



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 200 OF 2008

DIPA PULLING.....PLAINTIFF

VERSUS

SUCHAN INVESTMENTS LIMITED.....1ST DEFENDANT

SANDEEP RAJNI DESAI.....2ND DEFENDANT

NIRANJAN JASHBHAI DESAI.....3RD DEFENDANT

KEVIT SUBASH DESAI.....4TH DEFENDANT

JUDGMENT

Background:

By a written will dated 29th March, 1991, Jashbhai Motibhai Desai (hereinafter referred to as “the deceased”) bequeathed to the plaintiff and the 2nd, 3rd and 4th defendants all that parcel of land known as Land Reference No. 209/1916/6 (Original No. 209/1916/1/1) (hereinafter referred to as “the suit property”) to be held by them as tenants in common in undivided equal shares. The deceased died on 11th July, 1991 and grant of probate of his written will was issued to Niranjan Jashbhai Desai and Rajni Jashbhai Desai, the joint executors of his estate in Nairobi High Court Succession Cause No. 1147 of 1991 (hereinafter referred to as “the succession cause”). By a deed of assent dated 27th October, 1995, the said executors of the deceased’s will transferred to the plaintiff and the 2nd to 4th defendants herein the suit property together with the buildings and improvements thereon to hold as tenants in common in equal shares on 22nd June, 1999.

Sometimes in the year 2004, a dispute arose between the 2nd, 3rd and 4th defendants concerning their interests in the suit property. The dispute was not resolved and the 3rd and 4th defendants filed a suit against the 2nd defendant in the High Court at Nairobi namely, HCCC No. 364 of 2004 (hereinafter referred to as “the High Court suit”) seeking various reliefs among them, an order that the suit property be sold and the proceeds of sale less any liabilities incurred or to be incurred be shared equally amongst the registered proprietors. The plaintiff herein was not made a party to that suit although she was one of the proprietors of the suit property. That suit was compromised through a consent order made on 7th March, 2006. The consent order provided among others that:

(i) the suit property be sold and the proceeds of sale less any liabilities incurred or to be incurred be shared out equally among the registered proprietors of the property.

(ii) all disputes between the parties that gave rise to the suit be marked as settled.

On 8th December, 2006, the 3rd and 4th defendants herein moved the court in the succession cause aforesaid seeking the court’s approval of the said consent order made in the High Court suit on 7th March, 2006. The court in the succession cause upon considering the 3rd and 4th defendants’ application approved the said consent order on 8th December, 2006 and allowed the 2nd, 3rd and 4th defendants to sell the suit property.

The plaintiff was aggrieved with the order that was made in the succession cause allowing the sale of the suit property and moved the court on 17th August, 2007 to set aside the same on the ground that she was not served with the application which gave rise to the order. The plaintiff’s application was allowed on 29th July, 2008 and the order that was made on 20th June, 2007 in the succession cause aforesaid authorising the 2nd, 3rd and 4th defendants to sell the suit property was set aside.

While the plaintiff’s application seeking to set aside the order that was made in the succession cause on 20th June, 2007 aforesaid was

pending, the 3rd and 4th defendants entered into an agreement and supplementary agreement with the 1st defendant on 14th February, 2008 and 18th February, 2008 respectively for the sale of their half (½) undivided share in the suit property on terms and conditions that were set out in the said agreements. The agreement between the 3rd and 4th defendants, and the 1st defendant was completed successfully and the 3rd and 4th defendants' half (½) undivided share in the suit property was registered in the name of the 1st defendant on 31st March, 2008.

The present suit:

The plaintiff brought this suit on 29th April, 2008 seeking; a permanent injunction restraining the 1st defendant from accessing the suit property for the purposes of destroying and/or demolishing the buildings thereon or any of them, a declaration that the plaintiff was entitled to quiet enjoyment of the suit property and, a declaration that the suit property being a National Monument could not be destroyed. In her plaint dated 29th April, 2008, the plaintiff averred that she owned the suit property together with the 2nd to 4th defendants as tenants in common in equal shares and that the 3rd and 4th defendants had unilaterally sold their shares in the suit property to the 1st defendant who had threatened to invade the suit property and destroy the buildings standing thereon which had been gazetted as a National Monument. The plaintiff averred that in furtherance of its threats, the 1st defendant's director had visited the suit property on a number of occasions with armed policemen in an attempt to gain access to the property and on 18th April, 2008, the 1st defendant entered the suit property and deposited building materials thereon.

The suit was initially brought by the plaintiff against the 1st defendant only. On 21st May, 2008, the 2nd defendant herein was added to the suit as 2nd plaintiff on application by the 1st defendant. On 29th May 2008, the 1st defendant filed a statement of defence and counter-claim against the then two (2) plaintiffs. On 25th February, 2009, the 1st defendant filed amended defence and counter-claim in which, Sandeep Rajni Desai who was previously the 2nd plaintiff in the suit was struck out as a plaintiff and made a 2nd defendant. Through the same amendment, the 3rd and 4th defendants were added to the suit as defendants.

In its amended defence and counterclaim, the 1st defendant averred that it purchased the 3rd and 4th defendants' shares in the suit property pursuant to the orders that were issued in the High Court suit and the succession cause mentioned herein earlier. The 1st defendant averred that following that sale, the 1st defendant was registered as a proprietor of the suit property together with the plaintiff and the 2nd defendant as tenants in common in undivided shares with the 1st defendant holding two (2) shares and the plaintiff and the 2nd defendant holding one (1) share each. The 1st defendant averred that although the 1st defendant was the owner of two (2) shares in the suit property, the plaintiff and 2nd defendant had wrongfully restrained it from accessing the property. The 1st defendant counter-claimed against the plaintiff and the 2nd defendant for among others, an order directing a registered surveyor to be appointed by the court or by agreement of the parties to partition the suit property, an order physically allocating the suit property to the plaintiff and the 1st and 2nd defendants in accordance with their respective shares and an order granting the 1st defendant access to its portion of the suit property.

I have not seen on record the plaintiff's reply to amended defence or defence to amended counter-claim by the 1st defendant. The 2nd defendant filed a defence to the plaintiff's claim and the 1st defendant's counter-claim, and a counter-claim against the 1st defendant with leave of the court on 2nd February, 2018. The 2nd defendant averred that, the 2nd defendant, the plaintiff and the 3rd and 4th defendants inherited the suit property from Jashbhai Motibhai Desai (the deceased). The 2nd defendant averred that the deceased was the plaintiff and the 3rd defendant's father and a grandfather to the 2nd and 4th defendants. The 2nd defendant averred that by his will dated 29th March, 1991, the deceased bequeathed the suit property to the plaintiff and the 2nd to 4th defendants to hold in undivided equal shares absolutely. The 2nd defendant averred that the deceased's will provided that the suit property could only be sold if there was unanimity amongst the beneficiaries and that the plaintiff and the 3rd defendant's interests in the suit property were limited to their lifetime.

The 2nd defendant averred that following the issuance and confirmation of a grant of probate in respect of the estate of the deceased, a deed of assent was executed between the administrators of the estate of the deceased and, the plaintiff and the 2nd to 4th defendants under which the suit property was transferred and registered in the names of the plaintiff and the 2nd to 4th defendant on 22nd June, 1999 to hold as tenants in common in undivided equal shares.

The 2nd defendant averred that since 2000, he was the sole occupant of the suit property with the knowledge and consent of the plaintiff and the 3rd and 4th defendants. The 2nd defendant averred that in 2004, the 3rd and 4th defendants expressed to him their wish to have the suit property sold and the proceeds of sale shared equally amongst the registered owners of the property. The 2nd defendant averred that at the time, the plaintiff and he were not ready and willing to sell the suit property due to the sentimental value which they attached to the building standing thereon known as Desai House which the deceased used during the colonial period as a meeting place for those who were agitating for Kenya's freedom from the colonial rule.

