



Makilya alias Petronilla Mutuku Ngove & another v Kathendu, Ngove and Ngove (Sued in their capacity as the Administrators of the Estate of TabitKalonduha Kalondu Ngove - Deceased) & 2 others; Land Registrar Machakos Land Registry & another (Interested Parties) (Environment & Land Case E047 of 2021) [2025] KEELC 3861 (KLR) (13 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3861 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E047 OF 2021**

**AY KOROSS, J
MAY 13, 2025**

BETWEEN

**PETRONILLA MUTUKU MAKILYA ALIAS PETRONILLA MUTUKU
NGOVE 1ST PLAINTIFF
WINFRED KATUNGWA NGOVE 2ND PLAINTIFF**

AND

**CAROLINE MBINYA KATHENDU, KENNEDY THYAKA NGOVE AND
PAUL MATULAI NGOVE (SUED IN THEIR CAPACITY AS THE
ADMINISTRATORS OF THE ESTATE OF TABITHA KALONDU NGOVE -
DECEASED) 1ST DEFENDANT
PAUL MATULAI NGOVE ALIAS EDWARD KALA NGOVE 2ND DEFENDANT
RUBIS ENERGY KENYA PLC (KENOLKOBIL PLC) 3RD DEFENDANT**

AND

**THE LAND REGISTRAR MACHAKOS LAND REGISTRY INTERESTED
PARTY
THE HONOURABLE ATTORNEY GENERAL INTERESTED PARTY**

JUDGMENT

Background of the case

1. The dispute before this court presents an interesting scenario in which the plaintiffs are seeking this court's intervention to interpret the ownership of land Title No. Machakos Town/Block II/283 ("Suit property").



2. This suit property was registered on 26/10/1992 in the names of Tabitha Kalondu Ngove (Tabitha) and her son, Paul Mutulai Ngove (Paul) as lessees of the then County Council of Masaku in their personal capacities and in trust for George Kathendu Ngove, Kennedy Thyaka Ngove and Jacqueline Mumba Ngove as tenants in common in equal shares.
3. All these persons they held in trust for, namely George Kathendu Ngove (George), Kennedy Thyaka Ngove (Kennedy) and Jacqueline Mumba Ngove (Jacquiline), are all Tabitha's children and Paul's siblings.
4. Tabitha is now deceased, and her estate is the subject of probate proceedings in Nairobi HC Succession Cause No. 2712 of 2003. It also appeared that Jacqueline is also deceased, but disclosures were not made in respect on her estate or death certificate.
5. All the parties except for the 3rd defendant and interested parties (IPs) are either Tabitha's children or legal representatives.
6. Before Tabitha's demise, she and Paul had entered into a lease agreement with the 3rd defendant, whose term was coming to an end, and it is the intended renewal of this lease that triggered the suit that is now before this court.

Plaintiff's case and evidence

7. In a plaint dated 10/05/2021, the plaintiffs pleaded that the 2nd defendant erroneously believed he owned ½ of the suit property, hence collected 50% rental proceeds from the 3rd defendant.
8. They argued the title deed of the suit property should be construed to read that Tabitha, Paul, George, Kennedy and Jacqueline were all tenants in common in equal shares, with each one of them owning a 20% share of the suit property.
9. Accordingly, they sought the following reliefs from this court: -
 - a. A declaration be and is hereby issued that the suit property is owned by Tabitha, Paul, George, Kennedy and Jacqueline as tenants in equal shares, with each one of them owning a 20% share of the suit property.
 - b. A declaration be and is hereby issued that there was an error and/or mistake in the commercial lease registered on 24/03/1993 over the suit property entered between Tabitha and Paul as lessors and Kenya Oil Company KenolKobil Ltd and now the 3rd defendant on the interpretation of ownership of the property and by apparent error and/or mistake, the commercial lease registered on 24/03/1993 be and is hereby declared null and void.
 - c. Costs of the suit and interest.
10. The 1st plaintiff testified as PWI, she adopted her witness statement and produced documents in support of her case which were marked as PEX1-6.
11. She testified they were born 10 siblings, one of whom was deceased, and she was a beneficiary of Tabitha's estate. She argued Tabitha's children had not been aware of Paul's registration over the suit property since the title deed had always been in the custody of the 3rd defendant.
12. She maintained that, given that they were now aware of the registration particulars, Tabitha's other children should be given a share of the suit property by the issuance of a new title in the names of all her children.



