Munyiri (Suing as the Administrator of the Estate of Wamunyu Munyiri - Deceased) v Munyiri (Environment and Land Appeal E003 of 2020) [2025] KEELC 1041 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1041 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT AND LAND APPEAL E003 OF 2020

JM MUTUNGI, J

MARCH 6, 2025

BETWEEN

WAWIRA MUNYIRI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF WAMUNYU MUNYIRI - DECEASED) ..... APPELLANT

AND

ROSE IGOKI MUNYIRI ..... RESPONDENT

(An appeal arising from the Judgement of Honourable E.O Wambo delivered on 4th April 2019 in Kerugoya Chief Magistrate's Court Civil Case No. 79 of 2014 in the Magistrate's Court at Kerugoya)

JUDGMENT

1. This appeal arises from the judgment delivered by Hon. E.O. Wambo (SRM), who entered Judgment in favour of the Respondent who was the Plaintiff before the Lower Court and dismissed the Appellant's Counterclaim who was the Defendant before the Court.

2. Aggrieved and dissatisfied with the Judgment, the Appellant has appealed to this Court and has through an Amended Memorandum of Appeal and Record of Appeal dated 3rd March 2023 raises 3 grounds of Appeal as follows:-

    1. That the Learned Magistrate erred in law and in fact in delivering the judgment in favour of the Respondent against the weight of evidence.

    2. That the Learned Magistrate erred in law and fact in failing to fairly analyze the evidence adduced in Court.

    3. That the Learned Magistrate erred in law and in fact in allowing the Plaintiff's suit and dismissing the Defendant's counterclaim while the Plaintiff had proved her case.

3. The Appellant prays that the Appeal be allowed and the Judgment in the Civil Case No.79 of 2014 be set aside and be substituted with an order allowing the Appellant's Counterclaim with costs.

4. In her evidence before the Lower Court, the Respondent adopted her witness statement dated 16th April 2014 and relied on her documents as per the list of even date. During cross-examination, the Respondent stated that she wanted the property left to her by her late husband, whom she married in 1986; She stated that she and her husband could not legally marry because he was already married to another woman; however, he paid her dowry and they lived together for 30 years as husband and wife. The Respondent also testified that she was registered as a co- owner of the suit land in 2002 and stated that although the title indicated that she was a minor, she clarified that she had been of age since 1970 but that at the time of registration, she did not possess an identity card. She stated she acquired one in 2016 after the initial one got lost. She testified that she was registered as a minor in the title because she did not possess an identity card.

5. The Appellant Wamunyu Munyiri (PW1), adopted her witness statements dated 13th June 2014, and 3rd October 2014. During cross-examination, she stated that Munyiri Nyaga was her husband. She claimed that she did not know the Respondent and was unaware that the land was registered in their joint names. Munyiri testified that the land was originally registered in her late husband's name, and she had never seen the title to the suit land. She stated that she did not know that the Respondent was a co-owner of the suit land and confirmed that she was the one utilizing it. The second witness Pauline Wanjiru (PW2) called by the Appellant adopted her witness statement. During cross-examination, she stated that she did not know the Respondent and had never seen her.

6. Upon considering the evidence, the Trial Court delivered the impugned Judgment, upholding the Respondent's claim and dismissing the Appellant's Counterclaim. In doing so, the Trial Court noted that it was challenging to rule in favour of the Appellant, as she failed to address several important issues. These included the legality of the Respondent's marriage to her late husband, the matter of the Respondent being registered as a minor and the question of shares in the suit land owned by her deceased husband. Consequently, the Trial Court concluded that the Appellant had not proved her case, while the Respondent had successfully proven hers.

7. The Appeal was canvassed by way of written submissions and Appellant vide her submissions dated 4th November 2023 argued the three grounds of Appeal together. The Appellant argued that she had adduced evidence that the land in question belonged to her late husband, who transferred ownership to both of them as joint owners. The Appellant contended she never knew the Respondent and she was not a co-wife.