The 2nd defendant averred that due to the plaintiff and the 2nd defendant's reluctance to sell the suit property, the 3rd and 4th defendants filed the High Court suit in which the 3rd and 4th defendants sought to compel him to agree to sell his interest in the suit property. The 2nd defendant averred that without his knowledge or agreement the 3rd and 4th defendants procured an irregular consent in the High Court suit on 3rd April, 2006 authorising them to sell the suit property which consent they presented to the court in the succession cause and irregularly had it adopted by the court on 20th June, 2007 without the knowledge of the 2nd defendant.

The 2nd defendant averred that the plaintiff challenged the order authorising the sale of the suit property in the succession cause and had it stayed and ultimately set aside on 29th July, 2008. The 2nd defendant averred that the 3rd defendant who had only a life interest in the suit property had no title in the property to sell to the 1st defendant. The 2nd defendant averred that the orders issued in the succession cause could not enable the 3rd and 4th defendants to sell their shares in the suit property to the 1st defendant because the order was obtained irregularly and was accordingly set aside.

The 2nd defendant averred that on several occasions, the 1st defendant's director invaded the suit property in the company of goons and forcibly gained access to the same. The 2nd defendant averred that the 2nd defendant and the plaintiff had obtained several court orders to restrain the 1st defendant's acts of trespass on the suit property but the 1st defendant through its agents and servants had continued with acts of trespass on the suit property and interference with the 2nd defendant's ownership and enjoyment of the property. The 2nd defendant averred that the 1st defendant's said acts of trespass had been undertaken maliciously with the intention of coercing the 2nd defendant to accede to its claims of ownership over the suit property and vacate the same to allow for the demolition of Desai House which is standing on the property to give room for the construction of apartments.

The 2nd defendant averred that by reason of the 1st defendant's conduct aforesaid, the 2nd defendant was subjected to great anguish and mental illness and suffered loss and damage for which he claimed general and special damages from the 1st defendant. By way of special damages, the 2nd defendant claimed Kshs. 80,800/= being veterinary costs for treating his dogs which were attacked by the 1st defendant's agents, Kshs. 2,422,632.71/= for hiring security and Kshs. 832,228.73/= being storage charges and costs for moving pieces of art that were originally in Desai House on the suit property for storage off-site for safe keeping. The 2nd defendant denied that the 1st defendant lawfully purchased the interests of the 3rd and 4th defendants in the suit property and that it was registered as a co-proprietor of the suit property. The 2nd defendant denied that the 1st defendant was entitled to any of the reliefs sought in the amended counter-claim.

The 2nd defendant averred that the 1st defendant had threatened and intended unless restrained by the court to continue with the wrongful acts complained of. The 2nd defendant reiterated the contents of its defence and counter-claimed as against the 1st defendant for; a declaration that the 1st defendant by itself or through its directors, servants or agents were not entitled to enter or use the suit property, a permanent injunction restraining the 1st defendant from entering or using the suit property, an order of eviction of the 1st defendant from the suit property, an order for the demolition of the wall and structures put up by the 1st defendant on the suit property, special damages in the sum of Kshs. 3,355,661.44 and damages for trespass and interference with the 2nd defendant's enjoyment of the suit property.

The evidence:

It is not clear from the record whether the 1st defendant filed a reply to the 2nd defendant's defence and defence to the 2nd defendant's counter-claim. I have not seen any in the court file. The 3rd and 4th defendants did not defend the suit. When the hearing of the suit commenced on 8th February, 2018, the parties agreed that the witness statement of the plaintiff dated 23rd August, 2013 and her bundle of documents dated 10th September, 2013 be admitted in evidence without the plaintiff being called to testify.

In her witness statement aforesaid, the plaintiff reiterated the contents of the plaint that I have highlighted herein earlier. The plaintiff reiterated that according to the will of Jashbhai Motibhai Desai (deceased), the suit property could only be sold by agreement of all the beneficiaries. The plaintiff reiterated that the order which the 3rd and 4th defendants obtained in the succession cause authorising them to sell the suit property was set aside at her instance. The plaintiff stated that the building on the suit property was declared a National Monument through a Gazette Notice No. 3204 of 3rd April, 2008 published in the Kenya Gazette of 25th April, 2008. The plaintiff stated that during the subsistence of her application to set aside the order that been issued in the succession cause aforesaid and after the building on the suit property had been declared a National Monument, the 3rd and 4th defendants sold their 50% share in the suit property to the 1st defendant which deposited construction materials on the suit property and threatened to demolish the building thereon.

The plaintiff stated that the 1st defendant's director went to the suit property on a number of occasions with armed policemen in an attempt to gain access to the suit property. The plaintiff stated that if the 1st defendant succeeded in demolishing the buildings on the suit property, she would suffer substantial loss and would lose the income from the suit property. The plaintiff urged the court to issue a permanent injunction restraining the 1st defendant from interfering with her quiet possession of the suit property. The plaintiff closed her case after the admission of her statement and bundle of documents in evidence.

The 1st defendant called four (4) witnesses. The 1st defendant's first witness was John Koyier (DW1). DW1 was a planner. He told the court that he held a Master of Science Degree and a Diploma in Urban Planning and that he was a professional urban planner and a member of Kenya Institute of Planners. He told the court that he had been instructed by the 1st defendant to advise it on the available options for partitioning the suit property in which it owned 50% share. He told the court that he gave the 1st defendant five options which he presented to the 1st defendant in a report dated 8th January, 2018. He produced the report in evidence as DExh. 1.

The 1st defendant's second witness was Joel Odhiambo Akumu (DW2). DW2 was a licensed surveyor. He told the court that one, Kamal Chandulal Shah informed him that he had some lay-out proposals for partitioning of a property and asked him to confirm if the said proposals were implementable from a survey perspective. He stated that the said Kamal Chandulal Shah availed to him the lay-out drawings prepared by DW1 and DW1's report among other documents. He stated that Kamal Chandulal Shah wanted to know if the proposals that had been given by DW1 could be implemented on the ground. He stated that he visited the suit property after which he prepared a report in which he concluded that DW1's proposals could be implemented on the ground. DW2 produced his report dated 10th January, 2018 as DExh. 2.

The 1st defendant's other witness was Bernard Kamau Gachoka (DW3). DW3 was a registered valuer and an estate agent. He told the court that Kamal Chandulal Shah sought his professional opinion regarding some claims that he had in respect of some property that he purchased but was not given vacant possession. DW3 stated that the said Kamal Chandulal Shah gave him a copy of the 1st defendant's defence and counter-claim and copies of the earlier valuation reports that had been prepared in respect of the suit property. He stated that following the said instructions, he prepared a report under Value Line Consulting Ltd. which he produced in evidence as DExh. 3. The 1st defendant's last witness was its director, Kamal Chandulal Shah (DW4). DW4 adopted his witness statements filed on 25th July, 2017 and 16th January, 2018 as his evidence in chief.

The 2nd defendant (DW5) was the last to give evidence at the trial. In his testimony, the 2nd defendant adopted his witness statement dated 2nd February, 2018 as part of his evidence in chief and produced his bundle and supplementary bundle of documents as 2nd defendant's Exh.1 and Exh. 2 respectively. The 2nd defendant reiterated the contents on his defence and counter-claim against the 1st defendant. He told the court that he was entitled one (1) undivided share in the suit property. He stated further that according to the will of his grandfather (the deceased) pursuant to which he acquired a share in the suit property; in the event that the plaintiff and the 3rd defendant died, their shares in the property were to be transferred to the 2nd and 4th defendants. He stated that the 3rd defendant had no right to sell his share in the suit property. He stated that it was his deceased grandfather's wish that the suit property remains in the hands of the family. The 2nd defendant stated that he carried out a search on the title of the suit property on 7th January, 2014 and obtained a result on 8th January, 2014 which showed that the suit property was registered in the names of the plaintiff and the 2nd to 4th defendants.

