



**Jethwa v Jethwa (Environment & Land Case 16 of 2023)
[2023] KEELC 21042 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21042 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 16 OF 2023
A OMBWAYO, J
OCTOBER 19, 2023**

BETWEEN

JASWANT KUMARBA BANESINGH JETHWA PLAINTIFF

AND

PRADEEP KUMAR JETHWA DEFENDANT

JUDGMENT

1. Jaswant Kumarba Banesingh Jethwa (hereinafter referred to as the Plaintiff) has come to this court by originating summons against Pradeep Kumar (hereinafter referred to as the Defendant) for orders that the honorable court be pleased to order the severance of the joint tenancy of the land parcel number Nakuru Municipality Block 10/96 (herein referred to as the suit property) into tenancy in common in equal shares and that upon the grant of the prayer, the honorable court be pleased to order the Defendant to execute all instruments of severance within 14 days upon issuance of the order failure to which the Deputy Registrar of this honorable court be pleased to execute the same on his behalf. In the alternative, the suit property be hereby liquidated and the proceeds to be shared equally. Further in the alternative, the court be pleased to grant an option to the Defendant herein to buy out the interest of Plaintiff herein valued at Kshs.70,000,000/=. Lastly, that the Land registrar to immediately rectify the register and effect the said prayers as shall be granted by this honorable court. The costs of this suit be provided for.
2. The originating summons is based on grounds that the Plaintiff and the Defendant are joint proprietors of the suit property where leasehold is due to expire on 30th November 2023 and that the Plaintiff has obtained a provisional extension of lease. The Defendant has refused to sever the joint ownership or liquidate to property or buy out the Plaintiff. The other joint owners are deceased and that the Plaintiff who is 89 years old is in dire need of finances, to support herself. The Plaintiff laments that she has spent a fortune to have the lease renewed or extended. The Plaintiff states that



the Defendant is holding her at ransom hoping that she will predecease him to enable him acquire the entire property.

3. In the replying affidavit the Defendant states that the Plaintiff who is his mother and himself are the only surviving joint tenants of property number NKR Mun/Block10/96 holding it under leasehold basis and when lease is due to expire on 30th November 2023. He successfully caused to lease to be extended by surrendering the original certificate of lease to the Ministry of Lands Offices at Ardhi House Nakuru.
4. According to the Defendant before he could get the documents a Mr Abdulrahman Bashir collected the documents on behalf of the Plaintiff. The Plaintiff lives in the U.K and can't be said to be the one who presented the documents. He states that his sister Vasanti Rana has been arm-twisting them to register the land as tenants in common so that she can inherit the Plaintiff's land. He states that the Plaintiff is not short of money as she has a lot of properties.
5. In the supplementary affidavit the Plaintiff states that she is the one who initiated the process of extension of lease. Moreover, that her son has never taken care of her welfare but it is the daughter Vasanti Rana who has done so. She states that the property in the United Kingdom is her home and that she can sell it because she will remain homeless. She states that the four unities of title, possession, time and interest have been broken by the Defendant collecting rent from the tenant in the suit property and enjoying rental income solely and not the Plaintiffs.
6. The court gave directions on 28/9/2023 where the originating summons was committed into plaint and the replying affidavit to Defence. The court made direction the suit be determined by written submissions.

Plaintiff's Submissions

7. The Plaintiff submits through able and eloquent counsel Mr Biko that the 1st issue to be dealt with is whether or not the Plaintiff has a rightful interest in the suit property. According to the Plaintiff, the fact that the Plaintiff is a co-owner is not denied. The Plaintiff was an owner of the suit land even before the Defendant herein considering that she is the mother and this was always a family property acquired by the Plaintiff and his late husband. The property has always been a joint tenancy at all times to avoid the long processes of succession as no parent ever anticipates being denied their property by their own children. As such, it is only trite that the Plaintiff has a rightful proprietary interest in the suit property.
8. The second issue according to the Plaintiff is whether the joint tenancy should be severed in line Plaintiff's proprietary rights.
9. The Plaintiff submits that it a much known fact that any person who owns an interest in a property also has some proprietary rights that they are entitled to. One of such rights is to freely enjoy their property and benefit from it and these rights are clearly articulated under Article 40 of [the Constitution of Kenya 2010](#) and in the [Land Act](#).
10. Further, where the land is co-owned by parties whether as tenants in common or joint tenants as is the case herein, then a co-owner cannot deal with that property, either by leasing, selling, sub-dividing and/ or assigning it to someone else without the consent of the other. Each proprietor has an equal right to the property and should as such be allowed to deal freely with the land; albeit with the consent of the other. This consent should not however be unreasonably withheld when sought for as is the case herein.



