff as the surviving joint tenant. Counsel argued that a joint tenancy cannot pass under will or intestacy so long as there is a surviving joint tenant, the right of survivorship takes precedence.
  17. The Plaintiff's Counsel in her submissions also contended that the defendant had not demonstrated that the suit properties were being held in trust as alleged.
  18. It was also submitted that during the hearing of the suit, the Defendant had admitted that indeed the suit properties were registered in the joint names of the deceased Henry Muli and that of the Plaintiff Anna Itumbi Mulli. Counsel further submitted that the suit property does not form part of the estate of the deceased Henry Nzioka Mulli and neither can it be part of the deceased estate and is therefore not available for distribution in the succession cause filed in Machakos High Court Succession Cause No. 53 of 2017 In the matter of the Estate of Henry Nzioka Mulli.
  19. Counsel concluded his submissions by urging the court to declare the Plaintiff as the owner of the suit properties L.R. No. 27/254/33 and 3734/389 and further restrain the Defendant from any dealings on the properties.

### **The Defendant's submissions**

20. The Defendant filed her written submissions dated May 4, 2022. Counsel outlined 3 issues for consideration by the court: -
  - i. Whether the doctrine of survivorship was applicable in the circumstances.
  - ii. Whether or not the estate of the deceased is entitled to or has a legal interest in the suit properties.



iii. Who should bear the costs.

21. Counsel for the defendant argued that the matter before this court lies within the provisions of the matrimonial property Act (Act No. 49 of 2013) which was meant to cure the gaps in the Land Registration Act, 2012 and further through Act No. 28 of 2016.

22. The Land Registration Act ushered a new dawn on dealing with matrimonial properties to court:-  
Section 93 of the Act provides-

“Co-ownership and other relationships between spouses’ subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses of all spouses, such property may be deemed to be matrimonial property and shall be dealt with under the matrimonial property Act.”

23. Counsel also made reference to section 8 of the Matrimonial Property Act, 2013 which stipulates as follows: -

- “(1) If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the
- a. Matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only if the property was acquired before the man married another wife and
  - b. Matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives”

24. The Defendant contended that by didn't of registration of the suit properties in the joint names of the Plaintiff and deceased, a trust anticipated under section 8(1) (b) of the Matrimonial Property Act, 2013 was created. It was also submitted that from the said provision, the only properties in which joint ownership as stipulated by the Land Registration Act would apply is as relates to the properties acquired and registered in the names of the husband and wife, prior to the marriage turning into polygamous one and as such those properties would be protected under the law to the extent that they belong to the first wife (widow). This upon settling into a polygamous marriage, all the wives and the future wives are treated as equal and similarly to the children of marriage in respect of the property acquired thereafter and as far as inheritance is concerned. Hence therefore the death of Henry Mulli automatically dissolved marriage as anticipated by law and the subject properties herein fall within his estate. Counsel further stated that the Plaintiff was not the first wife of the deceased and Section 8C (1) (a) of the Matrimonial Property Act does not apply to the suit property. Reliance was made to the case of Re Estate of Josiah Kipkirui arap Rono (deceased) (2021) eKLR.

25. It was also submitted that Article 43(3) of the constitution provides that parties to a marriage acquire equal rights regardless of whether the marriage is polygamous or monogamous. Counsel also referred to Article 27(4) and (5) of the constitution which prohibits discrimination and that applying the doctrine of survivorship in this case would amount to discrimination against the estate of the deceased. Hence the registration of the Plaintiff as the absolute proprietor of the suit properties after the death of the deceased was irregular and illegal. Counsel concluded his submissions by praying for the Plaintiff's suit to be dismissed with costs.



## Analysis and determination

26. I have considered the evidence tendered by the Plaintiff and Defendant together with the pleadings of the parties and the submissions filed herein. In my view the issues arising for determination in this suit are as follows; -

- i. Whether the suit properties are matrimonial properties.
- ii. Whether the doctrine of survivorship is applicable herein.
- iii. What orders should issue.

27. I will proceed to address the issues sequentially as hereunder:

### Issue No. 1 Whether the suit properties are matrimonial properties.

28. The Defendant submitted that the matter before this court lies within the provisions of the Matrimonial Property Act (Act No. 49 of 2013) which came to force on January 16, 2014. The Defendant also argued that the Act was made to cure the gaps in the Land Registration Act, 2012. The Defendant's Counsel reiterated that this court cannot close its eyes on matter pertaining to matrimonial property and proceed as if the law to that respect does not apply. Reliance was placed on section 93 of the Land Registration Act and section 8 of the matrimonial property Act.

29. From the evidence that was tendered herein, the Plaintiff produced PEX 1 which was a copy of the title in respect to LR 37/254/33 and L.R. 3734/389. From the said exhibit, in respect to property known as LR 37/254/33, there was entry no. 979 which showed that the property was registered and transferred to the names of Henry Nzioka Mulli and Anna Itumbi Mulli on July 4, 1973. The same exhibit also showed that a death certificate dated October 7, 2015 of Henry Nzioka Mulli was registered against the title on March 8, 2016.

30. The Plaintiff also produced a marriage certificate as PEX 2 which showed that her marriage to the deceased Henry Nzioka Mulli was solemnized on February 22, 1975 at the Registrar marriages office in Nairobi. The said certificate indicated the deceased Henry Nzioka Mulli as divorced and the Plaintiff as a spinster.