The 2nd defendant stated that according to the said search result, the 1st defendant was not indicated as one of the owners of the suit property. The 2nd defendant stated that he visited the Nairobi City County Government offices and found that the particulars of the suit property did not exist in their records. He stated that he reported the matter to the Directorate of Criminal Investigations (DCI) for investigation. He stated that the DCI wrote to him confirming that the suit property was still registered in the names of the plaintiff and the 2nd to 4th defendants.

The 2nd defendant stated further that in December, 2017, he carried out an online search on the 1st defendant in the Companies Registry portal which showed that the 1st defendant was incorporated on 11th June, 2010. The 2nd defendant stated that having been incorporated on 11th June, 2010, it was not possible for the 1st defendant to have purchased the suit property in 2008. The 2nd defendant stated that he was not liable to pay any rent to the 1st defendant because he did not have any tenant on the suit property. The 2nd defendant averred that the proposals that were put forward by the 1st defendant for the subdivision of the suit property were all not viable as all would require the demolition of the house which he occupied on the suit property.

The 2nd defendant stated that the options that had been put forward for the portioning of the suit property were speculative and did not take into account the fact that the building on the suit property had been declared a National Monument. The 2nd defendant stated that the building on the suit property which is to be demolished in the various proposals for partitioning the suit property put forward by the 1st defendant had been their family residence for over 80 years.

The submissions:

After the close of evidence, the parties filed written submissions. The plaintiff filed her submissions on 17th January, 2019. In her submissions, the plaintiff contended that the suit property could only be sold if it was unanimously agreed by all the beneficiaries. The plaintiff submitted that the 1st defendant's act of altering the suit property interfered with her right to peaceful and quiet enjoyment of her share of the suit property. The plaintiff averred that the fact that she had an interest in the suit property was not in contention. The plaintiff submitted that the 1st defendant's forceful entry in the suit property and the demolition of structures thereon denied her quiet possession and enjoyment of the property.

The plaintiff submitted further that, since the suit property was held by the plaintiff and the 2nd to 4th defendants as tenants in common in equal shares, none of them was entitled to a separate share in the property and as such disposition of the suit property could be made only by all the proprietors. The plaintiff contended that any transfer of a share in the suit property was void unless the property was first partitioned. The plaintiff submitted that the 1st defendant was aware that the suit property was held by the proprietors as tenants in common and that there was a restriction in the disposition of the property. The plaintiff submitted that despite that knowledge, the 1st defendant colluded with the 2nd to 4th defendants to purchase the 3rd and 4th defendant's shares in the suit property without first obtaining the plaintiff's consent. The plaintiff submitted that the sale of the 3rd and 4th defendants' shares in the suit property to the 1st defendant was illegal and that the 1st defendant should not be allowed to benefit from an illegality.

The plaintiff submitted further that she was not liable to pay any compensation to the 1st defendant. The plaintiff averred that she had been residing in the United Kingdom for the last 40 years and that she had no physical control of the suit property and that she was not privy to the sale of the shares in the suit property to the 1st defendant. The plaintiff averred that she was a stranger to the 1st defendant and as such she was not liable to the 1st defendant for the alleged loss of profits. The plaintiff submitted that the suit property could not be altered as it had been declared as a National Monument. In conclusion, the plaintiff submitted that she had established her claim against the defendants.

The 1st defendant filed its submissions on 1st March, 2019. The 1st defendant submitted that in a judgment delivered in Nairobi Civil Appeal No. 46 of 2012, the Court of Appeal found the declaration of the building on the suit property as a National Monument null and void, and that the said decision of the Court of Appeal had not been set aside. The 1st defendant submitted that the said decision of the Court of Appeal meant that the suit property was a private residential property. The 1st defendant submitted that this court had in its ruling delivered on 28th March, 2017 made a finding that the 1st defendant owned 50% share in the suit property while the plaintiff and the 2nd defendant owned 25% share each in the property. The 1st defendant submitted further that the court had also made a finding that the suit property had not been formally partitioned and that the 2nd defendant was in occupation of the entire property in dispute. The 1st defendant submitted that the 2nd defendant had been ordered to deposit all rent collected from the suit property in a joint account with effect from 1st April, 2017 which order the 1st defendant failed to obey.

With regard to its counter-claim, the 1st defendant submitted that the plaintiff did not file a defence to the counter-claim and did not appear in court to give evidence neither did she call any witness. The 1st defendant submitted that its witnesses more particularly the physical planner (DW1) gave the court guidance on how the suit property could be partitioned. The 1st defendant submitted that the surveyor (DW2) confirmed that partitioning of the property was possible. The 1st defendant submitted that it was entitled to prayers (a) and (b) of its counter-

claim. The 1st defendant submitted that prayers (c) and (d) of the plaint were spent because the 1st defendant was already occupying half of the suit property that was sold to the 1st defendant by the 3rd and 4th defendants. With regard to prayers (e), (f) and (g) of the counter-claim, the 1st defendant submitted that the valuer (DW3) who gave evidence on its behalf submitted a report in which he identified what was payable to the 1st defendant on account of mesne profits, fair market rent from all the buildings on the suit property and the 1st defendant's share of rent from 18th February, 2008 up to 18th March, 2016. The 1st defendant submitted that the evidence that was tendered by its witnesses was not shaken in any way and that the 1st defendant had proved its case against the plaintiff and the 2nd defendant on a balance of probabilities.

The 1st defendant submitted that the plaintiff had admitted that she was entitled to 25% share in the suit property which she was entitled to enjoy peacefully. The 1st defendant submitted that it was also entitled to enjoy its 50% share in the suit property peacefully. The 1st defendant submitted that in order for the plaintiff and the 1st and 2nd defendants to enjoy ownership of their respective shares in the suit property without interference from each other, it was necessary and logical that an order for the partitioning of the suit property be made. The 1st defendant submitted that the plaintiff's contention that the 3rd and 4th defendants could not sell their shares in the suit property without her consent had no basis. The 1st defendant submitted that the plaintiff's contention that the suit property was a National Monument could not also hold in light of the decision of the Court of Appeal referred to earlier.

The 1st defendant submitted further that the 2nd defendant's contention that the 1st defendant did not own 50% share in the suit property had no basis in light of the court's earlier finding that indeed, the 1st defendant owned 50% share in the suit property. The 1st defendant submitted that it was not a trespasser on the suit property and that the special damages claimed against it by the 2nd defendant had no basis. The 1st defendant reiterated that it had established its case against the plaintiff and the 2nd defendant on a balance of probabilities and urged the court to allow its claim.

