



REPUBLIC OF KENYA



**Muchiri v Njenga & another (Environment & Land Case 175 of 2019)  
[2024] KEELC 527 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 527 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 175 OF 2019  
AA OMOLLO, J  
FEBRUARY 1, 2024**

**BETWEEN**

**DIANA MUCHIRI ..... PLAINTIFF**

**AND**

**LYDIA WARIARA NJENGA ..... 1<sup>ST</sup> DEFENDANT**

**MARIA WANJIRA NJENGA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit was commenced by Plaintiff dated 23<sup>rd</sup> May 2019, which was amended on 10<sup>th</sup> March 2021 and further amended on 10<sup>th</sup> June 2021. In the further amended Plaintiff, the Plaintiff seeks the following reliefs against the Defendants;
  - a. A declaration that all that property known as Nairobi /Block 111/1799 together with the improvements thereon belongs to the Plaintiff.
  - b. An order directing the Defendants to give up vacant possession of the suit property to the Plaintiff, and in default, the court do issue an order for forceful eviction of the Defendants from the suit property.
  - c. The Officer Commanding Station Kayole Police Station do ensure compliance with order (b) above.
  - d. A permanent injunction restraining the Defendants, by themselves, their assigns, agents, servants, employees or anyone claiming under them, howsoever from entering, re-entering and/or remaining upon the suit property.
  - e. Damages for trespass.
  - f. Costs of this suit.



2. As per the Further Amended Plaintiff, the Plaintiff's case is that all that property known as Nairobi/Block 111/1799 located at Komarock, Nairobi County (hereinafter referred to as "the suit property") was at all times registered in her name and the name of her late husband Peter Njenga Kimani (hereinafter referred to as "the deceased") as joint tenants. She averred that the suit property comprises a permanent house, designated as House No. 305, Msisi Court, Komarock Sector 1 made up of a main house and a Detached Servant Quarter (DSQ). She averred that they occupied the main house on the suit property as their matrimonial home while the detached servant quarter (DSQ) is let out to tenants.
3. The Plaintiff averred that sometime in 2015, the Defendants unlawfully, illegally and without any colour of right trespassed onto, encroached and forcefully evicted the Plaintiff from the suit property and moved into the main house. Further, that the Defendants claimed to do this on the basis that the suit property formed part of the estate of the deceased and that they were taking over the suit property in accordance with Law of Succession. That the Defendants have let out the DSQ to a tenant and are now deriving a commercial benefit therefrom on the basis of their illegal and unlawful trespass. The Plaintiff averred that the suit property does not form part of the estate of the deceased, and that she is the lawful proprietor thereof by virtue of the doctrine of survivorship, which she sought to rely on at the hearing of the suit. She alleges that as a result, the Defendants have displaced her from her property and they have refused to vacate it despite several requests and the demand herein to do so, hence the suit.
4. The Defendants filed an Amended Defence and Counterclaim dated 28<sup>th</sup> September, 2022. In their Defence, they denied the allegations set forth in the Plaintiff save for express admissions and clarified that the 2<sup>nd</sup> Defendant's name is Wanjira Peter Njenga. They admitted however that the property was registered in the name of the Plaintiff and the deceased as joint tenants. They averred that the Plaintiff and the Deceased lived on the suit premises until 28<sup>th</sup> April, 2001 when the Plaintiff left and moved to a house constructed for her by the deceased along Limuru Road in Kiambu County, and never set foot on the suit property. The Defendants averred that the Deceased is the one who paid for the suit property at HFCK and the Plaintiff had ceded any interest over the property when the deceased was still alive, and authorised HFCK to release the title thereto to the Deceased.
5. They further averred that the Deceased lived on the suit property with her daughter, the 1<sup>st</sup> Defendant, who continued after his demise, while the 2<sup>nd</sup> Defendant lives in Nyahururu and has never lived on the suit property. The Plaintiff thus could not have been evicted from the suit property having left in 2001, and that she has never asked the 1<sup>st</sup> Defendant to vacate as alleged. They alleged that the Plaintiff unequivocally and voluntarily gave up her interest and the doctrine of survivorship was not intended to apply. They added that the joint registration was due to love and affection at the time of marriage, which ceased when the Plaintiff sought to annul the marriage. The Property is therefore part of the Estate of the deceased and included in Succession Cause No. 747 of 2015, In the Estate of Peter Njenga Kimani. They averred that it should be demised as such, as doing otherwise would be stealing a march on the other beneficiaries, being the deceased's other widows and children.
6. In their counterclaim, the Defendants reiterated the contents of the Amended Defence and averred that the Plaintiff's actions lead to the inescapable conclusion that there was a mutual intention of the parties to sever the joint tenancy. The Defendants listed the particulars leading to this conclusion being the filing of the divorce, allowing the deceased to occupy the suit property and representing to HFCK that she did not wish to have any claim on the property even though her name was on the title. Their prayers against the plaintiffs are as follows:-
  - i. For the Plaintiff's suit to be dismissed with costs;