31. Section 6 of the Matrimonial Property Act No. 49 of 2013 defines Matrimonial property as follows: -

“Section 6 meaning of Matrimonial property

1. For the purposes of this Act, Matrimonial property means: -
  - a. the matrimonial home or homes;
  - b. household goods and effects in the matrimonial home or homes.
  - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
2. Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

Section 8 property rights in polygamous marriages

1. If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the



- (a) matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife and
- c. Matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives.

32. In the instant case, the Defendant maintained that she started cohabiting with the deceased Henry Nzioka Mulli as husband and wife from 1972 and as a customary law wife where they underwent all the Kamba customary law marriage rites and rituals. It was the Defendant's case that the Plaintiff cannot claim a greater right over her owing to the fact that she was a wife to the deceased way before her marriage and the deceased husband.
33. From the evidence that was tendered, it was not disputed that property known as L.R. No. 37/254/33 was acquired and registered in the joint names of the deceased and the Plaintiff on November 26, 1969. While property L.R. No. 3734/389 was registered in the joint names of the deceased Henry Nzioka Mulli and the Plaintiff on August 23, 1974. In view of the foregoing the said property having been acquired before the marriage of the parties could not have been deemed as matrimonial property unless if the parties desired it to be as such.

**Issue No. 2 Whether the doctrine of survivorship is applicable herein.**

34. It was the Plaintiff's case that upon the demise of the late Henry Nzioka Mulli, the principle of jus accrescendi applied and the deceased's interest in the suit property merged or united with that of the Plaintiff as the surviving joint tenant, the right of survivorship takes precedence.
35. The Defendant while admitting that indeed the suit properties were registered in the joint names of the deceased and Plaintiff submitted that a trust was created as anticipated under Section 8(1) (6) of the *Matrimonial property Act 2013*.
36. A joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares. Further, that there is a thorough and intimate union between joint tenants. Together they form one person.
37. The tenor and scope of joint tenancies was also deliberated upon in the case of *Mukazitoni Josephine v Attorney General* [2015] eKLR where the Court of Appeal stated and observed as follows:-
- “A joint tenancy cannot be severed unless one of the four unities of title, possession or interest is broken. A joint tenant has the right to the entire property or none. – since the other joint tenant also has a right to the entire property. This is expressed in latin as totum tenet et nihil tenet, a joint tenant holds everything and nothing”
38. Premised on the foregoing, what becomes apparent is that where one or more joint tenant dies, the rights that hitherto accrued in favour of the deceased joint tenants lapses, terminates and extinguishes. Consequently, all the rights stand transmitted to and vests in the survivor.



39. To underscore the effects of death upon joint tenancy, it is imperative to adopt and endorse the succinct holding/observation in the case of *Mwangi Gakuri vs Bernard Kigotho Maina & Another* (2016) eKLR, where the court stated as hereunder;

“The principle of survivorship also known as *jus accrescendi* operates as was explained in the case of *Isabel Chelangat v Samuel Tiro* (2012) eKLR, that a joint tenancy imparts to the joint owners with respect to all other persons than themselves, the properties of one single owner.”

40. In the instant case, evidence was led that the suit properties remained registered in the joint names of the Plaintiff and the deceased upto and including the point in time when the deceased passed on.

41. In view of the foregoing, there is no gainsaying that upon the death of the deceased herein, the entire rights over and in respect of the suit properties transmitted to and vested in the Plaintiff same being the survivor. Consequently, what ought to happen is that the Plaintiff herein merely ought to have and that was what was close, a death certificate of the deceased for the land registrar to delete or remove the name of the deceased from the register of title.

42. I therefore come to the conclusion that upon the death of the deceased, the Plaintiff herein accrued a lawful and absolute rights to and in respect of the suit properties, she became the sole proprietor to the exclusion of all and sundry.

### **Issue No. 3 What orders should issue.**

43. The Plaintiff is seeking for a permanent injunction against the Defendant in respect to the two suit properties. The Plaintiff is also seeking for a declaration that she is the absolute owner of the suit properties.

44. In the instant case, having addressed the issues that were highlighted and amplified in the body of the judgment, it is indeed evident that the Plaintiff has proved her case to the required standard and the orders sought ought to be granted.

45. On the issue of costs, although costs of an action or proceedings are the discretion of the court, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (CAP 21). In the instant case and having looked at the circumstances of the case, I will direct each party to bear own costs of the suit.

### **Final orders**

46. In conclusion, it is the finding of this court, that the Plaintiff has proved her case against the Defendant to the required standard and I enter Judgment in favour of Plaintiff on the following terms: -

- a. A declaration be and is hereby issued that LR 37/254/33 and LR3734/389 lawfully belongs to the Plaintiff.
- b. An order of permanent injunction be and is hereby issued against the Defendant restraining her and her agents, servants and or employees from entering, trespassing, felling or in any dealing with LR 37/254/33 and LR 3734/389
- c. Each party shall bear own costs of the suit.

Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NARABI THIS 19<sup>TH</sup> JANUARY 2023**



**E.K. WABWOTO**

**JUDGE**

In the presence of:-

Ms. Alusiola for the Plaintiff

Mr. Nzaku for the Defendant.

Court Assistant: Caroline Nafuna.

**E.K. WABWOTO**

**JUDGE**

<i>ELC CASE NO. 205 OF 2019 JUDGMENT</i>	0
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