The 2nd defendant filed his submissions on 12th March, 2019. The 2nd defendant submitted that the plaintiff's claim against the 1st defendant was merited in that the plaintiff had established that the 1st defendant intended to demolish the buildings on the suit property which could have interfered with her proprietary rights on the suit property. The 2nd defendant submitted that the plaintiff's evidence was corroborated by the 2nd defendant. The 2nd defendant submitted further that the 1st defendant's counter-claim was a non-starter. The 2nd defendant submitted that the counter-claim was defective on account of the fact that it was not verified by an affidavit. The 2nd defendant submitted that the court had no jurisdiction to entertain a counter-claim that had not been verified. The 2nd defendant cited a number of authorities in support of his submission on this issue. The 2nd defendant submitted further that the 1st defendant's counter-claim was non-existent as it was withdrawn by the 1st defendant under Order 25 Rule 1 of the Civil Procedure Rules through a Notice of Withdrawal dated 10th November, 2016. The 2nd defendant averred that the withdrawal of the counter-claim was confirmed by the 1st defendant's director in his witness statement dated 20th July, 2017. The 2nd defendant contended that the withdrawal of the counter-claim took effect on 10th November, 2016 and that the court had no jurisdiction to entertain the said counter-claim even though the 2nd defendant had responded to it. The 2nd defendant cited an authority in support of that submission. The 2nd defendant submitted that once a counter-claim is withdrawn, there is no provision in the rules for reinstating the same or for the recall of the withdrawal.

The 2nd defendant averred that even of the technical issues above were ignored, the 1st defendant's counter-claim still had no merit. The 2nd defendant submitted that the 2nd defendant did not have a validly acquired and registered legal interest in the suit property. The 2nd defendant submitted that even if it was assumed that the 1st defendant was a co-owner of the suit property; the suit property could not be partitioned for a number of reasons. The 2nd defendant submitted that according to the conditions attached to the title of the suit property, the property could not be subdivided without the consent of the Commissioner of Lands and that the 1st defendant had not joined the Commissioner of Lands as a party to the suit. The 2nd defendant submitted that the Commissioner of Lands was entitled to be heard on the issue of partitioning of the suit property together with the National Museums of Kenya which had declared the suit property a National Monument. The 2nd defendant submitted further that the 1st defendant's claim for rent against the 2nd defendant had no basis since no evidence was placed before the court in proof of the fact that the 2nd defendant had rented out the suit property or was collecting rent therefrom. The 2nd defendant submitted further that the claims for mesne profits and general damages could not lie against a co-tenant and more particularly when the 1st defendant had been kept out of the suit property by a court order validly issued.

The 2nd defendant submitted that his counter-claim against the 1st defendant should succeed for a number of reasons. The 2nd defendant submitted that the 1st defendant was not a registered co-owner of the suit property. The 2nd defendant submitted that this fact was proved by an official search which the 2nd defendant carried out on 8th January, 2014 which showed that the property was registered in the names of the Plaintiff and the 2nd to 4th Defendants. The 2nd defendant submitted that the said search was further buttressed by the documents that the 2nd defendant obtained from the National Land Commission and a letter dated 24th November, 2017 from the DCI which were all produced in evidence by the 2nd defendant. The 2nd defendant averred that a copy of the title for the suit property which was produced by the 1st defendant in evidence which showed that it was registered as a co-owner of the suit property on 31st March, 2008 was not certified by the Land Registry.

The 2nd defendant submitted further that the 1st defendant could not as a matter of law have acquired an interest in the suit property. The 2nd defendant submitted that the 1st defendant was incorporated on 11th June, 2010 and as such could not have acquired a property in 2008. The 2nd defendant submitted further that the 3rd and 4th defendants' interests in the suit property were restricted to the enjoyment of 3rd and 4th defendants personally and were under the Will of the deceased from whose estate the property devolved to them and section 6(d) of the Transfer of Property Act, 1882 of India not transferrable. The 2nd Defendant averred that the 3rd and 4th Defendants who had no physical possession of the suit property could not transfer a valid title over their interest in the suit property to a third party without a partition having been done first in their favour.

The 2nd defendant cited an Indian case and C.L. Gupta's Law of Transfer of Property in support of this submission. The 2nd defendant submitted further that the 3rd defendant had only a life interest in the suit property with a gift to the 2nd and 4th defendant upon the death of the 3rd defendant. The 2nd defendant submitted that the 3rd defendant's interest in the suit property was not transferrable. In support of this submission, the 2nd defendant also relied on an Indian case and C.L. Gupta's text on Transfer of Property. The 2nd defendant averred that the sale of the 3rd and 4th defendants' shares in the suit property to the 1st defendant violated his pre-emptive rights to purchase the said shares coming after the 2nd defendant had offered to purchase the said shares.

The 2nd defendant submitted further that the sale of the 3rd and 4th defendants' shares in the suit property was carried out in breach of the court orders that were issued by Aluoch J. on 29th August, 2007 which prohibited the sale of the suit property. The 2nd defendant submitted further that the sale was in breach of the doctrine of *lis pendens* provided for in section 52 of the Transfer of Property Act, 1882 of India as it was carried out when the plaintiff's application in the succession cause was pending. The 2nd defendant submitted that the 1st defendant entered into an agreement for sale with the 3rd and 4th defendants with the full knowledge of the existence of the said stay order and the proceedings in the succession cause.

In conclusion, the 2nd defendant submitted that the 1st defendant was liable to him for trespass and ensuing damages which were confirmed by the court in its ruling dated 28th March, 2017. The 2nd defendant submitted that the 1st defendant is deemed to have admitted his claim having failed to file a defence to his counter-claim. The 2nd defendant urged the court to grant the orders sought in the plaintiff's plaint and in his counter-claim against the 2nd defendant.

Issues arising for determination:

The parties did not agree on issues for determination by the court. In their submissions, each party framed his own issues. Some of the issues raised by the parties were not pleaded and the court cannot base its findings on the same. The court can only base its decision on pleaded issues. See, Nashon Aroko M. Seme v John Osumba Olum [2016] eKLR and Girdhari Lal Vidyarthi v Ram Rakha [1957] E.A 527. Order 2 Rule 4 of the Civil Procedure Rules, 2010 which is in the same terms as Order VI Rule 4 of the repealed Civil Procedure Rules provides that a party must in any pleading subsequent to a plaint plead any matter such as performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of Limitation or any facts showing illegality, which makes any claim or defence of the opposite party not maintainable or which if not specifically pleaded might take the opposite party by surprise or which raises issues of fact not arising out of the preceding pleading.

From the pleadings filed by the parties, I am of the view that the following are the issues which arise for determination in this suit;

- 1. Whether the 3rd and 4th defendants had a right to sell their shares in the suit property to the 1st defendant without the consent of the plaintiff and the 2nd defendant or at all.**
- 2. Whether the 1st defendant acquired the 3rd and 4th defendants' shares in the suit property lawfully and whether the 1st defendant is indeed registered as the owner of the said shares.**
- 3. Whether the 1st defendant had a right to enter the suit property and to commence development on a portion thereof.**
- 4. Whether the plaintiff is entitled to the reliefs sought against the defendants.**
- 5. Whether the 1st defendant is entitled to the reliefs sought against the plaintiff and the 2nd, 3rd and 4th defendants in its amended counter-claim.**
- 6. Whether the 2nd defendant is entitled to the reliefs sought in its counter-claim against the 1st defendant.**

Whether the 3rd and 4th defendants had a right to sell their shares in the suit property to the 1st defendant without the consent of the plaintiff and the 2nd defendant or at all.

As I have mentioned earlier in this judgment, the suit property was bequeathed to the plaintiff and the 2nd to 4th defendants by Jashbhai Motibhai Desai ("the deceased") in his will dated 29th March, 1991. On 2nd December, 1991, a grant of probate of the will of the deceased was issued in the succession cause. The said grant of probate was confirmed on 27th October, 1995. Through an assent dated 27th October, 1995 between the personal representatives of the estate of the deceased on the one hand and, the plaintiff and the 2nd to 4th defendants on the other hand, the personal representatives of the deceased at the request of the plaintiff and the 2nd to 4th defendants transferred the suit property together with the developments thereon to the plaintiff and the 2nd to 4th defendants to hold as tenants in common in equal shares absolutely.

