

**THE REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MILIMANI
ELC MISC NO. E060 OF 2024 (OS)**

**IN THE MATTER OF SECTION 13,17, 56 & 59 OF THE TRUSTEES
ACT CAP 167
IN THE MATTER OF THE LAND REGISTRATION ACT LR NO.
209/6913 ALSO KNOWN AS IR NO. 22552/13**

JOYCE NZISA MUTHAMA - APPLICANT

AND

**NAOMI KATHULE MUTHAMA - INTERESTED
PARTY**

**JUDGMENT
(In respect of the Originating Summons dated 19/9/2024)**

1. What is before this Court for determination is the Applicant's Originating Summons dated 19/9/2024. The Originating Summons is expressed to be brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Order 37 Rule 1 of the Civil Procedure Rules, Section 4 (1), 13, 17, 56 and 59 of the Trustees Act and Section 24 of the Land Registration Act. The Applicant prays for orders that;
 - a. This Honourable Court be pleased to authorize the sale of all that parcel of land known as LR No. 209/6913 also known as IR No. 22552/13.
 - b. This Honourable Court be pleased to grant leave to the Applicant to sell all that parcel of land known as LR NO. 209/6913 also known as IR No. 22552/13.
 - c. Costs of the application be in the cause.
2. The Originating Summons is based on the grounds appearing on its face and supported by the Affidavit sworn by the Applicant on the same date. The Applicant states that she married Johnson Nduya Muthama on 30/4/1988, and that the union was blessed with five children: Naomi Kathule, Alice Mulimu, Janet Nthoki, Margaret Mumbua, and Patricia

Mbesa. She affirms that they jointly acquired parcels known as LR No. 5/104, LR No. 7785/317 (Original No. 7785/10/315), LR No. Nairobi/Block 72/997, and IR No. 622362. She further states that the marriage was subsequently dissolved and a divorce decree issued on 15/10/1991.

3. The Applicant states that through a memorandum of final settlement dated 9/11/1992, resolving the matrimonial property dispute, it was agreed that LR No. Nairobi/Block 72/997 within Jambo Estate and LR No. 209/6913 within Woodley Estate in Nairobi would be transferred jointly to her and her children. She was to hold the properties in trust for herself and her children. The two properties were subsequently transferred in 1994, and she has been managing them since then.
4. The deponent states that Janet Nthoki, one of the registered owners, died on 22/4/2022, leaving behind a daughter, Melissa Nzisa, a minor. She indicates that the minor is currently attending Sherbone School, in North West Dorset, United Kingdom, and requires school fees. She further states that her intention is to sell LR No. 209/6193, also known as IR No. 22552/13, the subject property, and to use the proceeds to pay for the minor's school fees, boarding fees, and other expenses. Additionally, she plans to use the funds to purchase a farm where she can carry out farming activities to earn a living, spend her later years, and cover her medical bills. She asserts that the funds received shall also be shared among her other children.
5. The deponent asserts that the sale will not prejudice anyone's interests and that she is willing to abide by any conditions imposed by the court to that effect. She prays that the orders sought be granted in the interest of justice.

The Interested Party's Replying Affidavit

6. The application was opposed by the Interested Party through the Replying Affidavit sworn on 13/10/2025. The Interested Party states that

she is one of the joint proprietors of the subject property alongside the Applicant and her other four (4) sisters. She stated that she understands the proceeds from the intended sale were to be shared equally, with their mother, the Applicant herein, receiving 50%, and the remaining 50% to be divided equally among the five (5) children. However, the position presented before this court is not what she believed because the Applicant intends to use the proceeds for personal projects, payment of their niece's school fees, and settling alleged medical expenses.

7. She asserts that, while she has no objection to the sale of the subject property, she is concerned that the consent of the other joint owners has not been obtained. Furthermore, she states that the proposed distribution does not protect the interests of the other co-owners.
8. The Interested Party requests that a trust be established to manage and distribute the inheritance of their late sister's daughter, Melissa Nzisa, until she reaches the age of majority, that any proceeds from sales be fairly shared, and that the consent of all co-owners be obtained before any sale.

