



**Kikuvi v Musilu (Environment & Land Case E006 of 2021)
[2024] KEELC 5278 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5278 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E006 OF 2021**

**A NYUKURI, J
JULY 10, 2024**

BETWEEN

JUSTUS KIOKO KIKUVI PLAINTIFF

AND

FAITH VATA MUSILU DEFENDANT

JUDGMENT

1. When the light within our property laws is reflected and refracted against romance, the result is not a beautiful rainbow, but the drab of indifference. Like a tornado's path, romance is unpredictable; now you see it, now you don't. For that reason, lovers operating outside the precincts of wedlock and who wish to jointly acquire and own property, must be alive to the legal realities beacons along the path beaten by our property laws, if they hope to safely navigate the journey of property ownership.
2. The parties in this suit are erstwhile lovers. In 2015, they were in a romantic love relationship hoping that it would evolve into a marriage. It is on that hope and basis that on 9th July 2015, they jointly purchased and thereafter became joint registered proprietors of the parcel of land known as LR No 12715/3772 (IR. 156593) (hereinafter referred to as the suit property). Subsequently, they jointly put up a four-bedroom house on the suit property which they moved in together in a cohabitation arrangement. Their love culminated in the birth of their son B.K. on 19th September 2015.
3. It is apparent that their love could not withstand the headwinds it encountered and soon the smoldering rubble of their relationship turned cold. The dying ember of their love lost both its heat and flicker, rendering their cohabitation untenable. Now, the plaintiff is no longer staying on the suit property, which is solely occupied by the defendant together with their son, B.K who is still a minor of tender age.
4. This state of affairs resulted in the institution of this suit by Justus Kioko Kikuvi who filed a plaint dated 27th January 2021, against Faith Musilu seeking the following orders;



- a. That the joint ownership between the plaintiff and the defendant over that property known as Land Reference No 12715/3772 (IR. No 156593) be dissolved.
 - b. That upon dissolution of the said joint ownership, accounts with respect to the purchase of the suit property be taken and orders as to the disposal and sharing of the property and or its proceeds be made.
 - c. A declaration that the both the plaintiff and the defendant are entitled to equal shares on Land Reference No 12715/3772 (IR. 156593) together with all the developments that are presently being thereon.
 - d. In the alternative and without prejudice to prayer (2) and (3) above, the plaintiff prays that a declaration be made that the defendant pays the plaintiff an equivalent of half the prevalent market value of Land Reference No 12715/3772 (IR. 156593) together with all the development thereon being his half share the property.
 - e. That such other or further orders, reliefs and directions be made as to the giving effect to dissolution of the joint ownership of the suit property between the plaintiff and the defendant.
 - f. Costs of this suit together with interest thereon be paid by the defendant.
5. The plaintiff averred that the defendant had refused to allow him equal enjoyment of the suit property and that as the parties cannot jointly enjoy the suit property, the plaintiff had in vain sought to convince the defendant to have the same disposed so that the parties could share the proceeds thereof.
 6. In defence, the defendant filed a statement of defence dated 10th March 2021. She confirmed that indeed the parties herein jointly purchased, and subsequently developed the suit property. She however stated that their son B.K. is entitled to shelter on the suit property as both parents are bound by the provisions of Article 53 (1) (c) of the Constitution and that the orders sought by the plaintiff go against the rights and interests of B.K and would amount to breach of parental responsibility on the part of the plaintiff as B.K. had no alternative shelter having lived on the suit property since he was 8 months to date.
 7. The defendant stated that it is the plaintiff who left the suit property although he still has his set of keys to the house and that therefore she is not responsible for the plaintiff's choice of abandoning his right to occupy and enjoy the suit property. Further, that the plaintiff should not use his abandonment as justification to avoid the responsibility to provide shelter to B.K. She sought for the dismissal of the plaintiff's case with costs.
 8. In view of the above background and the parties' relationship, the court granted the parties opportunity to settle the matter out of court, but they failed to agree and therefore this matter proceeded to hearing by way of viva voce evidence. Both parties testified in support of their respective cases.