Following the registration of the said assent, the suit property was transferred to the plaintiff and the 2nd to 4th defendants as tenants in common in equal shares. The suit property was registered under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). In the pleadings and submissions by the parties, it was common ground that the plaintiff and the 2nd to 4th defendants held the suit property at all material times as tenants in common in equal shares.

In Megarry & Wade, The Law of Real Property, 17th Edition at pages 493 and 494 paragraphs 13-009 to 13-012, the authors have stated as

follows regarding the nature of a tenancy in common:

- 1. “1. The tenants hold in undivided shares. Unlike joint tenants, 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. Thus tenants in common have quite separate interests. 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. While the tenancy in common lasts, no one can say which of them owns any particular parcel of land.**
- 2. There is no right of survivorship. The size of each tenant’s share is fixed once and for all and is not affected by the death of one of his companions. When a tenant in common dies, his interest passes under his will or intestacy, for his undivided share is his to dispose of as he wishes...**
- 3. Only the unity of possession is essential. Although the four unities of a joint tenancy may be present in a tenancy in common, the only unity which is essential is the unity of possession. In particular, it should be noted that the unity of interest may be absent and the tenants may hold unequal interests, so that one tenant in common may be entitled to a one-fifth share and the other to four-fifths, or one may be entitled for life and another in fee simple”.**

In the case of Kurshed Begum Mirza v Jackson Kaibunga [2017] eKLR, the court stated that:

“By definition, a tenancy in common is a tenancy by two or more persons, in equal or unequal undivided shares, with each person having the right to possess the whole property but no right of survivorship. The central characteristic of a tenancy in common is that each tenant is deemed to own by himself, a physically undivided part of the entire parcel (see. Black’s Law Dictionary, 9th Edn and Thomas F. Bergin & Paul G. Haskell, ‘Preface to Estates in Land and Future interests 54 2nd Edn, 1984)”.

The 2nd defendant had contended that the plaintiff and the 3rd defendant had life interest in the suit property and as such could not dispose of their interests in the property. This argument that was based on the will of the deceased has no merit in my view. The will of the deceased took effect on the death of the testator. From my understanding of the deceased’s will, there is no indication at all that it was the deceased’s wish that the plaintiff and the 3rd defendant were to have life interest in the suit property. A plain reading and interpretation of the will gives the impression that the deceased intended to take care of a situation where the plaintiff and the 3rd defendant or any of them predeceased him. It was only if the two or any of them predeceased the deceased that their shares would go to the 2nd and 4th defendants. I am of the view that if it was the wish of the deceased that the plaintiff and the 3rd defendant should have life interest in the suit property he would have stated so expressly in the will.

This interpretation of the will finds support in the assent dated 27th October, 1995 between the executors of the will of the deceased and, the plaintiff and the 2nd to 4th defendants. In the said assent, the plaintiff and the 2nd to 4th defendants agreed to have the suit property transferred to them as tenants in common in undivided shares absolutely (emphasis added). When the suit property was transferred and registered in the names of the plaintiff and the 2nd to 4th defendants, they were registered as holding the property as tenants in common in undivided equal shares without any qualification as to the shares held by any of them. I am of the view that if the shares held by the plaintiff and the 3rd defendant were for life, that fact ought to have been set out in the title.

As I have mentioned earlier, the suit property was registered under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). In the case of Nishith Yogendra Patel Legal Representative of The Deceased Plaintiff Yogendra Purshottam Patel v Pascale Mireilee Baksh (Nee Patel) & another [2019] eKLR, the court stated that:

“The titles to the house and the farm very explicitly showed the three brothers to be owners in equal shares without any suggestion of a trust. Their title as such was indefeasible under section 23 of the RTA save on grounds neither alleged nor were extant herein. This has been affirmed in a long line of authorities including JOSEPH ARAP NGOK vs. MOJI OLE KEIWA & 4 OTHERS [1997] eKLR, MBOTHU & EIGHT OTHERS vs. WAITITU & ELEVEN OTHERS (supra) and NAIROBI PERMANENT MARKETS SOCIETY & OTHERS vs. SALIMA ENTERPRISES & OTHERS [1995-1998] 1 EA 238”.

It is my finding that the plaintiff and the 2nd to 4th defendants held undivided shares in the suit property equally and absolutely. The contention by the 2nd defendant that the 3rd defendant could not dispose of his interest in the suit property because he only had life interest therein is overruled. The plaintiff and the 2nd defendant had also contended that the 3rd and 4th defendants could not transfer or dispose of their shares in the suit property without their permission. This argument was partly based on the contents of the will which I have referred to earlier and partly of what was claimed to be the law. To the extent that the argument is based on the will of the deceased, it must fail on the same grounds that I have proffered above. When the plaintiff and the 2nd to 4th defendants were registered as owners of the suit property, there was no indication that none of them could transfer their shares in the suit property without the consent of the others. I am of the view that persons dealing with the suit property had no duty to investigate the root of the tenancy in common that was held by the plaintiff and the 2nd to 4th defendants beyond the title and the register to find out if there was any qualification to the disposal of any of the shares held by them.

Section 44 of the Transfer of Property Act of 1882 (now repealed) provides as follows:

“Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect

to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

In the case of Yogendra Purshottam Patel v Pascale Mireille Baksh (nee Patel) & 2 others [2006] eKLR, where the court was dealing with a dispute over among others properties held by tenants in common, the court stated as follows:

"The first defendant as a tenant in common in equal shares has a right to deal with her share of the Nairobi West house and Kigwa estate without the permission of the court. She can sell her undivided share without the authority of the court. However, it is not easy for her to sell her undivided shares particularly to third parties seeing that the other co-owners are her relatives. I can see a lot of problems particularly in selling her 1/3 share of Kigwa estate to strangers. In my view, it is just that the first defendant should offer her share for sale. In the disputed properties to one or both co-owners as first priority and if they decline to buy or fail to offer acceptable price then offer her shares for sale to other close family members. If that fails, then she can sell her shares to any interested purchaser."

This finding by the High Court was confirmed by the Court of Appeal in Nishith Yogendra Patel Legal Representative of the Deceased Plaintiff Yogendra Purshottam Patel v Pascale Mireille Baksh (Nee Patel) & another (supra). From the foregoing, I am of the view that at the time when the 3rd and 4th defendants sold their shares in the suit property to the 1st defendant, there was no law prohibiting an owner of a share in a property held under tenancy in common registered under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) from selling his share in the property without the consent of the other tenants in common or the court. Whether or not a purchaser could take possession of such share is a different issue and depended on the circumstances of each case.

I have perused the Indian case of Baldev Singh v Smt. Darshani Devi and Another, AIR 1993 HP 141 that was cited by the 2nd defendant on this issue. That case is distinguishable. The main dispute in that case revolved around whether an owner of un-divided share in a property could sell a specific portion of such property to a third party and whether the third party purchaser was entitled to possession of that specific portion of the property. The dispute did not turn on the issue of whether or not an owner of undivided share in a property held under tenancy in common could sell his share in such property.

The 2nd defendant had also contended that the 3rd and 4th defendants' sale of their shares in the suit property was in breach of the 2nd defendant's pre-emptive right to purchase the said shares. No evidence was placed by the 2nd defendant before the court of the existence of the said pre-emptive right. The offer alleged to have been made by the 2nd defendant to purchase the 3rd and 4th defendants' shares in the suit property was not produced in evidence. I find no merit in this contention.

