



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**ENVIRONMENT AND LAND DIVISION**

**CIVIL SUIT NO.8 OF 2014**

MOSES BII.....PLAINTIFF

**VERSUS**

KERICHO DISTRICT LAND REGISTRAR.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

**J U D G M E N T**

***(Proprietorship of land; joint proprietorship and proprietorship in common; register reflecting 4 names but not indicating whether proprietorship is joint or in common; argument of plaintiff that proprietorship is joint; no evidence of joint proprietorship nor proprietorship in common; whether in such instance proprietorship is joint; held that presumption should be that the proprietorship is in common; joint proprietorship only to be presumed in the clearest of circumstances; suit dismissed.)***

The suit herein concerns the registration of the land parcel Kericho/Kabianga/1498. This land was first registered on 16<sup>th</sup> February, 1970 in the names of four persons, namely, Kiprono Bii, Moses Bii (the plaintiff), John Bii, and Cheriro Tuimising. To date however, the title deed has never been issued. In the course of time, John Bii and Kiprono Bii died. The plaintiff contends that despite their death, the Kericho District Land Registrar, has failed to register their death certificates and delete their names from the register, although he has been duly notified. What the plaintiff wants in this suit is for the names of Kiprono Bii and John Bii to be deleted from the register and a title deed be issued in the names of himself and Cheriro Tuimising as joint proprietors of the suit property. He also wants costs and interest of the suit.

The plaintiff testified as the sole witness and gave evidence to the effect that the four registered persons are brothers. He testified that the land is jointly registered in the names of the four persons named in the register of the suit property. He testified that Kiprono Bii died in the year 1973 whereas John Bii died in the year 1999. In cross examination, he testified that each of the four persons or their survivors have an equal share in the land. However, since the land is jointly registered, he wants the title deed issued to the two surviving persons, and thereafter they will take upon themselves the sub-division to each family.

The state did not offer any evidence and it is also only Mr. Siele Sigira for the plaintiff who filed submissions. He inter alia submitted that Sections 101, 102, 103 and 118 of the Registered Land Act,

(CAP 300) (repealed by the Land Registration Act, 2012), apply to this case. He submitted that although the register is silent on the kind of registration, since the defendant did not produce the parcel file, the court should be guided by the plaintiff's testimony that the land was jointly registered. He pointed out that the plaintiff's evidence was unchallenged. He relied on the case of ***Richard Nangubo Masinde vs Makokha Opicho Job, Bungoma HCCC No. 69 of 2012 (OS)***.

I have considered the matter. The land herein was registered in the year 1970 when the **Registered Land Act, Cap 300, (RLA)** was the operative law. **Section 101 (1)** of the **Registered Land Act** provided as follows :-

**"101. (1)** *An instrument made in favour of two or more persons, and the registration giving effect to it, shall show-*

*(a) whether those persons are joint proprietors or proprietors in common; and*

*(b) where they are proprietors in common, the share of each proprietor."*

The contemplation of the above law is that in every situation where the proprietors are more than one, the register will reflect whether their registration is joint or in common. The RLA did not envisage a situation where you have several proprietors, without it being disclosed in the register, whether they are joint proprietors or proprietors in common.

The characteristics of these two kinds of proprietorship were brought out in **Sections 102 and 103** of the **Registered Land Act** which were drawn as follows :-

**102. (1)** *Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently -*

*(a) dispositions may be made only by all the joint proprietors; and*

*(b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly.*

**(2)** *For avoidance of doubt, it is hereby declared that -*

*(a) the sole proprietor of any land, lease or charge may transfer the same to himself and another person jointly; and*

*(b) a joint proprietor of any land, lease or charge may transfer his interest therein to all the other proprietors.*

**(3)** *Joint proprietors, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joint proprietorship, and the severance shall be completed by registration of the joint proprietors as proprietors in common and by filing the instrument.*

**103. (1)** *Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.*

**(2)** *No proprietor in common shall deal with his undivided share in favour of any person other than*

*another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.*

In a nutshell, where proprietorship is joint, the persons do not have any separate shares in the land, and therefore if one proprietor dies, his interest automatically vests upon the surviving proprietor. Thus if land is owned jointly by A and B, and A dies, B now becomes the sole proprietor of the land and does not hold it in trust for the estate of A. In other words, there are no separate shares for the proprietors. Where land is owned in common, each proprietor has a separate share, only that the same is undivided and held together with the other proprietor/s as one whole. Thus if one proprietor dies, his share does not vest in the surviving proprietor, but vests in his estate.

In our case, as I stated before, the register does not show whether the proprietorship was joint or in common. I also mentioned that the RLA did not contemplate a scenario where the register does not indicate whether land is held jointly or in common, and did not provide for the course to follow, where there are several proprietors but no indication as to whether they hold the land jointly or in common. What then should happen in such a situation "

My view is that if the register does not reflect whether land is held jointly or in common, the fallback position should be to presume that the land is held in common. Joint proprietorship, where the same has not been explicitly indicated, should only be presumed in the clearest of circumstances, where there can be no shred of doubt that the contemplation of the parties was to have the property held jointly. I for myself cannot think of such a state of affairs other than where the proprietors are spouses, though I cannot rule out other situations, but they really must be so clear as to obviate debate on it.

The current law, which is contained in the Land Registration Act, Act No. 3 of 2012 (which repealed the RLA and which came into effect on 2 May 2012) in fact frowns deeply on joint proprietorship. It effectively bans them unless the proprietors are spouses or unless by order of court. The operative section is Section 91 (8) which is drawn as follows :-

*“Section 91 (8) : 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.”*

In our situation, the proprietors are four brothers. They became registered as proprietors on 16<sup>th</sup> February, 1970. As I pointed out, the register does not show whether they are proprietors in common or whether they are joint proprietors. My presumption is that they were registered as proprietors in common. In fact, the nature of their holding fortifies that position. The four persons are first registered proprietors. In his evidence, the plaintiff testified that their parents gave them the land. In other words, they inherited it from their parents. Evidence taken in the course of trial demonstrated that on the site of the property, each of the four proprietors or their survivors, occupy 3/4 of an acre. The plaintiff stated that there is also a commercial area where each of the four proprietors or their survivors, are entitled to a plot of 25 x 100 feet. This to me, points at a holding, which tends to be a holding in common, rather than one which is joint. I cannot therefore fault the Land Registrar, for failing to presume that the proprietorship is joint, and for failing to issue a title deed only bearing the names of the surviving proprietors. In fact, I can say that the Land Registrar was correct in registering a restriction, barring any dealings, until the interest of the survivors of one of the deceased proprietors is catered for.

I further note that this suit was filed on 22nd February 2014, at a time when the Registered Land Act had been repealed at a time when Section 91 (8) of the Land Registration Act, was effective. In essence, if

the new law is applied, the plaintiff automatically fails. But it doesn't matter, for even on application of the old law, the plaintiff will still fail.

The long and short of it is that I hold that the proprietorship of the four persons in the land parcel Kericho/Kabianga/1498, be deemed to be a proprietorship in common. The net effect is that I have to dismiss this suit and it is so dismissed with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 2<sup>nd</sup> DAY OF OCTOBER, 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**In the presence of:**

Mr. Siele Sigira for Plaintiff

No appearance for the State Law office for Defendants



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