- ii. Or in the alternative, the suit herein be stayed pending the hearing and determination of Succession Cause No. 747 of 2015, In the Estate of Peter Njenga Kimani;
  - iii. Or in the alternative, for a declaration that the joint tenancy was severed by the mutual actions of the parties
  - iv. Costs of the suit be borne by the Plaintiff
7. In response, the Plaintiff filed a Reply to the Amended Defence and Counterclaim asserting that the Suit Property was her matrimonial home where she live with the Deceased until 2015, when she was forced out of the property by the Defendants. The Plaintiff avers that she has never ceded her proprietary rights to the Suit Property. The Plaintiff avers that the mortgage repayments to Housing Finance (HFCK) were made jointly by the Plaintiff and the Deceased, up and until 2006. The Plaintiff stated that the 1<sup>st</sup> Defendant has no right to occupy the Suit Property, and that the averments in the Amended Defence are an admission of trespass by the 1<sup>st</sup> Defendant. The Plaintiff averred that Divorce Cause No. 31 of 2001 was never prosecuted hence the marriage to the Deceased was subsisting at the time of his death. Further, that filing of a divorce case does not in any way extinguish a person's proprietary rights to any property and that the doctrine of survivorship applies, thus the Suit Property cannot form part of the Deceased.
8. In her Defence to the Counterclaim, the Plaintiff reiterated the averments and assertions made out in the Amended Plaintiff and the Reply to Defence hereinabove. She alleged that the Suit Property does not form part of the estate of the Deceased, therefore, the High Court Family Division would have no jurisdiction over the Suit Property and the instant suit can therefore not be stayed in favour of the succession cause. She asserted that filing a divorce did not extinguish a joint proprietors proprietary rights. She averred that she did not, at any time during the subsistence of her marriage to the Deceased, occupy any other matrimonial home other than the suit property, and she never during that time abandon the matrimonial home. The Plaintiff averred that she has never denied her proprietary rights to the suit property. The Plaintiff prays that the Counterclaim be dismissed with costs, and that judgment be entered in her favour as prayed in the Amended Plaintiff.

### **Hearing and Evidence**

9. Hearing of the suit commenced on 20<sup>th</sup> April, 2023 with the Plaintiff, Diana Muchiri, testifying as PW1. She testified that she is a retired Civil Servant living in Kiambu, Lari Sub-County. She adopted her undated witness statement signed by thumb-print as her evidence in chief, and the documents in her list of documents dated 23<sup>rd</sup> May, 2019 and further list of documents dated 2<sup>nd</sup> November, 2021.
10. In her statement, she stated that she is the registered proprietor of the suit property, registered as a joint tenant alongside the deceased. She testified that sometime in the year 2015, the Defendants forcefully evicted her from the suit property alleging it formed part of the deceased's estate. PW1 testified however, that the suit property did not form part of the deceased's estate as the doctrine of survivorship applies, thus on the death of her deceased husband, she was to be registered as the sole proprietor thereof. PW1 concluded that her claim was for the Defendants to deliver vacant possession of the suit property to the Plaintiff and for compensation for trespass, as the Defendants had derived a benefit from the property being rent from the DSQ.
11. On the same day, PW1 was cross-examined by Ms. Khayega for the Defendants. She testified that she stopped living with the deceased in 2001, and she moved out of the home and went to live with her parents. PW1 testified that she filed for divorce but it did not go through and her husband died on 22<sup>nd</sup> March, 2014, at which point they had been separated for 10 years, and she never visited her husband