8. Counsel pointed out that the Trial Court did not address the Appellant's counterclaim for the cancellation of the registration of the Respondent as a Co-owner of the suit property. The Appellant argued the Respondent's registration as a minor was in contravention of the law. Counsel highlighted the Respondent's own testimony, in which she admitted she had not legally married the late Munyiri Nyaga because he was already married to someone else. Additionally, during the registration, the Respondent was classified as a minor as she did not possess an identity card.

9. Counsel placed reliance on Section 47(1) of the *Land Registration Act* 2012, which states:

> "The name of a person under the age of eighteen years may be entered in the register to enable the minor's interest to be held in trust, and shall be registered under the name of the guardian, either on first registration, or as a transferee, or on transmission."

10. My understanding of Section 47 of the *Land Registration Act*, 2012 is that the name of a minor is not barred from being entered in the land register. It can be entered but such minor can only deal with such land through a trustee. This is discernable from the provisions of Section 47(2) & (3) of the *Land Registration Act* which provides as follows:-

    (2) Nothing in this section enables a person under eighteen years of age to deal with land or any interest in land by virtue of such registration, and, if the Registrar knows a child has been registered, the Registrar shall enter a restriction accordingly.

    (3) If a disposition by a minor whose minority has not been disclosed to the Registrar has been registered, that disposition may not be set aside only on the grounds of minority.

11. Counsel argued that the Trial Court made an error in allowing further the partitioning of the suit land, as the Respondent had not complied with the requirements set out in Section 94 of the *Land Registration Act*. To support this assertion, Counsel cited the case of Muhuri Muchiri vs. Hannah Nyamunya (sued as Administrator of the Estate of Njenga Muchiri, alias Samuel Njenga Muchiri (Deceased) (2015) eKLR) where the Court held:-

    > " Under this section, the power to partition land held under common tenancy is granted to the Registrars appointed under Sections 12 and 13 of the *Land Registration Act*. This Court finds that it cannot grant the order to sever the common tenancy concerning LR No. 1049/18, as the legal procedures have not been followed."

12. The Respondent filed undated written submissions and raised two issues for consideration: first, whether the Appellant's appeal was incompetent, and second, whether the Trial Court erred in allowing the Respondent's suit while disallowing the Appellant's Counterclaim.

13. Counsel for the Respondent pointed out that the Appellant's record of Appeal was missing several key documents, including the Respondent's reply to the defence and Counterclaim; the supplementary Respondent's list of witnesses; the Appellant's further statement; the Appellant's further list of witnesses; and a witness statement from Pauline Wanjira, as well as the supplementary Respondent's list of documents. Counsel argued that this incomplete record rendered the Appellant's Appeal incompetent and fatally defective. To support their argument, Counsel cited the following cases: Ndegwa Kamau t/a Sideview Garage v. Fredrick Isika Kalumbo (2016) eKLR; Kenya Commercial Bank Limited & Another v. Pili Victoria (2020) eKLR; and Bwana Mohamed Bwana v. Silvano Buko Bonaya & 2 Others (2015) eKLR. Counsel urged the Court to dismiss the Appeal with costs to the Respondent.

14. Regarding the second issue, Counsel contended that, following Munyiri Nyaga's death, the suit land had been divested to the parties involved in this suit. He explained that the Respondent filed her claim in the Trial Court because the Appellant refused to grant consent for partitioning the land. Counsel stated that the appeal had been overtaken by events since the original Appellant had passed away, resulting in the land automatically vesting to the Respondent under Section 60 of the *Land Registration Act*, 2012.

15. Counsel submitted that while the Appellant sought the cancellation of the Respondent's name from the title, she did not specify the grounds for this prayer. Consequently, Counsel argued that the Appellant's counterclaim failed to meet the requirements of Section 80 of the *Land Registration Act*, which states:

    > " 80.

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made, or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and has acquired the land, lease, or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud, or mistake in consequence of which the rectification is sought, or caused such omission, fraud, or mistake, or substantially contributed to it by any act, neglect, or default."

16. Counsel further supported this position by referencing the case of Josephine Egwa Mbela (Suing as a Personal Representative of the Estate of Eric William Mbela (Deceased) v. Elizabeth Wanjiku Muchira & Another (2021) eKLR.