Plaintiff's evidence

9. PW1 was Justus K K, the plaintiff in this matter. He adopted the contents of his witness statement dated 27th January 2021 as his testimony in chief. It was his evidence that he was the registered proprietor of the suit property, jointly with the defendant. That the parties spent Kshs. 9,001,358/- on the construction of their four bedroom house which was completed on 31st January 20116, upon which the defendant moved in.



10. He stated that his intention was that both parties were to jointly enjoy the suit property, but that he had been excluded from enjoying it. He further stated that at the time of purchase and construction of the suit property, the parties were in a boyfriend – girlfriend relationship hoping that it would culminate in a marriage, which did not happen. He stated that he wholly financed the purchase and construction of the suit property although the intention of the parties was to jointly own the same. According to him, the defendant had refused to allow him equal enjoyment of the suit property. Further that since he has tried in vain to convince the defendant to dispose the suit property and share proceeds thereof, his right to own the property was curtailed illegally.
11. It was his evidence that they had a parental responsibility agreement with the defendant over their son B.K. which they signed before the Child Protection Officer. That they agreed how to take care of the child so that whoever has the custody of the child would provide shelter. Further that the agreement was that the defendant would take care of food and clothing while the defendant would take care of education and medical needs. He averred that shelter was not included in the agreement because whoever has custody would provide shelter. He alleged that whenever he is with the child, he stays with him and provides food and clothing. He informed court that B.K is not the only child he has, as he has five other children.
12. He produced documents attached to his list of documents dated 27th January 2021, namely, a sale agreement; construction agreement; certificate of title and demand letter.
13. On cross examination, he stated that although they had been lovers with the defendant, they are now separated but she is the mother of his son. He stated that although they had planned to settle, they did take any step to solemnize the relationship. He confirmed to have visited the defendant’s home with his relatives for purposes of introducing their relationship. He alleged that he works in South Sudan and between July 2015 and April 2016, he was in South Sudan, but that he remotely supervised the construction on the suit property. He confirmed that the parties moved into the house together and that he still has keys to the house which he can access. He confirmed having lived in the house on the suit property for some time and stated that he now has a family and cannot leave his family to go live with his former girlfriend who is the defendant. He stated that the issue of the child can be determined by the Children’s Court. In re-examination, he stated that when the parties put up the house, they intended to jointly benefit from it. That marked the close of the plaintiff’s case.

Defendant’s case

14. DW1 was Faith Vata Musilu, the defendant in this matter. She adopted the contents of her witness statement dated 10th March 2021 as her testimony in chief. Her evidence was that in 2015, she jointly with the plaintiff purchased the suit property which they subsequently developed. That they cohabitated together leading to the birth of their child B.K on 19th September 2015. She stated that they had previously lived together in a rented house in Buruburu Estate in Nairobi.
15. She further testified that in 2017, without notice or information, or giving any reasons, the plaintiff moved out of the suit property while she was away. She averred that she has been living on the suit property with her son since he was 8 months to date. Further, that the parties do not own any other property jointly on which their child B.K can stay. She maintained that she was still single but does not know the marital status of the plaintiff although she knew he had two other children but does not know where the two children live.
16. She maintained that both herself and the plaintiff have parental responsibility to their son B.K. to provide him with a home and therefore she did not wish to sell her share of the suit property. She stated that it is not possible to sell a half of one single house and insisted that she has never stopped



the plaintiff from occupying the house as he has his set of keys to the house. According to her, none of the parties should be allowed to rent out, or dispose their rights in the suit property as it was the only shelter and home for their son B.K. It was also her testimony that they had a parental responsibility with the defendant which provided for the child's education, medical, clothing and shelter. That the question of shelter was not stated because the child would be staying on the suit property.

17. She produced documents attached to the list of documents dated 10th March 2021 and supplementary list dated 10th February 2023. She produced the birth certificate of B.K. and the parental responsibility as her exhibits.
18. On cross examination, she conceded that there was nothing stated in the parental responsibility agreement regarding the shelter of B.K. She further stated that she was in the process of being engaged to the plaintiff as he brought his relatives to her home. She confirmed that when the suit property was purchased, B.K had not been born and that she was not customarily or statutorily married to the plaintiff. She stated further that she did not wish to sell her share of the suit property and that the reason she opposed the plaintiff's prayer to dispose the same is because of their parental responsibility to B.K. She insisted that B.K has a right to shelter over the suit property. That marked the close of the defence case.
19. Parties filed written submissions in support of their respective cases. On record are submissions filed by the plaintiff on 18th Mary 2023 and those of the defendant filed on 18th July 2023.