13. She also lamented that the 1st defendant had entered into a lease agreement with the 3rd defendant to the plaintiffs' detriment and urged the court to grant the reliefs sought in the plaint.

Parties' submission

14. Despite directions from the court, only the law firm of M/s. Kivuva Omuga & Co. Advocates, who are on record for the plaintiffs, filed written submissions dated 14/02/2025, and they urged this court to grant the reliefs sought in the motion.
15. Upon identifying and considering the issues for determination, this court will, in its analysis and determination, consider the plaintiffs' arguments on the particular issue as contained in the submissions.

Issues for determination

16. This court has considered the plaintiff's pleadings, adduced evidence, as well as submissions and shall now proceed to consider the merits or otherwise of the plaintiff's claim. Conceivably, the issues that arise for determination are;
 - I. Whether the registered owners and persons they held in trust for each had a share in the suit property as tenants in common in equal shares.
 - II. Whether the relief for a declaration that the lease dated 1/01/1993 should be declared null and void is now moot.
 - III. What orders should this court issue, including an order as to costs?

Analysis and Determination

17. The issues that were earlier identified as arising for determination shall be handled in a seriatim manner.

I. Whether the registered owners and persons they held in trust for each had a share in the suit property as tenants in common in equal shares.

18. In its broad sense, interpretation is often intended to understand or explain a word or a set of words. Thus, this court will apply the tools of legal interpretation to assist the plaintiffs in the interpretation of the suit property's title deed.
19. In the context of this case, it is undeniable that Tabitha and Paul are the registered owners of the suit property. To this extent, the plaintiffs do not seem to have a challenge. Instead, it is the meaning of words contained in the proprietorship section of the suit property's title document that has presented them with difficulty.
20. It would seem that Tabitha's legal administrators and the beneficiaries of the trust have not had any difficulties with interpretation, and this is so because they already have a draft lease agreement in place.
21. It is this quandary of interpretation of the title document by the plaintiffs that has created an impediment in the renewal of a lease between Paul in his personal capacity and on behalf of the surviving trustees and the administrators of Tabitha's estate, as lessors on the one hand, and the 3rd



defendant as lessee on the other. Consequently, this court is called upon to interpret the following words: -

“Tabitha Kalondu Ngove) Paul Mutulai Ngove) in their personal capacities and in trust for George Kathendu Ngove, Kennedy Thyaka Ngove and Jacqueline Mumbé Ngove as tenants in common in equal shares.”

22. In giving effect to the grammatical, ordinary, or legal meaning of these words, this court has not suffered any exertion in construing them as the registered owners of the suit property are Tabitha and Paul, and since Tabitha is deceased, the administrators of her estate stand in for her in that respect.
23. Moreover, Tabitha and Paul owned the suit property not only as owners but also as trustees of George, Kennedy and Jacqueline as tenants in common in equal shares.
24. Since there are 5 tenants, it means each one of them owns 1/5th of the suit property either as owners and trustees (in the case of Tabitha and Paul) or beneficiaries (in this case, George, Kennedy and Jacqueline).
25. The nature of the tenancy in common governs the relations between the 5 tenants or their estates since a tenancy in common envisages that the interests of each registered owner are determinable and severable as provided for under the provisions of the [Land Registration Act](#).
26. Just to elucidate on tenancy in common, Section 91 of the [Land Registration Act](#) sets out some of the inherent features of a tenancy in common thus: it is registered in the name of two or more persons (Section 91 (1)), each tenant is entitled to have an undivided share in the whole (Section 91 (5)), upon the death of a common tenant, her undivided share forms part of her estate ((Section 91 (5)) and lastly, a common tenant cannot deal with her undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants ((Section 91 (6)).
27. The apex court charted the characteristics of a tenancy in common in the case of John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2021] eKLR when it stated thus:-

“Tenants in Common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. Therefore, while the tenancy in common lasts, no one can say which of them owns any particular parcel of land. (See Megarry and Wade, ‘The Law of Real Property’ 6th Edition Pages 477 and 480).