Analysis evaluation and determination

17. I have reviewed the evidence on record, the record of appeal, and the written submissions from both parties. The issues for determination by this Court are as follows:

    1. Whether the incomplete Record of Appeal rendered the Appeal fatally defective?

    2. Whether the trial court erred in dismissing the Appellant's Counterclaim?

    3. Whether the trial Court erred in ordering the partitioning of the suit land into two equal portions?

18. This Court being a Court of Appeal of first instance must re-evaluate the evidence presented before the Trial Court in keeping with the principle in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123 to ascertain whether the decision reached by the Trial Court was justified on the basis of the evidence adduced. In the case the Court of Appeal stated as follows:-

> "----- This Court is not bound necessarily to accept the findings of fact by the Court below. An Appeal to this Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

Does the incomplete record of appeal make the appeal defective?

19. Order 42 Rule 13(4) of the Civil Procedure Rules provides for the documents that should be on the Court's record before the appeal proceeds for a hearing. It states as follows:-

    4. Before allowing the appeal to go for hearing, the judge shall be satisfied that the following documents are on the record and that such of them as are not in the possession of either party have been served on that party., that is to say;

        1) The memorandum of appeal

        2) The pleadings;

3) The notes of the trial magistrate made at the hearing

4) The transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

5) All Affidavits, maps, and other documents whatsoever put in evidence before the Magistrate;

6) The Judgment, order or decree appealed from and, where appropriate, the order (if any) giving leave to appeal;

Provided that-

i) a translation into English shall be provided of any document not in that language;

ii) the Judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs *(a)* (b) and (f).

20. Order 42 Rule 13 clearly states that before an appeal is heard, the Judge must ensure that the necessary documents are included in the Court record. The index captures what the Appellant included in her Record of Appeal. No doubt the list does not include the documents listed by the Respondent's advocate in her submissions. This notwithstanding, striking out an Appeal owing to some missing documents would be drastic and harsh. In support of his submission Counsel relied on the following cases Ndegwa Kamau t/a Sideview Garage v. Fredrick Isiki Kalumbo (2016) eKLR and Kenya Commercial Bank Limited & Another Versus Pili Victoria (2020) eKLR. In both cases the Courts identified key documents that should be included in the Record of Appeal, and these must include an order or decree, the Memorandum of Appeal, pleadings, and the Judgment.

21. In the Case of Kenya Commercial Bank Ltd & Another –vs- Pili Victoria (2020) eKLR Mrima, J inter alia held that:-

> "-----Under Order 42 Rule 13(4) of the Rules a Court may dispense with any document to be part of the Record of Appeal except the Memorandum of Appeal, the pleadings and the Judgment, Order or decree appealed from and in appropriate cases the order giving leave to appeal -------".
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> Sitati, J in the Case of Elvis Anyimbu Sichenga –vs- Orange Democratic Movement & 4 Others (2016) eKLR held that the omission of a decree in a Record of Appeal rendered the Appeal fatally defective. The Judge held thus:-
>
> 32. What then am I saying about the failure by the Appellant to attach a certified copy of the decree appealed from? I am saying that omission is not a mere technicality for if it were so, the drafters of the rules would not have made its attachment a mandatory requirement. I am therefore satisfied that the Applicant has satisfied this Court that the said omission is fatal to the petition and I so find."

22. In the Appellant's Record of Appeal, the decree is found on page 4, the proceedings and Judgment span pages 5 to 23, the parties' submissions are at on pages 34 to 41, and the Respondent's Plaint, Verifying Affidavit, list of witnesses, witness statements, list of documents, and the actual documents cover pages 42 to 50. Additionally, the statement of defence and further witness statements are included from pages

51 to 56. I find that the omission of the documents listed by the Respondent's Counsel is not fatal to the appeal's validity, as the crucial documents were included in the record. I may also mention that the essence of serving the record of Appeal is for the parties to affirm that it infact contains all the vital documents. The Appellant may at anytime before the Appeal is heard apply to file a Supplementary Record if any document was omitted. Equally a Respondent ought not wait until the hearing of the Appeal to raise the issue of some missing document in the Record of Appeal. The prudent thing to do would perhaps be to apply to strike out the Record or bring that out to the attention of the Appellant. For good measure the Court has the benefit of the original record of the Lower Court.