- during this period. She testified that she was not aware the deceased purchased property for her in Kabuku, Kiambu. She continued that the suit property was charged to HFCK and she paid the loan but she had no evidence of such payments. PW1 testified that the title was released to her and the deceased in June, 2013 and she retained a copy of the title while the deceased kept the original.
12. PW1 continued in evidence that she had not ceded her interest in the suit property because he bought her land in Kabuku. She testified that she was not aware if succession proceedings had been taken in the estate of the Deceased and that she has two children with the deceased. She clarified that the 1<sup>st</sup> Defendant was the deceased's daughter while she knew the 2<sup>nd</sup> Defendant as the deceased's first wife, and that she knew she had dropped the name Maria but it is still in her ID. PW1 denied telling HFCK that she did not want anything to do with the land resulting in the title being given to the deceased.
  13. On re-examination, PW1 testified that the suit property is still registered in her name and that of the deceased, and further, that she had filed a divorce case but it had nothing to do with the suit property. The Plaintiff then closed her case.
  14. On the same date, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants case was heard and the 1<sup>st</sup> Defendant, Lydia Wariara Njenga, testified as DW1. She clarified that the 2<sup>nd</sup> Defendant was her mother and her name is Wanjira Peter Njenga, therefore she did not know Maria Wanjira Njenga. She then adopted her witness statement dated 20<sup>th</sup> July, 2022 as her evidence in chief, as well as produced the documents in the list of documents of the same date as DEX1.
  15. DW1 testified that her father had five wives and the Plaintiff was his 4<sup>th</sup> wife. She testified that she has lived on the suit property since 2002 and has never left. She stated that the deceased built a house for the Plaintiff which was ready by 2002 and the Plaintiff moved in then. She added that she was aware of the existence of Succession Cause No. 747 of 2015 and confirmed that the suit property herein had been listed as one of the Deceased's assets and his sons listed as beneficiaries. She testified that the deceased paid for the loan using funds from her mother's land. She informed the court that title was picked in 2013. DW1 testified that she cared for the deceased who was sick from 2008 to 2014, and during this period and became privy to information through interactions with him prior to his demise, which information was the basis of her statement.
  16. In addition, in her witness statement, DW1 stated that the Plaintiff and the deceased parted ways and the Plaintiff filed Divorce Cause No. 31 of 2001, Diana Wakonyo Muchiri vs Peter Njenga Kimani, through which she obtained orders to stop living with the deceased. The Plaintiff then left the suit property and never pursued the Divorce Case, thus she remains a wife and beneficiary of the deceased. DW1 acknowledged that the Plaintiff lived on the suit property before she left, however the deceased sold ancestral land and bought the Plaintiff land in Limuru, registered it in her name and constructed a house for her where she lives to date. She informed the court that she was aware that the purpose was so she could have a home together with her children and also for her to relinquish her claim to the suit property.
  17. It was DW1's testimony that the Plaintiff has no claim whatsoever on the suit property and has never set foot thereon after she left, thus it is not true that she was forcefully evicted. She stated that the deceased paid for the property with his own funds and only included the Plaintiff's name solely because she was his wife at the time, but she did not make any contributions to the purchase. DW1 emphasised that the Plaintiff informed HFCK that she had no interest in the suit property because the deceased had settled her elsewhere. That is why the suit property was listed as an asset in the succession cause and the Plaintiff's claim should be addressed therein to prevent her from stealing a march on the other beneficiaries. DW asserted that it would be in the interest of justice to stay this suit pending the outcome of the succession cause. In the alternative, she prayed that the suit herein be dismissed so the



Plaintiff's interest can be canvassed in the succession cause. That in any event, the Plaintiff had not proved her claim to the required standard.

18. On cross-examination by Mr. Gichingo for the Plaintiff, DW1 testified that her statement did not indicate that the monies were obtained from selling her mother's land. DW1 testified that she still lives in the house to date and had not sought the Plaintiff's permission after her father's demise because she did not seek her permission when entering, even though the title to the suit property was registered in joint names of the Plaintiff and the deceased. DW1 acknowledged that at page 23 of the Defendant's bundle, the last paragraph indicated that the deceased admitted that the Plaintiff had been servicing the mortgage. DW1 testified that she did not know who bought the house in Kabuku but knew that her father solely built the house. She admitted that the divorce was not finalised and as per the letter at page 15 of the Plaintiff's documents, the deceased still referred to the Plaintiff as his wife. She testified that the house is 3 bedrooms, but she did not know the current rental income in that area as she had never inquired.
19. DW1 was re-examined and she testified that since the marriage was not dissolved, the Plaintiff remains a beneficiary of the deceased's estate. That in the Affidavit at page 24 of the Defendant's Bundle deceased indicates that the Plaintiff did not pay the mortgage and that is the reason she was running away. DW1 stated that the Plaintiff was not there when she went to live on the suit property in 2001 and she did not thus evict her therefrom since she never came back. Further, that the Plaintiff never served her with a notice to vacate before filing this suit.
20. The 2<sup>nd</sup> Defendant was called to testify as DW2 and clarified that she has never been called Maria Wariara Njenga and that her name is Wanjira Peter Njenga as per the National ID produced as Exhibit 7. She testified orally that they used to visit the deceased in the house as his wives and she was introduced to the Plaintiff by the deceased. DW1 testified that the Plaintiff contributed KShs. 140,000/- when they were in good terms but later refused to pay and the deceased informed him that HFCK wanted to sell it. She testified that the Plaintiff was ill and hospitalised when they received the notice from HFCK. Consequently, DW2 agreed that the deceased sell part of her land in Nyahururu to offset the loan. She added that she visited the Kabuku Plot during construction and has never gone back again. DW2 confirmed also that the suit property was listed as part of the deceased's estate in the succession cause.
21. In addition to her oral testimony, DW2 also adopted her witness statement dated 20<sup>th</sup> July, 2022. In her statement, she testified that she resides in Nyahururu and has never lived on the suit property thus she told the court that she had no interest thereon it never having belonged to her. According to her, the suit property belonged to the deceased and it was only proper that it be inherited by his children. DW2 testified that her husband lived there until his demise, and their daughter the 1<sup>st</sup> Defendant joined him from 2001. DW2 denied evicting the Plaintiff from the suit premises.
22. DW2 testified that she knew of her husband selling ancestral land to settle the Plaintiff in Kiambu County and she never attended his burial despite being a wife, thus she ought not to have or make any claim on the suit property. DW2 stated that she was aware the Plaintiff refused to be included as a wife in the Petition for Grant of Letters of Administration. Even though DW2 admitted the jurisdiction of this court to handle the matter, she opined that issues of who inherits property are better handled in the family division.
23. On cross-examination by Mr. Gichingo, DW2 testified that even though the Plaintiff refers to Maria Wariara Njenga, she knew that she was the one being sued. DW2 testified that she had not produced the details of the land that was sold. That she was aware the suit property was registered in the joint names of the Plaintiff and the deceased. She reiterated that she was aware that the Plaintiff contributed KShs. 140,000/- towards purchase of the suit property.