The Applicant's Further Affidavit

9. The applicant filed a further affidavit sworn on 7/11/2025 in response to the interested party's replying affidavit. The applicant asserts that her intention to sell the subject property has never been to deprive any registered owner of their rightful share in the property. She states that she agrees to the creation of a trust to administer the minor's share until she reaches the age of majority.
10. The Applicant asserts that although the transfer of the property to their joint names followed a Memorandum of Final Settlement in the resolution of matrimonial property after the dissolution of marriage, she argues that if the property was transferred to her as her share of the matrimonial assets, then the inclusion of the children's names in the title was irregular and unintended, as the children were not parties to the

marriage and therefore could not have been direct beneficiaries under the matrimonial property settlement. She emphasises that the court's determination of this matter is crucial in clarifying the rights and interests of all registered proprietors. She consequently asks the court to decide whether the property was transferred to her as a marital entitlement or as a gift jointly owned with the children.

Court's directions

11. Upon noting that the title is registered in the names of the applicant, Alice Mulimu, the Estate of the late Janet Nthoki, Margaret Mumbua, and Patricia Mbesa, the court on 13/11/2025 directed that the other co-owners—Alice Mulimu, the Estate of the late Janet Nthoki, Margaret Mumbua, and Patricia Mbesa—be joined as Interested Parties or Respondents. The Applicant was further instructed to serve the pleadings on them within 7 days. After service, they were granted 15 days to file their responses if necessary.
12. On 11/12/2025, the Applicant informed the court that her two daughters, Naomi and Alice, have no objection to the sale of the subject property. Further, she stated that Melissa would be turning 18 in March 2026. Conversely, counsel for the Interested Party informed the court that the Interested Party had no objection to the sale of the land, provided that the interests of the other parties are protected and the share of the deceased joint owner is held in trust for her surviving minor. The Interested Party does not oppose the application.

The written submissions

13. The Applicant filed her submissions dated 14/1/2026. Meanwhile, counsel for the Interested Party informed the court that they would not be filing any submissions. The Court has considered the submissions filed herein in its decision.

Analysis and Determination

14. I have considered the Originating Summons, the rival Affidavits thereto and the Applicant's submissions. The issues that arise for determination are;

- a. Whether the Applicant's application is merited.
- b. Who should bear the costs of the application.

Whether the Applicant's application is merited

15. The Applicant seeks the court's authorisation to sell the subject property herein, LR No.209/6913. She moved the court under the provisions of Order 37, Rule 1, of the Civil Procedure Rules, as well as Sections 4(1), 13, 17, 56, and 59 of the Trustee Act.

16. Order 37 Rule 1 of the Civil Procedure Rules states that;

"The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions—

- (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;
- (b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;
- (c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;

- (d) the payment into court of any money in the hands of the executors, administrators or trustees;
 - (e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;
 - (f) the approval of a sale, purchase, compromise or other transaction;
 - (g) the determination of any question arising directly out of the administration of the estate or trust.
17. The Applicant also relies on the provisions of the Trustees Act. Section 4 (1) of the said Act provides that; a trustee may invest funds in his hands, whether at the time in a state of investment or not; (b) Section 13 provides for power of trustees for sale by auction; (c) Section 17 power to raise money by sale, mortgage; (d) Section 56 on the power of court to authorize dealings with that property and Section 59 on the power to charge costs on trust estate.
18. The undisputed evidence on record shows that the subject property, LR No.209/6913, is registered in the names of the Applicant and her five children. The registration resulted from a Memorandum of Final Settlement dated 9/11/1992, which settled the matrimonial property dispute between the Applicant and her former husband, Johnson Nduya Muthama. The Transfer of Lease and the Certificate of Title dated 17/8/1993, Entry No. 13, indicate that the transfer was made to Joyce Nzisa Muthama, Naomi Kathule Muthama, Alice Mulimu Muthama, Janet Nthoki Muthama, Margaret Mumbua Muthama, and Patricia Mbesa Muthama, for natural love and affection.
19. Evidently, the subject property herein does not belong to a deceased person, nor is it a Trust property. The Applicant is not a devisee, legatee, or creditor. It therefore follows that the originating summons is anchored on wrong provisions as the application does not raise any question of law for the determination by this court under Order 37 Rule 1 of the Civil

Procedure Rules 2010 or the Trustees Act. Although the court would have struck out the Originating Summons, I will, however, determine it on its merit pursuant to Article 159 (2), which urges courts not to give undue regard to procedural technicalities.