The 2nd defendant had also contended that the sale of the 3rd and 4th defendants' shares in the suit property was carried out in contravention of the order of stay that was made by Aluoch J. on 29th August, 2007 in the succession cause. In my view, the order that was made in the said succession cause on 20th June, 2007 that was stayed by Aluoch J. had authorised the sale of the whole of the suit property. The order of 20th June, 2007 did not refer to or concern the sale of the 3rd and 4th defendants' shares in the suit property which is the subject of this suit. The 3rd and 4th defendants did not sell the entire property but only their shares. In the circumstances, I am unable to see how the sale of the 3rd and 4th defendants' shares in the suit property violated the orders of Aluoch J. made on 29th August, 2007. In any case, the said order by Aluoch J. did not prohibit the 3rd and 4th defendants from selling their shares in the suit property.

The last salvo that was thrown by the 2nd defendant against the sale of the 3rd and 4th defendants' shares in the suit property was based on section 52 of the Transfer of Property Act, 1882 (now repealed) which provides as follows:

"During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

This section deals with the *lis pendens* rule. I cannot see the relevance of the rule in these proceedings. A sale of a property which is the subject of an ongoing suit does not become void under the *lis pendens* rule. What the rule says is that anyone who purchases such property does so at his own risk since any interest acquired would be subject to the final outcome of the suit. The 2nd defendant's objection to the sale of the 3rd and 4th defendants' shares in the suit property based on the *lis pendens* rule has no merit.

Due to the foregoing, it is my finding that the 3rd and 4th defendants had a right to sell their shares in the suit property without the consent of the other co-owners of the property.

Whether the 1st defendant acquired the 3rd and 4th defendants' shares in the suit property lawfully and whether the 1st defendant is indeed registered as the owner of the said shares.

I have already held that the 3rd and 4th defendants had a right to sell their shares in the suit property and that there was no legal impediment to such sale. The sale of the 3rd and 4th defendants shares in the suit property was therefore lawful. The 2nd defendant had also contended that

the 1st defendant was not registered as a co-owner of the suit property. In support of this contention, the 2nd defendant relied on a search which he purportedly carried out on the title of the suit property on 8th January, 2014 and correspondence he exchanged with the National Land Commission and the Directorate of Criminal Investigations (DCI).

I find the 2nd defendant's claim that the 1st defendant is not registered as a co-owner of the suit property insincere for a number of reasons. First, this suit was brought by the plaintiff. In paragraphs 4 and 5 of the plaint, the plaintiff admitted that the 3rd and 4th defendants had sold their shares in the suit property to the 1st defendant and that the 1st defendant had half undivided share in the suit property. In her affidavit sworn on 29th April, 2008 in support of her application for a temporary injunction of the same date, the plaintiff stated that she, the 2nd defendant and the 1st defendant held the suit property as tenants in common in undivided shares. To the said affidavit, the plaintiff annexed as annexure "DP1", a copy of Grant No. I.R 99139 for L. R. 209/1916/6 (the suit property) as the title for the suit property. Entry No. 3 in the said Grant is the registration of transfer of the 3rd and 4th defendants' shares in the suit property to the 1st defendant. Grant No. I.R 99139 was issued on 22nd September, 2005 and registered on 6th October, 2005.

At this stage, note should be taken of the fact that the property that the plaintiff and the 2nd to 4th defendants inherited from their deceased father, Jashbhai Motibhai Desai was a leasehold interest for a term of 99 years from 1st April, 1904 under Grant No. I.R 15204. This lease expired on 1st April, 2003. Grant No. I.R 99139 was a renewal of the said old lease under Grant No. I.R 15204 which expired in 2003. As a result of the expiry of the initial 99-year lease, Grant No. I.R 15204 ceased to exist. The same was replaced by a new Grant No. I.R 99139 which is a lease of 50 years with effect from 1st April, 2003. This is the grant which the plaintiff had referred to in her affidavit aforesaid. In his own affidavit sworn on 23rd March, 2016 in support of an application for injunction of the same date, the 2nd defendant stated as follows in paragraph 2:

"THAT I am a joint owner of the undivided share with Dipa Pulling, the Plaintiff herein and Suchan Investments Limited whose purchase I will challenge in due course in respect of the suit property and in possession of the property. Annexed hereto and marked "SD 1" is a copy of the Title."

In this affidavit, the 2nd defendant admitted that the 1st defendant owned undivided share in the suit property. In addition, the title that the 2nd defendant annexed to this affidavit was Grant No. I.R 99139 which has the 1st defendant's interest in the suit property endorsed thereon. The 2nd defendant who had stated on oath that the 1st defendant owned undivided share in the suit property together with the plaintiff and he cannot turn round and claim that the 1st defendant is not registered as a co-owner of the suit property.

In a desperate attempt to push this contention forward, the 2nd defendant relied on a purported search on the suit property dated 8th January, 2014(2nd DExh. 2). The purported search was done on the old title for the suit property namely Grant No. I.R 15204. The old title of the suit property was in the names of the plaintiff and the 2nd to 4th defendants only. The 1st defendant's interest in the suit property was entered in the new Grant No. I.R 99139 which was issued in 2005. The 2nd defendant's search that was done on an expired lease after a new title had been issued is worthless and of no evidential significance. As a further demonstration of the 2nd defendant's insincerity and bad faith, the 2nd defendant relied on a letter dated 24th November, 2017 from the DCI in support of his contention that the 1st defendant was not registered as a co-owner of the suit property. The letter is at page 69 of 2nd defendant's Exh. 3. In the said letter, the DCI enclosed a number of documents which included "New Grant" and "Expired Lease". The 2nd defendant did not produce the new grant that was referred to in the said letter by the DCI. Instead, he chose to rely on the expired lease to support his position on the 1st defendant's interest in the suit property.

The 2nd defendant had also contended that the 1st defendant was not in existence as at 31st March, 2008 when it is said to have acquired interest in the suit property. In support of this claim, the 2nd defendant relied on a purported search done in the Registry of Companies' Portal by one, Phineas Omwola Ndengu on 4th January, 2018. According to the search (page 74 of 2nd DExh.3), the 1st defendant was incorporated in 11 June, 2010. The allegation that the 1st defendant was incorporated in 2010 was raised by the 2nd defendant in his evidence. It was not pleaded so as to give the 1st defendant an opportunity to respond to the same. The manner of production of the evidence was also not proper. If the 2nd defendant thought that he had such important piece of evidence, he ought to have sought and produced a certified search from the Registry of Companies instead of relying on unsigned and uncertified search from an online portal which had a disclaimer. The document is unreliable and cannot be accorded any evidential weight by this court.

Due to the foregoing, it is this court's finding that the 1st defendant acquired the 3rd and 4th defendants' shares in the suit property lawfully and that the 1st defendant is registered as the owner of 3rd and 4th defendants' undivided shares in the suit property.

Whether the 1st defendant had a right to enter the suit property and to commence development on a portion thereof.

As I have found above, the 1st defendant is an owner of undivided half share in the suit property. The 1st defendant's share in the property is undivided. The 3rd and 4th defendants did not own any particular portion of the suit property and did not sell to the 1st defendant any particular part of the property. As a co-owner of the suit property, the 1st defendant had a right to enter the suit property. The 1st defendant could not however lay a claim to any particular portion of the suit property. I am of the view that since the plaintiff, the 2nd defendant and the 1st defendant owned the whole of the suit property, the 1st defendant could not lay a claim to any portion of the property. Possession of any particular portion of the suit property or development of any particular part thereof had to be undertaken with the consent of the other co-owners who were in possession. In the absence of such agreement, the only option that was open to the plaintiff was to apply to court for an order of partition or sale of the suit property. It is my finding therefore that the 1st defendant had no right to forcefully take possession and fence off a portion of the suit property for development.