Plaintiff's submissions

20. According to counsel for the plaintiff, the suit raised the following three issues;
 - a. Whether the joint ownership between the plaintiff and defendant should be severed.
 - b. Whether the plaintiff proved his case on the required standard.
 - c. Who bears the cost of the suit?
21. On the first issue, counsel submitted that Section 91 (1) and (6) of the *Land Registration Act* No 3 of 2012 provides that although dealing in the undivided share by one tenant in joint tenancy ought to be by consent, consent ought not be unreasonably withheld. It was contended for the plaintiff that despite the plaintiff trying to reason with the defendant to dispose the suit property and share the proceeds equally, the defendant was unable to justify her demand for the plaintiff to forfeit his 50% share and bequeath it to B.K.
22. Counsel argued that it was not the intention of the parties to hold in trust the suit property for B.K. and that the parties herein were never married. It was further submitted for the plaintiff that the defendant was unreasonably exploiting her share of the tenancy as she had not given rational grounds why the joint ownership should not be severed. Counsel maintained that introduction of the child B.K. in the plaintiff's claim is an attempt to divert the real issues which goes against the rights of a proprietor in Section 25 of the *Land Registration Act*, since the suit property was not registered to be held in trust for the minor.
23. It was contended for the plaintiff that although the parties purchased the suit property while in a love relationship, the same did not culminate in a marriage and that the defendant cannot exclusively enjoy the property to the detriment of the plaintiff as that would violate Article 40 of the *Constitution* of Kenya 2010.



24. Reliance was placed on Section 96 (1) of the *Land Registration Act* and the cases of *Nizar Hasham Viaran v Shamsudin G. Nanji* and *JNM v ENM* [2019] eKLR for the proposition that where property is jointly owned, each tenant has an equal share therein.
25. On whether the plaintiff had proved his case on the required standard, counsel relied on Sections 107, 108 and 109 of the *Evidence Act* and argued that the plaintiff had discharged the burden of proof as demonstrated by the sale agreement, certificate of title and demand letter which proved joint ownership. It was maintained for the plaintiff that the defence was an abuse of the court process, frivolous and vexatious as the same does not challenge the plaintiff's proprietary interest in the suit property. Counsel argued that the defendant's claim based on breach of parental responsibility was raised in the wrong forum as Section 73 (a) of the *Children Act* provides that such matters ought to be raised in the Children's Court hence this court lacks jurisdiction in respect of that issue. To buttress this position, counsel relied on the case of *NLS v BRP* [2016] eKLR.
26. Counsel cited the provisions of Article 162 (2) (b) of the *Constitution* of Kenya 2010 and Section 13 of the *Environment and Land Court Act* to argue that the jurisdiction of this court is on matters of environment and the use and occupation of, and title to land and that this court has jurisdiction to determine a dispute on joint ownership of land and has no jurisdiction to determine the dispute on child rights including B.K's right to shelter and housing.
27. On the question of costs, counsel argued that costs follow the event and urged the court to condemn the defendant to pay costs of the suit on the basis that that the defendant has failed to prove reasonable grounds for non-severance of joint ownership.

Defendant's submissions

28. Counsel for the defendant listed three issues for determination as follows;
 - a. Whether the joint ownership of LR No 12715/3772 (IR No 156593) should be dissolved.
 - b. Whether the dissolution of joint ownership will breach the minor son's right to shelter.
 - c. Whether the dissolution of joint ownership is in the best interest of the child.
29. It was submitted for the defendant in regard to the first issue that although the suit property is not expressly held in trust for B.K., the parties' intention in acquiring the same was to bring up their family in that home and that the mere fact that the plaintiff had changed his mind should not affect the parties original intention or the right of their son to continue living on the suit property.
30. On the question of this court's jurisdiction to determine the rights of B.K regarding the suit property, counsel submitted that the child's right to shelter is a Constitutional and basic right directly related to the issue of property as shelter will only be found in property of whichever form. Further, that this court is the only court that ought to determine property rights and therefore the Children's Court has no jurisdiction to determine a matter where one parent infringes on the right to shelter through constructive eviction.
31. Reliance was placed on the case of *SA v MA & others* [12659/2009] [2012] ZAWCHC401 for the proposition that children have a right to shelter and a parent should not evict his children without providing alternative accommodation. Counsel also argued that in making their decisions regarding proprietary interests, parties ought not be blind to the best interests of the child and their right to shelter.