Whether the Trial Court erred in dismissing the Appellant's Counterclaim?

23. The Appellant filed a Counterclaim on 13th June 2014, seeking the cancellation of the Respondent's name from the register of the suit property. The Appellant stated that the Respondent was a stranger to her and that the Respondent's registration as a co-owner was illegal. The *Land Registration Act* is clear regarding issues of land ownership. Section 24(a) of the *Land Registration Act* states the following:

> " Subject to this Act, 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."

Section 26 (1) of the *Land Registration Act*, 2012 provides as follows:

1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
    a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
    b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

24. Although Section 26(1) of the Act as above provides title of a registered proprietor is absolute and indefeasible it also provides that such title be challenged on the grounds of fraud, misrepresentation, or if the title was acquired illegally, unprocedurally, or through a corrupt scheme, as outlined in Section 26(1) (a) and (b) of the Act.

25. Section 80 of the *Land Registration Act*, provides the circumstances under which the Court may order the rectifications of the Registrar of Land. It provides:-

> " 80 (1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be canceled or amended if it is satisfied that any registration was obtained, made, or omitted by fraud or mistake."
>
> (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default."

26. It was not disputed that both the Respondent and Wamunyu Munyiri were listed as co-owners on the register of land parcel Baragwe/Thumaita/2514. The Appellant claimed that the Respondent's

registration was unlawful; however, the Appellant did to provide any evidence to support the allegation of illegality in the Respondent's registration. Merely stating that she did not know the Respondent was insufficient; the Appellant should have detailed, specified, and proven her allegations to the required legal standards. The Counterclaim was not proved and was correctly dismissed by the Learned Trial Magistrate.

Whether the partitioning of the suit land was proper?

27. The Trial Court issued an order requiring the Appellant to sign all necessary documents to facilitate the partitioning and transfer of the disputed land into two equal portions. These portions were to be registered in the names of the parties involved.

28. The suit property was registered under the Registered *Land Act*, Chapter 300, Laws of Kenya (now repealed). Registration of land in the names of more than one person was provided for in Sections 101, 102 and 103 of the Registered *Land Act* which provide 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
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> (b) where they are proprietors in common, the share of each proprietor.
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> 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...
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> 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. ..."

29. Section 118 of the Registered *Land Act* 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."

30. The Registered *Land Act* was repealed by the *Land Registration Act*, 2012 which has similar provisions in Section 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."

31. The distinction between joint tenancy and tenancy in common was articulated by Munyao, J in the Case of 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."
>
> 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:-
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> (i) The unity of possession.
>
> (ii) The unity of interest.
>
> (iii) The unity of title.
>
> (iv) The unity of time.

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.

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.

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."

32. I fully agree with my brother Munyao, J in his exposition of the legal position as regards joint tenancy proprietorship and common tenancy proprietorship and I affirm what he has expounded is fully applicable in the circumstances of the Appeal before me.

33. Under which co-ownership was the suit land registered? This is vital to establish, as it will shed light on how the suit land is to be divided and how many shares each party is entitled to. The parcel register that could have specified whether or not the parties in the Trial Court were registered as joint proprietors (joint tenants) or proprietors in common (tenants-in-common) was not exhibited and neither was the instrument that effectuated the registration tendered in evidence.

34. The repealed Registered *Land Act*, under which the suit land herein was registered, did not have a default framework spelling out the presumption that was to be made in the event of failure to specify whether the proprietorship was joint or in common. The present *Land Registration Act*, 2012 has filled the lacuna in the repealed Act by making the following provision in Section 91(2):

> 91(2) Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.

35. The Environment and Land Court and the High Court have made conflicting pronouncements on the presumption that was to be made in the absence of a clear specification of the nature of the interest of co-proprietors. In the case of In Re Estate Dorica Lumire Mapesa [Deceased] [2018 eKLR Musyoka J of the High Court stated as follows:

> "The register in respect of East Wanga/Lubiru/66 did not indicate whether the proprietorship was joint or in common. However, going by what is stated in Chesire & Modern Law of Real Property cited above, that 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, I would hold that the deceased and Silas Okumu Simeyo held East Wanga/Libiru/66 as joint proprietors. That is to say that a presumption would arise that the tenancy intended to be joint. I held similarly in re-estate of Josephin Mumbua Mehlaff – Deceased (2015) eKLR."