24. On re-examination, DW2 testified that the KShs. 140,000/- was refunded in the KShs. 200,000/- used in constructing the Kabuku house. Thereafter, the Defendants closed their case and the court directed parties to file their written submissions.

### Submissions

25. The Plaintiff's submissions are dated 4<sup>th</sup> July, 2023. Therein, the Plaintiff's counsel submitted that the suit property, as indicated in the Certificate of Lease dated 27<sup>th</sup> May 2013 and the Certificate of Official Search, is undoubtedly registered in the names of the Plaintiff and the deceased as joint proprietors. The Parties without a doubt also presented that Peter Njenga Kimani is deceased. The Plaintiff submitted that in cases of joint tenancy, upon the death of one of the proprietors, the surviving proprietor automatically becomes the registered proprietor of the property upon presenting the evidence of death of the joint tenant, i.e death certificate, to the registrar. The principle of survivorship (*jus acresendi*) thus operates to exclude the property from the Law of Succession upon the death of one of the joint tenants. He relied on Section 60 of the [Land Registration Act 2012](#) which provides that:

“If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of death delete the name of the deceased tenant from the register by registering the death certificate.”

26. He also relied on *Isabel Chelangat vs Samuel Tiro*(2012) eKLR, quoted in *Cyrus Muchira Ndambiri vs Faith Wanjiru Ndambiri* (2020) eKLR, *Mwangi Gakuri vs Bernard Kigotho Maina & Another*, H. C NBI. Succ. Cause No. 2335/2011, quoted in *re Estate of M'kiunga M'rinyiru (Deceased)* [2021]eKLR and *re Estate of M'kiunga M'rinyiru (Deceased)* (2021) eKLR. Counsel concluded that under the principle of survivorship, the Suit Property belongs to the Plaintiff, and does not form part of the estate of Peter Njenga Kimani (Deceased).
27. Counsel submitted that pursuant to Section 91(7) of the [Land Registration Act 2012](#) and The Land Registration (General regulations) 2017 at Regulation 53(1), the only way by which a joint tenant can sever his/her rights is by making an application for severance, which application shall be registered as provided in law. The Plaintiff faulted the Defendants for stating that the Plaintiff ceded her rights in the joint ownership of the suit property voluntarily by moving out of the said suit property, or that she further lost her rights by the fact that she instituted a Divorce Cause. The Plaintiff submitted that she did not at any point sever or cede her interest in the said suit property in the manner provided by law (*Cyrus Muchira Ndambiri v Faith Wanjiru Ndambiri* [2020] eKLR).
28. With regards to damages for trespass, it was submitted that the 1<sup>st</sup> Defendant admitted that she has been and is still in occupation of the Suit Property without the Plaintiff's permission, hence the 1<sup>st</sup> Defendant is a trespasser. Counsel submitted that the Plaintiff is therefore entitled to general damages for trespass. Counsel submitted that as the surviving joint proprietor, by operation of the law, the Plaintiff has established that the Suit Property does belong to her, and she is therefore entitled to being declared and registered as the owner thereof, to the exclusion of the estate of Peter Njenga Kimani (Deceased). That the Plaintiff is therefore clearly entitled to the prayers as sought in the Amended Plaintiff.
29. The Defendants' submissions on the other hand are dated 16<sup>th</sup> August, 2023. The Defendants' Counsel submitted that the intention was that upon separation of the Plaintiff and the Deceased, the joint tenancy was severed. See *Mukazitoni Josephine vs Attorney General Republic of Kenya* (2015) eKLR, flowing from which the Defendant submitted that the unity of possession was broken when the Plaintiff left the matrimonial home in 2001. He submitted that the Plaintiff's refusal to take



possession of the title is evidence that she had ceded her interest in the suit property to the deceased in consideration of the house he constructed for her. Further, the Plaintiff's refusal to be part of the succession was a recognition that she was no longer a widow/beneficiary of the deceased having divorced him, and she raised no objection to have the property removed from the list of the Deceased's assets (HCCA No. 131/1996, David Njoroge Kimani & Another vs James Mukuha Njau).