32. On whether dissolution of joint ownership will breach B.K's right to shelter, counsel submitted that in determining the parties rights herein, this court should not disregard the minor's interests as that would violate the rights of the child under Article 53 of the Constitution of Kenya 2010. Counsel referred to Section 31 of the Children Act and Bromley's Family Law, 8th Edition and argued that parental responsibility rests on both parents equally. It was maintained for the defendant that both parents in this matter had provided B.K. with a house, but that if the joint ownership is dissolved, the minor's right will be infringed upon.
33. It was further contended for the plaintiff that the dissolution of joint ownership will not be in the best interests of the child B.K. Counsel cited Article 53 of the Constitution of Kenya; Section 8 of the Children Act; Article 3 of the United Nations Convention on the rights of a child; Article 40 (1) of the African Charter on the Rights and Welfare of the child and the case of MAK v RMAA & 4 others Petition 2 (E003) of 2022 [2023] KESC21 KLR (CIV) (2 March 2023) SAJ v AOG & another [2019] eKLR, among others, placing emphasis on the centrality of the best interests of the child.

Analysis and determination

34. The court has carefully considered the pleadings, evidence and the parties' rival submissions. This dispute brings to the fore the social dilemmas arising from the intersection between failed love relationships and property rights. The fact that the suit property is jointly owned by the parties herein with each of them being entitled to half of the undivided share in the whole is not disputed. In addition, the fact that the suit property having been developed jointly by the parties with a four-bedroom house and is incapable of being equally partitioned is not in dispute. What is in dispute is whether the plaintiff is entitled to orders of severance of the joint ownership of the suit property in view of his parental responsibility to provide shelter to B.K. Closely connected to that issue is whether this court has jurisdiction to determine the question of parental responsibility raised by the defendant.
35. Jurisdiction is the power of the court to determine a matter. Jurisdiction is everything and when a court determines that it has no jurisdiction on an issue, it ought to down its tools in so far as that issue is concerned. Jurisdiction flows from the Constitution or statute or both and a court cannot by means of judicial craft or otherwise arrogate itself the jurisdiction it does not have.
36. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme court held that:
- A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.
37. This court's jurisdiction is clearly set out in Article 162 (2) (b) of the Constitution of Kenya 2010 and expounded in Section 13 of the Environment and Land Act, which provide for this court's jurisdiction to determine disputes relating to the environment, and use and occupation of, and title to land. Article 162 (2) (b) of the Constitution of Kenya 2010 provides as follows;



(2) Parliament shall establish courts with the status of the High court to hear and determine disputes relating to-

(b) the environment and the use and occupation of, and title to, land.

Section 13 of the [Environment and Land Court Act](#) specifies the jurisdiction of this as follows;

1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the [Constitution](#) and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
2. In exercise of its jurisdiction under Article 162(2)(b) of the [Constitution](#), the Court shall have power to hear and determine disputes——
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the [Constitution](#).
4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
5. Deleted by Act No 12 of 2012, Sch.
6. Deleted by Act No 12 of 2012, Sch
7. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including——
 - i. interim or permanent preservation orders including injunctions;
 - ii. prerogative orders;
 - iii. award of damages;
 - iv. compensation;
 - v. specific performance;
 - vi. restitution;
 - vii. declaration; or
 - viii. costs.