36. In the Case of Moses Bii v Kericho District Land Registrar & another [2015] eKLR Munyao, J of the Environment and Land Court rendered himself on this issue as follows:

> "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."

37. A five Judge bench of the Court of Appeal was similarly confronted with the above question in Mukazitoni Josephine v Attorney Genral Republic of Kenya [2015] eKLR. The five Judge bench of the Court of Appeal pronounced itself on the question as follows:

> " 34. We have considered the appellant's contention and the Learned Judge's finding. The title document to the property has two names and this is concurrent ownership. There is no indication as to whether the property is held on a tenancy-in-common or joint tenancy or tenancy in entirety. When a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in joint tenancy and not tenancy-in-common or tenancy in entirety. A tenancy in common or tenancy in entirety means that the interest of each registered owner is determinable and severable; in a joint tenancy, the interest of each owner is indeterminable, each owns all and nothing.
>
> 35. 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 nihit tenet, a joint tenant holds everything and nothing (see Re Foley (deceased) Public Trustee -v- Foley & Another (1955) NZLR 702). In Stack -v- Dowden (2007) UKHL 17, the House of Lords expressed itself as follows: "The starting point where there is sole legal ownership (a sole name case) is sole beneficial ownership. The starting point where there is joint legal ownership (a joint name case) is joint beneficial ownership. The onus is upon the person who seeks to show that the beneficial ownership differs from legal ownership. The onus of rebutting the presumption is heavier in joint name cases. The amount of interest (s) would be declared on evidence."

38. The statement from the Court of Appeal indicates that prior to the enactment of Section 91(2) of the *Land Registration Act* when the land was registered in the names of two or more individuals without a clear indication of the nature of their interests in the register, the property was presumed to be held in joint tenancy (or joint proprietorship) rather than in tenancy-in-common (or proprietorship-in-common). In other words, before Section 91(2) of the *Land Registration Act*, 2012 was enacted, if the register did not specify the type of ownership for land registered in multiple names, it was assumed that the co-proprietors held the land as joint tenants. Additionally, this presumption could be disputed, and the responsibility to rebut the presumption rested with the party seeking to establish a different ownership interpretation.

39. To establish a presumption that the proprietors held the land as joint tenants, it is necessary to show that the person opposing the joint tenancy had the opportunity to rebut this presumption and that they presented evidence in Court that would support this rebuttal. As previously noted, the Plaintiff did not produce the land register during the trial, which would have clarified how the parties were registered in terms of co-tenancy. It is clear that the Appellant was not given the opportunity to contest the presumption that the suit land was held in joint tenancy. Consequently, the Appellant should not have been expected to provide evidence against a presumption that had not been established.

40. On the evidence that was adduced before the Lower Court, there was no clarity as to whether on 5th July, 2002 when Wamunyu Munyiri, Munyiri Nyaga and Rose Igoki Munyiri (minor) were registered as Co- owner of land parcel Baragwe/Thumaita/2514 were so registered as joint tenants and/or common tenants. The exhibited copy of the Title Deed and copy of the Certificate of Official Search dated 28th March 2014 do not make any disclosure as to the nature of the proprietorship. That being the case, the Court would have no alternative but to proceed on the basis of the provision under Section 91(2) of the *Land Registration Act*, 2012 and hold that the Co-owners held the subject land in Common in equal shares. In the circumstances the estates of the deceased would have to be involved in the subdivision of the suit land.

41. The net effect of my analysis and evaluation of the matter is that neither the Respondent and nor the Appellant proved their respective cases before the Lower Court. The Learned Trial Magistrate erred in holding the Respondent had proved her case and awarding her Judgment.

42. I allow the Appeal, set aside the Judgment of the Learned Trial Magistrate and substitute with an order dismissing the Respondents case and equally dismissing the Counterclaim by the Appellant.

43. Parties to bear their own costs of the Appeal and of the Court below.

Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 6TH DAY OF MARCH 2025.

J. M. MUTUNGI

ELC - JUDGE