20. Furthermore, the register herein does not specify whether the proprietors were registered as joint proprietors (joint tenants) or proprietors in common (tenants- in-common). The repealed Act did not provide a default framework specifying the presumption to be applied in the event of failure to specify whether the proprietorship was joint or in common.
21. Section 91(2) of the Land Registration Act provides that:

“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.”
22. From the above provision, it follows that the proprietors of the suit property herein are tenants in -common.
23. Section 91 (5) of the Land Registration Act, provides that if any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and upon the death of a tenant, the deceased’s share shall be treated as part of his estate while, Section 96 of the Land Registration Act recognizes that a tenancy in common can be determined by way of sale.
24. It is the finding of this court that the suit property is a tenancy in common which can only be determined by either unity of interests, partition or sale and not otherwise.
25. Having found that the subject property is a tenancy in common, should the court authorize its sale? The Applicant and her Five (5) children are presently the registered proprietors of the suit property. The Land

Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

26. As absolute proprietors, their rights can only be defeated by operation of the law. Under Section 25(1) of the Land Registration Act the rights of a proprietor are indefeasible except as provided in the Act and are held by the proprietor, together with all privileges and appurtenances belonging to the title, free from all other interests and claims whatsoever but subject only to the encumbrances and overriding interests specified in Section 25(1) (a) and Section 28 of the Land Registration Act and to the duty and obligations of the proprietor holding title as a trustee.
27. Article 40 of the Constitution of Kenya protects the right to acquire property either individually or in association with others. It also provides a broad framework of principles ring-fencing the right to enjoy the benefits and privileges accruing from ownership of property.
28. In the present suit, the Applicant wishes to terminate the tenancy in common by way of sale. Has each proprietor consented to this? I note that the Interested Party herein, Naomi Kathule Muthama, whose name appears as the second proprietor, initially opposed the sale due to the lack of consent from the other co-owners. However, she later changed her position and informed the court that she was not opposed to the sale, provided that the interests of the parties are protected and the share of the deceased joint owner is held in trust for her surviving minor.
29. Turning to the other proprietors, on 13/11/2025, the court directed that the other co-owners, Alice Mulimu, the Estate of the late Janet Nthoki, Margaret Mumbua and Patricia Mbesa, be joined as Interested Parties or Respondents. The Applicant was further directed to serve the pleadings

on them within 7 days. Upon service, they were granted 15 days to file their responses, if needed.

30. I note that although the Court directed the Applicant to enjoin the other co-owners, that was not done. According to the Affidavit of Service sworn by Boniface Kyalo deponed on 25/11/2025, the other co-owners; Alice Mulimu, Margaret Mumbua and Patricia Mbesa were served with a Mention Notice only. They were not even served with the pleadings. How were they expected to file their responses and/or consents, if any, if pleadings were not served upon them? The Applicant ought to have amended the Originating Summons to include the other co-owners as parties then serve them with the said pleading alongside the Mention Notice.
31. Order 1 rule 10 provides that:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

32. This Court directed the joinder of the other co-owners to the suit as they are necessary parties to the suit. They ought to have been joined to the proceedings as directed by the court. Their presence is necessary for the court to effectively and completely adjudicate upon and settle all questions involved in the matter. See the case of Kingori -vs- Chege & 3 Others [2002] 2 KLR 243 for the guiding principles for joinder of a party.

33. Although the Applicant informed the court on 11/12/2025 that Alice Mulimu is not opposed to the application, nothing could be easier than adducing her written consent to that effect.
34. Regarding the share of the deceased co-owner, Janet Nthoki Muthama, it is clear that she left a daughter, Melissa Nzisa Okirie, who has now reached the age of majority. The court ordered that the estate of Janet Nthoki Muthama, the deceased, be added to the proceedings.
35. The Law of Succession Act prohibits any dealing with the deceased's property before a grant has been confirmed. This is the hallmark of Section 45 of the Law of Succession Act which provides for intermeddling. Intermeddling is an offence attracting criminal sanction and penalty. Section 45 of the Law of Succession Act (Cap 160 Laws of Kenya) provides that: -
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”
36. The Applicant has not adduced any grant of administration whatsoever in respect of the deceased estate. Any dealing with her property therefore amounts to intermeddling.
37. In light of the above facts, evidence and principles, it is my view and finding that the Applicant has not satisfied the criteria upon which the court can exercise its jurisdiction to grant the orders sought.

38. Accordingly, the Originating Summons dated 19/9/2024 is hereby struck out. This being a family matter, there shall be no orders as to costs.

40 It is so ordered

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF MARCH 2026 VIA MICROSOFT TEAMS.

J. G. KEMEI
JUDGE

Delivered Online in the Presence of:

1. N/A for the Applicant
2. Mr Lijondo for the Interested Party
3. CA- Ms. Merylynn Nyanchama