28. Having dealt with the interpretation of the holding of the tenancy in common, the residual part that requires explication is what happens to the trusteeship in light of Tabitha’s demise.
29. Remembering that Tabitha’s estate and Paul are owners of the suit property, with each one of them owning 1/5th of the suit property, does that mean that upon Tabitha’s demise, the trusteeship came to an end? Is Paul the sole trustee? To answer this, this court has to consider the provision of Section 67 of the [Land Registration Act](#), which provides as follows: -

“Whenever two or more proprietors are registered jointly as trustees, and the survivor of such proprietors would not be entitled to exercise individually the powers that were vested in them, the Registrar shall enter a restriction to that effect.”



30. While considering this provision of law and keeping in mind the plaintiffs have not presented any material before this court signifying Paul's power to individually exert his mandate under the trust is impeded, this court finds as a surviving trustee, Paul holds the suit property in trust for George, Kennedy and Jacqueline.
31. Further, as a co-registered owner, Paul cannot deal with the suit property without the input of Tabitha's legal representatives, who have legal duties over her estate as envisaged by Sections 82 and 83 of the [*Law of Succession Act*](#)
32. As this court concludes on this issue, whereby it has illuminated on the tenancy in common and trusteeship, for emphasis and moreso because there are pending probate proceedings over Tabitha's estate, it hereby makes it clear that in respect of the suit property, only 1/5th thereof is Tabitha's free property and that is the only portion of the suit property that can be the subject of Nairobi HC Succession Cause No. 2712 of 2003.

II. Whether the relief for a declaration that the lease dated 1/01/1993 should be declared null and void is now moot.

33. The Black's Law Dictionary, 9th Edition defines mootness as:-

“having no practical significance; hypothetical or academic (the question on appeal became moot once the parties settled their case).”
34. After considering jurisprudence on mootness, the apex court in *Institute for Social Accountability & another v National Assembly & 5 others* [2022] KESC 39 (KLR) stated as follows on the doctrine: -

“66... The doctrine of mootness requires that controversy must exist throughout judicial proceedings including at the appellate level. An appeal or an issue is moot when a decision will not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The doctrine of mootness is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical.”
35. In this decision, the apex cited with approval Canada's Supreme Court's decision of *Borowski v Canada (Attorney General)* [1989] 1 SCR 342 which stated the process of determining if a decision is moot is a two-tier procedure whereby in the first instance, the court is first required to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case.
36. Noting the above expressions of case law, at the time of instituting the suit, this issue was live because the lease between Tabitha and Paul as lessor and the 3rd defendant as lessee commenced on 1/01/1993 and was to last for 30 years; nonetheless, it expired on 1/01/2023.
37. The term of the lease having so come to an end, an entertainment of this issue will merely be an academic exercise, and in this court's view, it has become moot as there is no longer a live controversy over it. Consequently, this court finds this issue is moot.



38. Before this court deals with the last issue, this court must mention that the plaintiffs are not beneficiaries of the trust held by Paul over the suit property, and it would appear they filed this matter as beneficiaries of Tabitha's estate.
39. Accordingly, it is probable they wanted to ascertain the percentage of shares held by Tabitha over the suit property for purposes of the probate proceedings.
40. In the end and in dealing with issue (III), it is trite law that costs follow the event, and because of the close relations between some of the parties who are siblings, each party shall bear their respective costs of the suit. Thus, this court hereby issues the following final disposal orders: -
- a. A declaration is hereby issued that the Title No. Machakos Town/Block II/283 is owned by Tabitha Kalondu Ngove and Paul Mutulai Ngove in their personal capacities, and as surviving trustee, Paul Mutulai Ngove holds it in trust for George Kathendu Ngove, Kennedy Thyaka Ngove and Jacqueline Mumba Ngove.
 - b. A declaration is hereby issued that as tenants in common in equal shares over Title No. Machakos Town/Block II/283, Tabitha Kalondu Ngove, Paul Mutulai Ngove, George Kathendu Ngove, Kennedy Thyaka Ngove and Jacqueline Mumba Ngove, respectively, each own a 1/5th share thereof.
 - c. Each party shall bear their respective costs of the suit.

It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 13TH DAY OF MAY, 2025.

HON. A. Y. KOROSS

JUDGE

13.05.2025

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Miss Njuguna for 1st and 2nd interested parties

N/A for other parties

Ms Kanja- Court Assistant

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