30. Counsel submitted that the Plaintiff had not lived on the suit property for 22 years and she was dishonest in claiming to have been forcefully evicted thus the court should not believe her. That the 2<sup>nd</sup> Defendant is not the person sued as the name in the suit is not hers and she does not live in Nairobi (Apex International limited & Anglo Leasing and Finance International Finance Ltd vs Kenya Anti-Corruption Commission (2012) eKLR). Therefore, the court has no jurisdiction to issue orders against the 2<sup>nd</sup> Defendant. Further, on damages, Counsel submitted that the Plaintiff produced no evidence to show that she was evicted in the year 2015, and instead she left of her own volition in 2001 and the 1<sup>st</sup> Defendant has been and is still living there (Civil Appeal No. 208 of 2018, Christine Nyanchama Oanda vs The Catholic Diocese of Homa Bay Registered Trustees). The Defendants submitted that the Plaintiff did not prove that the 1<sup>st</sup> Defendant's entry was unlawful, hence the claim for trespass is untenable and ought to be dismissed.
31. Counsel for the Defendants argued that stay of proceedings is a serious plea that a court does not easily allow as it interferes with access to justice and the right to have a dispute adjudicated timeously. Relying on Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 37 pages 330 and 332, counsel submitted that the Plaintiff's rights to expedited justice should be weighed against the rights of the of rest of the deceased's family. It was submitted that giving the Plaintiff the suit property would disinherit the other heirs of the deceased yet the Deceased settled the Plaintiff at the Kabuku home where she still lives and thus she would steal a march on the others. Counsel urged for either the dismissal of the suit or the stay of the suit pending the outcome of the succession cause.

### **Analysis and Determination**

32. Having considered the pleadings filed herein and responses thereto, the various testimonies of the parties, submissions filed and the authorities relied on, the following issues arise for determination by the court:
  - a. Whether the matter should be stayed pending the hearing of the succession cause
  - b. Whether the joint tenancy between the Plaintiff and the deceased Peter Njenga Kimani was severed
  - c. Whether the Plaintiff is entitled to an order evicting the Defendants from the suit property
  - d. Whether the Plaintiff is entitled to damages for trespass
  - e. Who shall bear the costs of the suit?
33. The parties are in agreement that the suit property is registered in the names of the Plaintiff and her deceased husband, Peter Njenga Kimani, as joint tenants. It is also not disputed that the Plaintiff and the deceased have lived apart since 2001. The 1<sup>st</sup> Defendant having moved to the suit property before her father's demise, now claims that the suit property forms a part of his estate and has in fact been included in the list of his assets in the succession cause. While the Plaintiff seeks a declaration that the suit property now solely belongs to her, the Defendants are of the opinion that the suit herein ought to be stayed pending the outcome of the Succession case as the property forms part of the estate of the deceased.



**a. Whether the matter should be stayed pending the hearing of the succession cause**

34. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the stay. In the case of *Kenya Wildlife Service vs James Mutembei* (2019) eKLR, though dealing with stay of proceedings pending appeal, Gikonyo J held that:

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.

35. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. The court should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended case as well as the scarcity and proper use of judicial time and whether the application has been brought expeditiously. In the *Kenya Wildlife Case* (Supra), Gikonyo J quoted Halsbury’s Law of England, 4<sup>th</sup> Edition. Vol. 37 page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

36. It is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case. As stated by the Court of Appeal in the case of *David Morton Silverstein v Atsango Chesoni* [2002] eKLR: -

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.

37. The running theme in this suit is that the deceased sold part of the 2<sup>nd</sup> Defendant’s land in Nyahururu to settle the mortgage. As correctly submitted by the Plaintiff, no evidence or details were produced in support of this allegation. Another allegation is that the deceased bought and build a home for the Plaintiff. This averment while significant in the family division of the high court, does not signify here. Section 13 of the *Environment and Land Court Act* states that this court has original and appellate jurisdiction to hear and determine the disputes set out at Article 162(2) (b) of *the Constitution* of Kenya 2010 and the provisions of this Act or any other law applicable in Kenya relating to environment and Land.



38. From the said provisions, this court deals with among other matters, those relating to ownership and use of land. Since the suit herein deals with the matter of ownership of the suit property, then it is properly before this court. The Defendant's belief that this suit ought to be stayed to await the outcome of the succession cause, is unfounded and misguided. This is because, as long as the suit property remains subject of an unresolved dispute before the Environment and Land Court, it cannot form part of the estate of the deceased that might be available for distribution.
39. The Succession Court on the other hand does not deal with issues of land ownership. To this end, it does not have jurisdiction to deal with the suit herein which is concerned with ownership of the suit property. It goes without saying that, should this court determine that the suit property is not part of the deceased's estate, then the same will have to be expunged from the list of assets. However, as explained, it is this court that can determine the question of ownership, and should it find that the joint tenancy had been severed, then the high court family division would have jurisdiction to deal with the suit property as part of the assets of the deceased. If anything, it is the succession cause that ought to be stayed pending the outcome of this suit.
40. The Defendants submitted that the Plaintiff had not objected to the inclusion of the suit property from the list of the Deceased's estate. However, this court disagrees, and is in fact of the opinion that filing of this suit is itself objection enough, since if the Plaintiff is held to be the sole owner, the property will automatically be expunged from the assets of the Deceased. Consequently, the prayer for stay of proceedings fails.

**b. Whether the joint tenancy between the Plaintiff and the deceased Peter Njenga Kimani was severed**

41. The suit property was registered under the now repealed Registered [Land Act](#), Chapter 300, Laws of Kenya (RLA), in the names of the Plaintiff and the deceased as joint tenants as provided for under Sections 101, 102 and 103 of thereof. The [Land Registration Act](#), 2012 has similar provisions in Section 91, which states as follows in subsection (1), (2), (3) and (4):

- “(1) In this Act, co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.
- (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.
- (3) 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 tenants or tenants in common; and
  - (b) the share of each tenant, if they are tenants in common.
- (4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently-
  - (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; 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.”