Whether the plaintiff is entitled to the reliefs sought against the defendants.

I have held above that the 1st defendant as a co-owner of the suit property is entitled to enter the suit property. The 1st defendant cannot therefore be restrained permanently from accessing the suit property. The 1st defendant as a co-owner of the suit property is also entitled to possession of the property together with the other co-owners. The 1st defendant is however not entitled to possession of any particular portion of the property. The evidence before the court shows that at all material times, it was the 2nd defendant who was in possession of the suit property. I am of the view that although it was a co-owner of the suit property, the 1st defendant could only take possession of the portions of the suit property that were in occupation of the other co-owners with their consent and in case there was a disagreement, the 1st defendant's recourse was to seek a partition. The 1st defendant as I have held above could not force his way into the property and in the process displace other co-owners.

The plaintiff as a co-owner of the suit property was entitled to quiet enjoyment of the property. The plaintiff is entitled in the circumstances to an injunction restraining the 1st defendant from forcefully entering the suit property and destroying and demolishing buildings thereon before the property is partitioned. The declaration of the suit property as a National Monument was quashed by the Court of Appeal. In the absence of any other determination on the issue to the contrary by a higher court, this court cannot make a declaration that the suit property is a National Monument and as such cannot be demolished or altered. The plaintiff is therefore entitled only to some of the reliefs sought in the plaint.

Whether the 1st defendant is entitled to the reliefs sought against the plaintiff and the 2nd, 3rd and 4th defendants in its amended counter-claim.

The 2nd defendant raised several preliminary issues on the competence of the 1st defendant's counter-claim which I wish to consider before delving on the merit of the reliefs sought by the 1st defendant. The 2nd defendant had contended that the 1st defendant had withdrawn its counter-claim against the plaintiff and the 2nd defendant and as such it was not entitled to the reliefs sought in the counter-claim. I have confirmed from the court record that the 1st defendant filed a notice of withdrawal of counter-claim on 10th November, 2016. The notice that was filed under Order 25 Rule 1 of the Civil Procedure Rules was to the effect that the 1st defendant had withdrawn the counter-claim dated 25th February, 2009 as against the plaintiff.

The counter-claim according to the notice was only withdrawn as against the plaintiff. The claim as against the 2nd defendant remained. It is not clear how the withdrawal of the suit as against the plaintiff would bar the claim against the 2nd defendant which was not withdrawn. I am in agreement with the 2nd defendant that the withdrawal of a suit under Order 25 Rule 1 of the Civil Procedure Rules takes effect from the date when the notice of withdrawal is filed in court and that the withdrawal cannot be recalled or countermanded as the 1st defendant attempted to do through the witness statement of its director. In the case of Kofinaf Company Limited & another v Nahashon Ngige Nyagah & 20 others [2017] eKLR that was cited by the 2nd defendant, Tuiyott J. after analysing a number of local cases and Indian authorities, held that:

“39. This is my view of the matter. This Court has little difficulty accepting the argument by the Affected Defendants that where the Right of a Plaintiff to withdraw or Discontinue is unfettered, the Plaintiff can, by unilateral action do so by giving a Notice. In which case the Withdrawal is complete once the Court receives the Notice. In that event the Plaintiff is barred from revoking or recalling the act of withdrawal.”

In the Allahabad High Court case of Smt. Raisa Sultana Begam & others v Abdul Qadir & others AIR (1966 ALL 318) cited in Kofinaf Company Limited & another v Nahashon Ngige Nyagah & 20 others (supra), it was held that:

“Either it is done or not done; there is nothing like its being incompletely or ineffectively. The consequence of an act of withdrawal is that the Plaintiff ceases to be a Plaintiff before the Court. If he is the only Plaintiff and withdraws the whole of the suit, the suit comes to an end and nothing remains pending before the Court; if he is only one of several Plaintiffs, he ceases to be a party and the suit of only the other Plaintiffs continues. If he withdraws only a part of the suit that part goes out of jurisdiction of the court and it is left with only the other part. This is the natural consequence of the act; a further consequence imposed by Sub-rule (3) is that he cannot institute any fresh suit in respect of the subject matter. He becomes subject to this bar as soon as he withdraws the suit. It follows as a corollary that he cannot revoke or withdraw the act of withdrawal. If he is absolutely barred from instituting a fresh suit, it means that he is absolutely barred from reviving his status as a Plaintiff before the Court. The bar on his instituting a fresh suit would be meaningless if he were permitted to revoke the withdrawal and get himself restored to the status of a Plaintiff in respect of the withdrawn suit. There is no provision allowing revocation of the withdrawal.”

From the foregoing, it is my finding that the 1st defendant's counter-claim was withdrawn only as against the plaintiff who has not taken any issue with the said withdrawal and that the 1st defendant could not revoke or cancel the said withdrawal. The 1st defendant's counter-claim as against the 2nd defendant however remained.

The 2nd defendant had also contended that the 1st defendant's counter-claim is bad in law for want of a verifying affidavit. I find no merit in this contention. The requirement for a verifying affidavit came with the Civil Procedure Rules, 2010 which came into effect on 17th December, 2010. This suit was filed in 2008 under the old Civil Procedure Rules. The amended counter-claim was filed on 1st April, 2010 before the commencement of the Civil Procedure Rules, 2010. The 1st defendant was therefore not required to file a verifying affidavit.

Having disposed of the preliminary issues, I will now consider the reliefs sought in the 1st defendant's counter-claim. The 1st defendant as

stated earlier, sought, partition of the suit property, access to the portion of the suit property allocated to it, assessment of fair market rent for the buildings on the suit property, fair share of the rent realised from the suit property since 18th February, 2008, mesne profits, general damages and costs of the suit.

As tenant in common, the 1st defendant is entitled to joint possession of the suit property with the other co-owners. The 1st defendant is also entitled to insist that the suit property be partitioned if there is no agreement between the co-owners on occupation and use of the property like in the present case. In the case of Baldev Singh v Smt. Darshani Devi And Another (supra), the court stated at pages 2 and 3 that, among the principles that have evolved relating to and in respect of the rights of co-owners in joint property was that:

“(8) The remedy of a co-owner not in possession, or not in possession of a share of a joint property, is by a suit for partition or for actual joint possession, but not for ejection. Same is the case where a co-owner sets up an exclusive title in himself.”

An order of partition in my view is discretionary in that it is subject to the conditions attached to the title of the property and the possibility of the partition exercise being undertaken successfully having regard to the nature of the property and the developments thereon. Condition 5 of the Special Conditions of Grant No. I.R 99139 provides that the property shall not be subdivided without the prior written consent of the Commissioner of Lands. An order of partition would be subject to this condition. This condition does not however mean as suggested by the 2nd defendant that a partition cannot be done. From the evidence on record, there are a number of buildings on the suit property. There is the main house and a block of flats. The main house is occupied by the 2nd defendant. The plaintiff and the 2nd defendant attach a lot of sentimental value to this house. Any partition that would result in the demolition of this house is not acceptable to the two.

The 1st defendant called a town planner (DW1) and a land surveyor (DW2) to give their opinions on how the suit property could be partitioned. DW1 submitted in evidence a report in which he made several proposals on how the suit property could be partitioned between the parties to this suit. DW2 confirmed that those proposals were implementable. The two witnesses however admitted that all the proposals assumed that the suit property was vacant and that in none of them would the main building cherished by the plaintiff and the 2nd defendant be spared.

In the circumstances, I am of the opinion that partition of the suit property is not the best option available to the parties unless it is voluntary. I am also of the view that it is not proper for the court to compel the parties if they are not in agreement, to partition the suit property in any particular manner. For the foregoing reasons, I will not compel the partitioning of the suit property but will give it to the parties as an option to the other remedies that are available to the parties.