38. Therefore, regarding land disputes, the above provision delineates the jurisdiction of this court to only handle disputes in so far as the same touch on the use and occupation of, and title to land.
39. The issue of parental responsibility to provide shelter to a child, which is the basis of the defendant's defence is anchored in Article 53 of the Constitution of Kenya and is a matter that is provided for in Section 31 of the Children Act as follows;
1. In this Act, "parental responsibility" means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.
 2. The duties referred to in subsection (1) include, but are not limited to—
 - a. the duty to maintain the child and, in particular, to provide the child with—
 - i. basic nutrition;
 - ii. shelter
 - iii. water and sanitation;
 - iv. clothing;
 - v. medical care, including immunization;
 - vi. basic education; and
 - vii. general guidance, social conduct and moral values;
 - b. the duty to protect the child from neglect, abuse, discrimination or other differential treatment;
 - c. the duty to—
 - i. provide parental guidance in religious, moral, social, cultural and other values that are not harmful to the child;
 - ii. determine the name of the child;
 - iii. procure registration of the birth of his or her child;
 - iv. appoint a legal guardian in respect of the child;
 - v. receive, recover and otherwise deal with the property of the child for the benefit, and in the best interests, of the child;
 - vi. facilitate or restrict the migration of the child from or within Kenya;
 - vii. upon the death of the child, to arrange for the burial, cremation of the child or any other acceptable method of interment; and
 - d. the duty to ensure that, during the temporary absence of the parent or guardian, the child shall 2022 be committed to the care of a fit person.
 3. Whether or not a person has parental responsibility over a child shall not affect –
 - a. any obligation which such person may have in relation to the child, such as a statutory duty to maintain the child; or



- b. any rights which, in the event of the child's death, such person may have in relation to the administration of the child's estate in accordance with the [Law of Succession Act](#).
4. A person who does not have parental responsibility over a particular child, but has care and control over the child, may, subject to the provisions of this Act, do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare.
5. The Cabinet Secretary may make regulations to give effect to the provisions of this section.
40. The Act that provides for parental responsibility is the [Children Act](#) No 29 of 2022, whose section 2 defines "court"; to mean the Children's Court designated under Section 90 of the Act. Section 90 of the [Children Act](#) provides that a Children's Court is designated by the Chief Justice by a Gazette Notice, and the High Court determines appeals from that court.
41. Section 91 of the [Children Act](#) is specific that questions regarding parental responsibility which is in Part III of the Act are matters within the jurisdiction of the Children's Court. The said provision states as follows;
 1. Without prejudice to the generality of section 90(1), the children's Court shall have jurisdiction to—
 - a. conduct civil proceedings on matters set out under Parts III, VII, VIII, IX, X, XI, XIII, XIV and XV of this Act;
 - b. hear any charge against a child, other than a charge of murder;
 - c. hear a charge against any person accused of an offence under this Act;
 - d. hear a charge in any case in which a person is accused of an offence against a child or in which a child is the victim or complainant; and
 - e. exercise any other jurisdiction conferred by this Act or any other written law.
 2. Subject to any rules or directions made or issued by the Chief Justice, where under any other written law any matter involving a child is required to be heard by a Court other than a Children's Court, that other Court shall, for the purposes of that matter, be deemed to be a Children's Court, and shall be bound by the provisions of this Act.
 3. Any reference to a subordinate court of any class in the First Schedule to the Criminal Procedure Code shall include a Children's Court.
 4. The Magistrate in charge of the Courts station or his or her representative shall preside over all cases involving children in respect of the Court's jurisdiction.
 5. Where, in the course of any proceedings in a children's Court, it appears to the Court that the person charged, or to whom the proceedings relate, is above the age of eighteen years, the Court shall transfer the proceedings to a Court other than a children's Court to conduct the proceedings under any other relevant law.
 6. Where, in the course of any proceedings in any Court other than a Children's Court, it appears to the Court that the person charged or to whom the proceedings relate, is under the age of eighteen years, the Court shall transfer the proceedings to a Children's Court to conduct the proceedings under this Act:



Provided that no transfer shall be necessary in any case where the magistrate concerned is duly appointed in accordance with section 90 to preside over matters relating to children.