11. The Plaintiff cites section 91(7) of the *Land Registration Act*, 2012 provide as follows;
- Joint tenants, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joining ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenants in common.
12. In the instant suit, the Plaintiff expressed her intention to sever the joint tenancy in the suit property. In this regard, and through her appointed attorney, the Plaintiff communicated her intentions to the Defendant and proceeded to fill the severance forms and forwarded the same to the Defendant for his execution.
13. The Plaintiff submits that it is trite law that for there to exist a valid joint tenancy, the four unities of possession, interest, title and time as indicated in the case of *Diana Muchiri Vs Lydia Wariara Njenga & another* (2022) eKLR, where honorable Judge S.Okong'o states that:-
- “A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and 'four unities". The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are
- i. The unity of possession.
 - ii. The unity of interest.
 - iii. The unity of title.
 - iv. The unity of time.
14. The afore-mentioned does not by any means imply that the interest of any one joint tenant is superior or the proprietary rights of one joint tenant supersede the others' rights.
15. The Plaintiff refers to the case of *Cornella Nabangala Nabwana v Edward Vitalis Akuku & 2 others* [2017] eKLR, it was stated that:
- “...The unity of possession implies that each joint tenant is as much entitled to possession of any part of the land as the others. He cannot point to any part of the land as his own to the exclusion of the others. No one joint tenant has a better right to the property than another”
16. Further she relies on the honorable court in *Nabangala Nabwana v Edward Vitalis Akuku & 2 others* [2017] eKLR, supra further stated that:
- “The unity of interest implies that the interest of each joint tenant is the same in extent, nature and duration because they are deemed to hold one estate. In this regard, any legal act e.g. a conveyance or lease of land requires the participation of all the joint tenants”



17. She summarizes her submissions by referring to the decision of the Court of Appeal in *Mukazitoni Josephine Vs Attorney General Republic of Kenya* (2015) eKLR, where it held thus:

“A joint tenancy cannot be severed unless one of the four unities of title, time, 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 *totem tenet et nihil tenet*, a Joint tenant holds everything and nothing”,

18. In the circumstances, the Plaintiff counsel submits that the facts of the case depict a clear case that warrant conversion of joint ownership to tenancy in common. One proprietor is being disadvantaged by being denied the right to deal with the suit property while the other, the Defendant herein is solely and unfairly benefitting.

Defendant’s Submissions

19. The Defendant on his part submits through able and consistent counsel Mr Okiro that Article 40(1) of *the Constitution* of Kenya provides that Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

(a) Of any description; and

(b) In any part of Kenya

(2) Parliament shall not enact a law that permits the State or any Person—

To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description;

‘Property’ as captured in Article 240 of *the Constitution* includes any vested or contingent right to, or interest in or arising from -Land, or permanent fixtures on, or improvements to, land.

20. Counsel submits that Section 24 (a) of the *Land Registration Act* provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

21. The actions of the Plaintiff herein your aim at nothing more other than to deprive the Defendant of his lawful interests and rights in the suit land and further deny the Defendant the benefit of using the subject property for his survival, dwelling and economic gain. This should more so be noted considering the fact that in joint tenancy, the individual joint tenants have the rights and interest in the whole of the property and not individual sections thereof. .

22. On whether the Plaintiff can cause severance of the joint tenancy without the consent and approval of the Defendant, the Defendant argues that the legal framework on the scope of the rights of a joint tenant and the statutory features of a joint tenancy are contained in Section 91 (4) of the *Land Registration Act* which provides as follows:

“If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently

a. disposition may be made only by all the joint tenants,

b. on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly, or



- c. each tenant may transfer their interest inter vivos to all the other tenants but to no other person and any attempt to so transfer an interest to any other person shall be void.
23. He submits that each party in a joint tenancy has an equal interest in the property an interest that ensures that each joint tenant holds an equal and undivided share in the property. This is what has been described by courts as unity of interest in that the interest of each joint tenant is the same in extent, nature and duration, for in theory of law, they hold just one estate.
24. He submits on the question of possession that all joint tenants have an equal right to possess and use the entire property, it implies that no joint tenant can claim exclusive rights to any specific part of the property. Therefore, the Plaintiff in this case cannot in anyway whatsoever bulldoze the Defendant into extinguishing his rights and interests in the suit property as is now currently held for no justifiable reason whatsoever.
25. He cites the case of *Cyrus Muchiri Ndambiri Vs Faith Wanjiru Ndambiri (2020) eKLR*, where the superior Court sitting in Kerugoya held that:
- “A joint tenancy can be converted into a tenancy in common by the doctrine of severance. Section 91 (7) of the *Land Registration Act* provides that joint tenants are free to sever the tenancy which severance must be completed by registration. The parties can only sever joint tenancy by executing an instrument in the prescribed form signifying that they agree to sever the joint ownership. Unless that is done, there is no other lawful way of separating co-ownership of property,”
26. According to counsel for the Defendant, the Defendant herein does not have any reservations in regards to the extension of the lease. He is more than willing and ready to have the same extended in the same tenure as it currently exists (joint tenancy), The Defendant has over the last few months taken substantial measures in initiating the process of extension including paying for the requisite fees in absence of any compensation from the Plaintiff. The Plaintiff (or rather individuals purporting to be the Plaintiff and acting behind the Plaintiff 's back) has since hijacked the process of registration to the utter shock and detriment of the Defendant.
27. To bolster his argument, he places reliance in the case of *Mukazitoni Josephine Vs Attorney General Republic of Kenya (2015) eKLR*, the Court of Appeal held thus;
- “A joint tenancy cannot be served 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 *totem tenet etnihittenet*, a joint tenant holds everything and nothing”.
28. He ultimately urges the honorable court to dismiss the application before it as the same is lacking in merit and has been brought in bad faith because as a joint tenant with equal interests in the suit property the Defendant is agreeable to buying the Plaintiff 's share of property in the event that a valuation is done by a government valuer.

Analysis and Determination

29. I have carefully considered the application and the affidavits on record and do find that the suit revolves on severance of a joint tenancy.



30. In *Mukazitoni Josephine Vs Attorney General* (2015) eKLR. The Court of Appeal held that a joint tenancy cannot be severed unless one of the four unities of title thus time, interest, possession or title are broken. That a joint tenant has the right to the entire property or none since the other joint tenant has the right to the entire property. This is expressed in the latin as *totem tenet et nihil tenet*. Thus a joint tenant holds everything and nothing.
31. This court observes that the term "joint tenancy" refers to a legal arrangement in which two or more people own a property together, each with equal rights and obligations. Joint tenancies can be created by married and non-married couples, friends, relatives, and business associates. This legal relationship creates what is known as a right of survivorship so if one owner dies, their interest in the property is directly passed on to the surviving party(s) without having to go through probate or court system. Tenancy in Common is different from joint tenancy, the former is a legal arrangement in which two or more parties share ownership rights in a real estate property or parcel of land. Each independent owner may control an equal or different percentage of the total property, whether commercial or residential. The parties are known as tenants in common. Tenancy in Common is one of three types of shared ownership. The other two types are Joint Tenancy and Tenancy by Entirety. A tenancy in common has no right of survivorship and when a tenant in common dies, their share of the property passes to their estate, where a beneficiary of the share of property may be named. Tenancy by the entirety refers to a form of shared property ownership that is reserved only for married couples. A tenancy by the entirety permits spouses to jointly own property as a single legal entity. This means that each spouse has an equal and undivided interest in the property. In this case this court is dealing with a Joint tenancy.
32. The suit property was registered under the Registered *Land Act*, Chapter 300, Laws of Kenya (now repealed) (RLA). It was registered in the names of the Plaintiff, Davendra B Jethwa (deceased), Pradeep B Jethwa(the Defendant) Nilesh B Jethwa(deceased) and Harish B Jethwa(DECEASED) . Registration of land in the names of more than one person was provided for in sections 101, 102 and 103 of the RLA the relevant provisions of which state as follows:
- “ 101. An instrument made in favour of two or more persons, and the registration
- (1) 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.
- 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...
- 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. ...”



33. Section 118 of the RLA provides that:

If one of two or more joint proprietors of any land, lease or charge dies, the Registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register.”

34. The RLA was repealed by the [Land Registration Act](#), 2012 which has similar provisions in sections 91, which states as follows in subsection (4):

If land is occupied jointly, no tenant is entitled to any separate share in the land and consequently –

- (a) a dispositions may be made only by all the joint tenants;
- (b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; or
- (c) Each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person and any attempt to so transfer an interest to any other person shall be void.”