42. Under a joint tenancy, once a joint tenant dies, the remaining tenant or tenants are entitled to the deceased tenants interest in equal share in what is referred to as the Doctrine of Survivorship (jus accrescendi). The concept of joint tenancy explained 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* 6<sup>th</sup> Edition and Cheshire & Burn’s, *Modern Law of Real Property*, 16<sup>th</sup> 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

- (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.”

43. According to the Certificate of Lease and the Certificate of Official Search dated 5<sup>th</sup> October 2021, the suit property was registered in the names of the Plaintiff and the deceased as joint tenants on 26<sup>th</sup> February, 1991 hence there is unity of title. Since the deceased and the Plaintiff both had a right to possess the property, the Plaintiff could not bring an action for trespass against the deceased. Unity of possession means that possession by the deceased during the period the Plaintiff was not on the property did not sever the Plaintiff's rights over the property. In other words, possession by the deceased was tantamount to possession by the Plaintiff. There is unity of interest since before her late husband's demise, both the deceased and the Plaintiff held the same interest in the suit property as one estate. Further, the interests of the deceased and the Plaintiff arose at the same time out of the registration of the suit property in the names of the deceased and the Plaintiff, hence the unity of time.
44. The doctrine of survivorship is set out under Section 91 (4)(b) of the [Land Registration Act](#) which provides that on the death of a joint tenant, the deceased tenant's interest shall vest in the surviving tenant or tenants jointly. Consequently, upon the death of the deceased, the Plaintiff became the sole owner of the suit property. However, the Defendants allege that the rights of the Plaintiff ceded and she has no proprietary interest over the suit property. The 1<sup>st</sup> Defendant also alleged that the Plaintiff's name was only included in the Title because she was the Deceased's wife who lived with him at the time of the purchase and registration of the suit property. It is the Defendant's case that by leaving the matrimonial home and filing the divorce cause, the Plaintiff's interest in the suit property ceased.
45. However, the Plaintiff has at page 16 of her bundle of documents produced a letter of allotment from the Kenya Building Society Limited dated 21<sup>st</sup> September, 1990. This letter is addressed to her and the deceased and allocated to them House No. 305 on Block 111 Plot No. 1799 (Nairobi/Block 111/1799 - the suit property herein). It is from this letter of allocation that the Certificate of Lease emanated. In addition, it emerged during the hearing that the Plaintiff also contributed to the purchase of the suit property by paying part of the mortgage (See the deceased's Replying Affidavit sworn on 4<sup>th</sup> May, 2001 in CMC Divorce Cause No. 31 of 2001), and the Defendants in their testimonies acknowledged the Plaintiff's financial contribution. This court can safely presume that these formed part of the reason the Plaintiff was registered as a joint owner thereto, and not solely because she was the wife of the deceased.
46. As to the allegation that the Plaintiff informed HFCK that she was not interested in the suit property, no evidence has been produced in support of this allegation. The court also saw the Defendants allegation that the Plaintiff and the deceased went to HFCK to take the title is not believable. In fact, according to the letter dated 7<sup>th</sup> August, 2006 there were two mortgage accounts one held by Peter Njenga Kimani and Diana Muchiri and another held by Mrs. Wanjira Peter Njenga. That letter authorised the Deceased's Advocate Mr. Stanley Kinuthia Wandaka to collect two title deeds relating to the two mortgages. By letter dated 8<sup>th</sup> August, 2006 the said advocate wrote to HFCK asking for the discharged titles. There is thus no evidence presented by the Defendants that the Plaintiff expressed intention of extinguishing her interest in the suit property.
47. As to the allegation that the Plaintiff refused to service the mortgage, DW2 confirmed that the Plaintiff was hospitalised when notice came from HFCK about selling the property due to default. It is clear



that the Plaintiff did not just refuse to pay, however she was unwell. Further, the procedure for severing a joint tenancy is given at Section 91(7) of the *Land Registration Act* 2012 which provides that:

“Joint tenants, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the jointing ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenants in common.”

48. In addition, The Land Registration (General regulations) 2017 at Regulation 53(1) provides that:

“An application for severance under Section 91(7) of the *Land Registration Act* 2012 shall be in Form LRA 37 as set out in the sixth schedule an application which shall be supported by inter alia the original title documents, where applicable a land rent clearance certificate, a land rates clearance certificate and any other documents as may be required under the regulations or any other written law.”

49. In *Isabel Chelangat v Samuel Tiro Rotich & 5 others* (supra) the court was clear that “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”.

50. Had the Deceased wished to sever the joint tenancy should have pursued legal procedure for doing so, but he did not despite having lived on the suit property with the 1<sup>st</sup> Defendant. If anything, he had dealings with the land after the Plaintiff left the matrimonial home and filed the divorce cause and he included the Plaintiff in his communications relating to the land be it with his advocate or HFCK. In the Agreements between the Plaintiff, the deceased and HFCK made after 2001 when the Plaintiff is supposed to have left the suit property, the said bank still dealt with both the two owners of the property. At page 15 of the Plaintiff’s bundle is a letter by the Deceased dated 27<sup>th</sup> June, 2013 and received by the bank on the same date, the deceased also referred to the Plaintiff as his wife and was asking for an update on the mortgage account relating to the suit property.