7. Where any conviction or sentence made or passed by a Court other than a Children's Court is appealed against, or is brought before the High Court for confirmation or revision, and it appears that the person convicted was at the time of commission of the offence under the age of eighteen years, the High Court shall have power to substitute for the conviction a finding of guilt in accordance with section 221.
 8. A Children's Court may, either on its own motion or on the application by any person, visit any children's institution and assess its condition and the circumstances under which the children are admitted, and on assessment, make any order as the Court may determine in the best interest of the children.
42. It is therefore clear that questions of a child's right to shelter pursuant to parental responsibility fall within the jurisdiction of a Magistrate's Court designated as such, unless another written law, requires any matter involving a child to be heard by a court other than a Children's Court, and in such case, that court will be deemed as a Children's Court, bound by the provisions of the *Children Act* and whose appeal shall lie to the High Court. Clearly, in view of the above provisions, the Environment and Land Court is not a children's court and being of the same status as the High court, cannot in any event act as a children's court. Although the defendant argued that the question of the right to shelter under Article 53 is a Constitutional question touching on property, which is a matter for this court, I take the position that the said constitutional right pursued in the context of parental responsibility in the protection of the best interests of the child, does not fall within the jurisdiction of this court, because this court can only handle Constitutional rights touching on the Environment and the use and occupation of, and title to land. I therefore find and hold that as this court is not a children's court, it has no jurisdiction to determine questions regarding the Plaintiff's parental responsibility to provide shelter for B.K.
43. In addition, since there is no evidence that the Children's Court has determined and or pronounced itself over B.K's right for shelter over the suit property, in the context of the Plaintiff's parental responsibility, it is my view therefore that B.K's alleged property rights have not crystalized in respect of the suit property, which would enable B.K to make a proprietary claim before this court.
44. I hasten to add that the parties before this court are Justus Kioko Kikuvi and Faith Vata Musili. B.K. is not a party to this suit. The defendant and B.K are not one and the same person. Although B.K is a child of tender age, he is a separate legal person, and no claim has been filed on his behalf in this matter. The defendant in her defence referred to B.K's claim in the absence of an order joining B.K to this suit thereby merging her defence with an alleged claim of B.K. In my view, that merger does not validate the alleged claim of B.K., as the latter is not party to this suit and his claim if at all, is independent of the interests of the defendant.
45. If the defendant intended to lawfully claim for shelter rights of B.K. over the suit property before this court, she ought first to have obtained a judgment from the Children's Court, in favour of B.K against the plaintiff in respect of the suit property, before approaching this court. That way, she would have brought B.K. within the ambit and purview of Article 162 (2) (b) of the *Constitution* and Section 13 of the *Environment and Land Court Act*. Otherwise as of now, B.K's rights to shelter under Article 53 of the *Constitution* as read with section 31 (2) (ii) of the *Children Act*, have not been determined by a competent court, which is the children's court and this court cannot replace the Children's court. In the premises, I find and hold that this court has no jurisdiction to hear and determine the question regarding the plaintiff's parental responsibility to provide shelter for B.K.



46. In view of the above findings, the question that follows then, is whether the defendant has provided reasonable justification for barring the plaintiff from dealing in his undivided share of the suit property.
47. In the instant case, the plaintiff has demonstrated by a certificate of title, a fact not disputed that he is co-owner with the defendant and both parties herein have equal shares in the suit property. Therefore, the plaintiff has proprietary rights protected under Article 40 of the Constitution and Section 25 of the Land Registration Act to exercise his rights over the suit property.

Section 25 of the Land Registration Act provides as follows;

1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
 2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
48. There is no dispute in this case that both parties own the suit property in equal shares. It is trite that no one should interfere with the exercise of proprietary rights of a registered proprietor without lawful justification. In this case, the defendant has argued in her defence that the joint ownership should not be severed due to the plaintiff's parental responsibility to provide B.K with shelter. In view of the fact that there is no judgment, decree or order from the Children's Court granting rights to B.K. over the suit property, that would have the effect of limiting or affecting the exercise of proprietary rights by the plaintiff, I find that the defendant has failed to demonstrate any lawful and or reasonable justification to bar the plaintiff from dealing in his undivided share of the suit property.
49. Section 96 of the Land Registration Act provides for sale of co-owned land that is incapable of being partitioned, as follows;
1. If for any reason the land sought to be partitioned is incapable of being partitioned, or the partition would adversely affect the proper use of the land, and the applicant for partition or one or more of the other tenants in common require the land to be sold, and the tenants in common cannot agree on the terms and conditions of the sale or the application of the proceeds of the sale, the tenants in common may make an application to the court for an order for sale and the court may—
 - a. cause a valuation of the land and of the shares of the tenants in common to be undertaken; and
 - b. order the sale of the land or the separation and sale of the shares of the tenants in common by public auction or any other means which appears suitable to the court; or
 - c. make any other order to dispose of the application which the court considers fair and reasonable,