35. The distinction between joint tenancy and tenancy in common was made in *Isabel Chelangat v Samuel Tiro Rotich & 5 others* (2012) eKLR, as follows:

At this juncture, I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land. To expound on this point, I have borrowed heavily from two texts, Megary & Wade, *The Law of Real Property* 6th Edition and Cheshire & Burn’s, *Modern Law of Real Property*, 16th Edition. According to Burn, at P242 “...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.”

36. A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities”. The right of survivorship (*jus accrescendi*) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are

- (i) The unity of possession.
- (ii) The unity of interest.
- (iii) The unity of title.
- (iv) The unity of time.

37. On unity of possession, each co-owner is entitled to possession of any part of the land as the other/s. (P477) One co-owner cannot point to any part of the land as his own to the exclusion of the other/s. If he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other/s, so that an action for trespass cannot lie against another co-owner. Unity of interest means that the interest of each joint tenant is the same in extent, nature



and duration, for in theory of law, they hold just one estate. Unity of title means that each joint tenant must claim his title to the land under the same act or document. This is satisfied by having the joint tenants acquiring their rights by the same conveyance and being so registered as joint tenants. Unity of time means that the interest of each tenant must vest at the same time.

38. Tenancy in common on the other hand is different from joint tenancy. In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential.
39. A joint tenancy can be converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders so remain.”
40. In *Re Estate of Dorica Lumire Mapesa (Deceased)* [2018] eKLR the court stated as follows on the same issue:

20. Having concluded that East/Wanga/Lubinu/66 was held by the deceased and Silas Okumu Simeyo as joint proprietors, it follows then that following her demise on 6th February 1994, the principle of *jus accrescendi* applied, and her interest in the said property merged or united with that of the surviving joint tenant or joint proprietor, Silas Okumu Simeyo. The effect of this then would be that the said property ceased to form part of the estate of the deceased and was not available for distribution in her estate. Indeed, by virtue of section 118 of the Registered *Land Act*, Silas Okumu Simeyo, did not even need to initiate a succession cause to have the property transferred to his name, all he should have done was provide proof of the death of the joint tenant to the Land Registrar for him to act as envisaged by that provision.”

41. In *Re Estate of Johnson Njogu Gichohi (Deceased)* [2018] eKLR, the court stated that:

By the principle of survivorship land owned jointly passes automatically to the surviving owner when one dies without the need to file a Succession Cause. W. M. Musyoka in his book *Laws of Succession* at page 3 states as follows: -

“Property is capable of passing upon death other than by will. It may pass by survivorship..... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship..... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants.”

42. Section 91 (4) of the *Land Registration Act* 2012 states that: “If land is occupied jointly, no tenant is entitled to any separate share in the land and consequently – (a) disposition may be made only by all the joint tenants (b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; and (c) each joint tenant may transfer their interest *inter vivos* to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void”



43. Similar provisions exist in Section 102 of the repealed Registered Land Act under which the suit land was registered. Being joint tenants therefore, the plaintiff and defendants are in law considered as one and none of them can claim any portion of the suit land. They hold the suit land as one with equal rights and that ownership of the suit land between them can only be severed through Section 91 (7) of the Land Registration Act which provides as follows: “Joint tenants not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joining ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenants in common”.
44. It is therefore clear that as a joint tenant in the suit land, the plaintiff is not at liberty to unilaterally sever such joint ownership or even purport to sell any portion of the same. Neither can she, as she did by filing a suit seeking orders for the sub-division of land held in a joint tenancy. This is because, all the joint tenants must “agree to sever” that relationship as prescribed under Section 91(7) of the Land Registration Act. This court was faced with a similar situation in Nancy Wangari Kinyua verses Rose Wambui and another where justice Boaz Olao held on appeal as follows:-

It is clear from the record therefore that although the trial magistrate erred in law and in fact in making the finding that the appellant had sold one acre of the land and therefore had no right over the suit land as pleaded in paragraph two (2) of the memorandum of appeal, the trial magistrate nonetheless arrived at the correct decision in dismissing the appellant’s claim that the suit land be sub-divided between her and the Defendants. This is because under the law, such severance can only be done with the concurrence of all the joint tenants.”

45. This court finds that the four unities have not been broken and therefore the joint tenancy between the Plaintiff and the Defendant still exist and therefore cannot be severed by this court. There is no evidence that the parties herein have separate possession of the land. The suit is an attempt to use this court to deny the defendant of his rights and interest in half of the property as he is entitled to equal share in the undivided property. The upshot of the above is that the suit is dismissed with no order as to costs as the parties are family members that is a mother and her son.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19TH DAY OF OCTOBER 2023.

A. O. OMBWAYO

JUDGE