51. There is no evidence or indication that the Plaintiff and the deceased at any point intended to sever the joint tenancy. The refusal to be included in the succession cause as a widow of the deceased and her failure to attend the deceased’s funeral also do not mean that she had ceded her interest over the suit property. Filing of the divorce cause and leaving the suit property also do not equate to severance of the joint tenancy. The Defendants in their submissions relied on HCCA No. 131/1996, *David Njoroge Kimani & Another vs James Mukuha Njau* (2003) eKLR. This court agrees with the decision of Justice Kuloba in that case where he held that:-

“Normally, during the continuance of a joint ownership a co-owner holds nothing separately from his fellows; but there is a general rule which may be expressed as *alienatio rei praefertur juri accrescendi*, which, in English, means that alienation of property is favoured by the law rather than accumulation. It is a general rule of commonly used in connection with the right of survivorship between joint tenants, which right is defeated by a disposition of his share by one of the joint tenants during the life of the other. Since according to this doctrine the law favours the alienation rather than the accumulation of property, one joint tenant can alienate his share to a stranger.

The effect of such an alienation, whether by way of sale or mortgage or assignment or howsoever, is to convert the joint tenancy into a tenancy in common, because the alienee and the remaining tenant or tenants hold by virtue of different titles and not under the one common title which is essential to the existence of a joint tenancy or ownership: see Buckley, LJ, in *Cedar Holdings Ltd v Green and another*, [1981] Ch 129, at p 138. Clearly, a severance



of a joint tenancy or ownership occurs upon assignment, settlement, charge or sale, of one's interest, and also upon a measure taken to prevent unjust enrichment.

Similarly, a determination of a tenancy in common may be by (a) partition, (b) sale, or (c) acquisition by one tenant or co-owner of shares vested in his co-tenants or co-owners.

In both cases of co-ownership, if one of the co-owners disposes of his interest in the property so owned or held, the sale, conveyance, mortgage, assignment, or other disposal is only to the extent of his fractional interest, and it is limited to the extent of the share of the co-owner who is divesting himself of his interest in the property.

As between co-owners as such, there is no fiduciary relationship: hence, one co-owner can dispose of his interest, and he is not liable to account to his co-owners, provided that he does nothing prejudicial to the other co-owner's interest or provided that he is not in breach of legitimate covenants.

In normal circumstances, a purchaser, or assignee, or such other person to whom the co-owner sells or assigns or otherwise transfers his share in the property, is not concerned to see or inquire whether the other co-owner or co-owners, has or have given their prior consent to the transaction: he is concerned only with consents which are, by law, made requisite to the transaction. Such a purchaser will be prejudiced only where he has been in collusion with the selling co-owner in committing a fraud, illegality, or other wrong which the law will not countenance.”

52. Going by the facts in the instant suit, there was no severance or alienation of the Deceased's or the Plaintiff's share as envisioned by the court in *David Njoroge Kimani & Another v James Mukuha Njau* (supra). In that case, the retired Justice Kuloba mentions that alienation may be by way of sale, mortgage or assignment or any such similar manner.
53. The Court of Appeal in the case *Mukazitoni Josephine v Attorney General of Kenya* [2015]Eklr discussed on the severance of joint ownership. They held inter alia;
  - “ 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.
  36. ....The law on joint tenancy is clear that a co-owner cannot exclude the other. The appellant's interest being concurrent, indivisible and unseverable from Mr. Kabuga's, the jurisdiction of the High Court extends to the entire subject property. The trial court has not determined through an inter parties hearing if there are facts that would break any of the unities of title, time, possession and interest that would allow the court to sever and divide the joint property”
54. From the case law cited, grounds for severance does not include divorce or not living on the suit property. In essence parting with physical possession, is not one of the ways through which an interest may be alienated or a joint tenancy severed. It is clear that the joint tenancy of the property in dispute was not severed and as consequence the Plaintiff is, pursuant to the death of said Peter Njenga Kimani, the sole proprietor of the suit property through the doctrine of survivorship. This entitles the Plaintiff to be declared as the sole owner of the suit property known as Nairobi /Block 111/1799 together with the improvements thereon.