2. The court shall, in exercising its powers under paragraphs (b) and (c), have regard to any of the matters set out in section 94 (3) (a) to (f) that may be relevant in the circumstances.
 3. A tenant in common shall be entitled to purchase the land or any share of it that is offered for sale, either at an auction or at any time by private sale.
50. Therefore, where common tenants have not agreed on the terms of the sale, but one of the tenants in common seeks to sell co-owned land which is incapable of being partitioned, the court has power to order a valuation of the land, allow one of the tenants to buy off the shares of the other tenant, or order the sale of the land to third parties and or make any fair and reasonable orders appropriate in the circumstances of the case.
51. In the case of *Muburi Muchiri v Hannah Nyamunya (sued as the administrator of the estate of Njenga Muchiri also known as Samuel Njenga Muchiri)* [2015] eKLR, the court held as follows;
- the law on termination of a tenancy allows co-owners to by agreement sever the co-ownership by partition; by acquiring the interests of another co-owner and thus become solely entitled; or by the sale of the common property and division of the proceeds of sale.
52. Section 91 (6) of the *Land Registration Act* grants the remaining tenant priority where one of the tenants in common intends to deal with his undivided share. The said provision states as follows;
- No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.
53. Therefore, the plaintiff in dealing with his share, he is obligated to avail the defendant the first opportunity to purchase the same before deciding to avail it to third parties.
54. Where property is jointly owned and is not capable of being partitioned, like in this case, the court has power to order for the same to be sold. Considering that the suit property measures 0.0459 Hectares having a four bedroom house, I find and hold that the same is incapable of being partitioned equally and therefore, to enable the plaintiff exercise his proprietary rights thereto, I find and hold that it is appropriate that the same ought to be sold, but the defendant is entitled to the first priority to buy.
55. The upshot is that this court finds that the plaintiff has proved his case on the required standard. Having taken into account the value of the suit property, the fact that the parties herein began as a team hoping to continue as such without success, and all the circumstances of this case; the orders that commend themselves to the court as being appropriate, and which this court makes, are as follows;
- a. A declaration be and is hereby made that both the plaintiff and the defendant are entitled to equal shares in regard to LR No 12715/3722 (IR No 156593).
 - b. The joint ownership between the plaintiff and the defendant in regard to LR No 12715/3722 (IR No 156593) be and is hereby severed.
 - c. The parties herein are ordered to jointly appoint a reputable valuer who will proceed to value the parcel of land known as LR No 12715/3722 (IR No 156593), to ascertain its current market value as well as a reserve price in the event of forced sale, within 30 days of this judgment. In the event of lack of agreement, then such valuer as shall be appointed by the Chairman of the Institution of Surveyors of Kenya shall conduct the valuation as stated herein. The costs of the valuation shall be borne equally by the parties herein in any event.



- d. Upon ascertaining the market value of the suit property, the plaintiff shall give the defendant the first priority to purchase the plaintiff's half share interest in the suit property in 6 months, by paying the plaintiff 50% of the current market value stated in the valuation report, and in default; the plaintiff shall have first priority to purchase the defendant's undivided share in the suit property at 50% of the current market value of the suit property stated in the valuation report in 6 months from the date of the defendant's default. In default, the parties to jointly dispose to a third party, the suit property and share the proceeds thereof equally.
- e. In the event any of the parties become uncooperative, necessitating sale of the suit property to a third party, then the Deputy Registrar of this court is hereby authorized to execute all documents regarding the sale and transfer of the suit property to a third party, and to facilitate distribution to the parties herein, of the proceeds thereof in the ratio of 50:50, provided that the consideration is not below the reserve price.
- f. Each party shall bear its own costs of this suit.

56. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 1TH DAY OF JULY 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Omondi for plaintiff

Ms. Ngina holding brief for Mr. Matimu for defendant

Court assistant – Josephine