## Whether the Plaintiff is entitled to an order evicting the Defendants from the suit property

55. In the instant suit, the Defendants do not hold title to the suit property as the same is in the Plaintiff's name. This court has already found that upon the demise of the joint tenant, the Plaintiff is now entitled to the entire suit property as the sole proprietor. As the current registered proprietor of the suit land, Section 24(a) of the *Land Registration Act* stipulates, such registration vests in the Plaintiff the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. In addition, Section 26(1) of the *Land Registration Act* provides as follows:
- “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.”
56. The Plaintiff prays for an order directing the Defendants to give vacant possession of the suit property and in default, she prays for an order of eviction of the Defendants from the suit property. The 1<sup>st</sup> Defendant admitted that she is still living on the suit property. From the legal provisions cited above, since the Plaintiff is the absolute proprietor of the suit property, she is entitled to all rights and privileges belonging or appurtenant thereto and hence entitled to protection of the law as envisaged in Sections 24, 25 and 26 of the *Land Registration Act*.
57. Due to the foregoing, this court finds that a case has been made out for issuance of the order for vacant possession of the suit property by the Defendant. The 1<sup>st</sup> Defendant, or anyone claiming through her or the 2<sup>nd</sup> Defendant, shall vacate and yield vacant possession of the suit property to the Plaintiff within 60 days from the date hereof. In default, a warrant of eviction shall issue for the forceful eviction of the Defendants from the suit property under the supervision of the Officer Commanding Kayole Police Station.
58. From the foregoing, it is clear that the Plaintiff is the absolute, rightful and indefeasible owner of the suit property herein. The 1<sup>st</sup> Defendant admitted to being on the suit property without the permission of the Plaintiff, however it would appear she went into the suit property during the lifetime of her late father who was the co-owner thereof. As explained above, the unity of possession is to the effect that a party cannot bring a claim for trespass against a co-owner. Since the 1<sup>st</sup> Defendant went into the property on invitation by the deceased, at that point there was no trespass.
59. The 1<sup>st</sup> Defendant's occupation of the suit property became problematic upon the demise of Peter Njenga Kimani. Since no evidence has been produced to show that the 1<sup>st</sup> Defendant sought the Plaintiff's consent or permission to continue occupying the suit property, her continued use and occupation thereof denied the Plaintiff use, occupation, possession and enjoyment of suit property



and does amount to trespass. The Plaintiff thus seeks damages for the said trespass. In *Park Towers Ltd v John Mithamo Njika & 7 Others* [2014] eKLR, the Court held that: -

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.”

60. On the measure of general damages for trespass, in *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR it was held as follows:

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less See *Hostler v Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).”

61. From the evidence on record, the Plaintiff has proved trespass but there is nothing in her evidence that can be used to enable this court determine the actual measure of the damage or loss. She has not adduced any evidence as to the state or the value of her property before and after the trespass. This makes it difficult to assess the general damages. Even though the Plaintiff claimed that the Defendants have been deriving a commercial benefit from the rent charged on the DSQ, this court has seen no evidence that the DSQ has in the past or is presently occupied by a tenant.

62. Where the formula set out in the *Phillip Ayaya Case* (Supra) cannot be applied as is the case herein, Courts have held that the guiding factors are the particular circumstances of each case. In *Halsbury Laws of England* 4<sup>th</sup> Edition, Vol 45 at para 26, 1503, it is provided as follows: -

- “(a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
- (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- (c) Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use...”

63. In the case of *Duncan Nderitu Ndegwa v KP&LC Limited & Another* [2013] eKLR where P. Nyamweya J. held that: -

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of KShs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants trespass.”

64. The court has acknowledged the fact that the 1<sup>st</sup> Defendant entered into the property by permission of her late father who was a co-owner. However, this court must also take into account that the 1<sup>st</sup> Defendant has, by her own admission, indeed been in occupation of the suit property to the disadvantage of the Plaintiff herein, who is the registered owner. In the circumstances, this court is of the view that an award of KShs. 100,000/- as general damages is sufficient. Since it is the 1<sup>st</sup> Defendant



who resides on the suit property, a fact that she herself has admitted, she shall be the one to pay the damages awarded herein.

### **Who shall bear the costs of the suit?**

65. Section 27 of the *Civil Procedure Act* provides that costs generally follow the event. The issue of costs is the discretion of the court as provided under the above section. The principle that costs follow the event is not intended to penalize the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending the case (see *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & others* [2014]eKLR).
66. The only relevant issue is whether or not the Plaintiff is entitled to costs of the suit in light of lawful steps taken in pursuit of the remedies herein. Since the Plaintiff was inconvenienced and forced to take steps to protect her interests, and being that she has been successful in that regard, I find that she is entitled to costs of the suit.
67. Consequently, I enter judgment in favour of the Plaintiff as against the Defendants jointly and several in the following terms: -
- a. A declaration be and is hereby issued that all that property known as Nairobi /Block 111/1799 together with the improvements thereon belongs to the Plaintiff.
  - b. An order be and is hereby issued directing the Defendants to yield vacant possession of the suit property to the Plaintiff within 90 days from the date of this judgement.
  - c. In default of (b) above, a warrant of eviction shall automatically issue for the forceful eviction of the Defendants from the suit property under the supervision of the Officer Commanding Kayole Police Station.
  - d. A permanent injunction be and is hereby issued restraining the Defendants, by themselves, their assigns, agents, servants, employees or anyone claiming under them, howsoever from entering, re-entering and/or remaining upon the suit property and which order takes effect after the lapse of the 90 days given for the voluntary surrender of vacant possession.
  - e. Damages awarded for trespass in the sum of KShs. 100,000/-.

SUBPARA f.

The cost of this suit is awarded to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF FEBRUARY, 2024**

**A. OMOLLO**

**JUDGE**