I am of the view that, in a tenancy in common relationship, where co-owners cannot agree on how to occupy and use the property held in common and cannot also agree to partition the property, the only option left to them to resolve the stalemate is to sell the property and share the proceeds in which case priority can be given to co-owners who may wish to buy out the others to do so before the sale.

None of the parties sought an order for the sale of the suit property. I am of the view however that this is an order that the court can make in exercise of its inherent power to bring this long standing dispute to a close. I have noted that the sale of the suit property would also be subject to the consent of the Commissioner of Lands and may fall into the same headwinds that would befall a partition in the event that consent is refused. The Commissioner of lands is expected however not to withhold consent unreasonably and can be compelled to grant a consent if the same is unreasonably withheld.

The 1st defendant had also sought an order that the 3rd and 4th defendants be involved in the process of partitioning the suit property. I am unable to see the basis for this prayer. First, the 3rd and 4th defendants transferred their shares in the suit property to the 1st defendant and are no longer interested in the property. That would explain why they took no interest in this suit.

On the 1st defendant's rent claim, the plaintiff and the 2nd defendant have a right to occupy the suit property. They are therefore not liable to pay rent to the 1st defendant. As to whether part of the property is occupied by rent paying tenants, no evidence was placed before the court in proof of that fact. The 1st defendant would be entitled to a share of rental income from the suit property proportionate to its share if there were tenants on the property. The same applies to the 1st defendant's claim for mesne profits. The plaintiff and the 2nd defendant are not trespassers on the suit property and as such are not liable to pay mesne profits to the 1st defendant.

The 1st defendant's last claim was for general damages. No basis was laid for this claim. The 1st defendant produced in evidence a valuation report in which its loss for being kept out of the suit property was assessed at Kshs. 147, 000,000/=. As I have stated earlier in this judgment, the 1st defendant did not purchase any particular or specific portion of the suit property. The 1st defendant's entry onto the suit property was resisted because the 1st defendant forcefully laid a claim to a portion of the suit property which resulted in the plaintiff and subsequently the 2nd defendant obtaining an injunction to restrain its interference with the suit property. The plaintiff and the 2nd defendant are in the circumstances not liable to the 1st defendant for its alleged loss. Instead of bulldozing its way onto the property, the 1st defendant should have sought a legal remedy against the 2nd defendant who was in possession of the property and who was against his entry onto the property.

Whether the 2nd defendant is entitled to the reliefs sought in his counter-claim against the 1st defendant.

The 2nd defendant sought, a declaration that the 1st defendant is not entitled to enter or use the suit property; a permanent injunction restraining the 1st defendant from entering or using the suit property; an order for the eviction of the 1st defendant from the suit property; an order for the demolition of the wall and structures the 1st defendant has put up on the suit property at its cost; special damages in the sum of Kshs.3, 355,661.44/=:; general damages for trespass and any further or other relief the court may deem fit to grant. As a co-owner of the suit property, the 1st defendant is entitled to enter and use the suit property with the other co-owners. The 1st defendant cannot therefore be

prevented by the court from entering and using the property. What the 1st defendant cannot do is to insist on using a particular portion of the suit property if the same is in use by the other co-owners before a partition. The manner in which the 1st defendant entered the suit property as I observed in my ruling of 28th March, 2017 was unlawful. However, the plaintiff and the 2nd defendant did not seek the removal of the 1st defendant from the suit property after its forceful entry. Now that the court has found that the 1st defendant is a co-owner of the suit property and is entitled to enter and occupy the suit property, it would be unjust to make an order for its eviction from the property. I am of the view that in the circumstances of this case, damages that the 2nd defendant suffered as a result of the 1st defendant's forceful entry onto the suit property can be compensated in damages rather than through an order of eviction. The order of eviction of the 1st defendant from the suit property sought by the 2nd defendant cannot therefore be issued. With regard to special damages, the law is that the same must be pleaded with the necessary particulars and specifically proved. The 2nd defendant sought veterinary costs for treating his dogs which were allegedly attacked and injured by the 1st defendant's hired goons.

From the evidence on record, the 1st defendant is said to have forcefully entered the suit property between 18th and 20th March, 2016. The documents produced by the 2nd defendant for the treatment that was given to his dogs show that the dogs were treated in February, 2017. No evidence was placed before the court on the relationship of the March, 2016 attack and the February, 2017 treatment. The dogs' treatment costs were therefore not proved. The other item concerned the security charges. After the 1st defendant made forceful entry onto the suit property, the 1st defendant came to court immediately thereafter on 24th March, 2016 and obtained an order of injunction restraining the 1st defendant from interfering with the suit property. The order is still in force as of the date of this judgment. In the circumstances a claim for security charges of KShs. 2, 422,632.71/= that was still being incurred as at 2018 is not justified. In addition, there is no evidence that the amount claimed was indeed paid by the 2nd defendant. The claim is rejected. With regard to the storage charges, no evidence was placed before the court as to the items that the 2nd defendant carried away from the suit property for safe storage. There is also no evidence that the 2nd defendant paid the amount claimed under storage charges. This claim is also not proved.

For general damages for trespass, I have stated earlier that the 1st defendant entered the suit property forcefully and caused disturbance and inconvenience to the 2nd defendant. Although it was a co-owner of the suit property, its title was disputed by the other co-owners. Its only recourse was to seek court assistance to establish its claim. To the extent that he made a forceful and chaotic entry onto the suit property with goons, his entry amounted to trespass as it forcefully entered onto a property that was occupied exclusively by the 2nd defendant with assistance of strangers without his consent. The 2nd defendant is entitled to damages for these acts of trespass.

Conclusion:

In the final analysis and for the foregoing reasons, I hereby make the following orders with respect of the parties' claims and counter-claims:

1. I declare that Land Reference No. 209/1916/6 ("the suit property") is owned by the plaintiff, the 1st defendant and the 2nd defendant as tenants in common in undivided shares of $\frac{1}{2}$ for the 1st defendant and $\frac{1}{4}$ each for the plaintiff and the 2nd defendant.
2. The plaintiff and the 1st and 2nd defendants shall discuss and agree on how to partition and allocate the suit property amongst themselves in accordance with their respective shares in the property within 90 days from the date hereof.
3. In the event that the plaintiff and the 1st and 2nd defendants fail to agree on the partitioning of the suit property within 90 days given in the preceding order, a registered valuer agreed upon by the plaintiff and the 1st and 2nd defendants and failing agreement, a registered valuer appointed by the Chairman of the Institution of Surveyors of Kenya at the instance of any of the parties with notice to the other parties shall carry out a valuation of the suit property for the purposes of ascertaining its current market value and a reserve price in the event of a forced sale.
4. The valuation costs shall in any event be shared between the plaintiff and the 1st and 2nd defendants in the ratio of the shares held by each in the suit property.
5. Following such valuation, the suit property shall be sold by public auction or, by private treaty if agreed upon by the parties, subject to a reserve price fixed by the valuer as aforesaid and the proceeds thereof shall be shared between the plaintiff and the 1st and 2nd defendants in accordance with their shares in the property less auction or sale expenses if any.
6. In case of an auction sale, the Deputy Registrar shall on application by either party with notice to the other parties appoint a licensed auctioneer to conduct the auction and the proceeds of sale shall be deposited in court for distribution to the parties in accordance with their shares in the property less auction expenses as aforesaid.
7. The parties shall co-operate fully with each other in the sale of the suit property should it become necessary and shall make available, all documents in their possession which may be necessary to complete the sale.
8. In the event that any of the parties fail to co-operate in the sale of the suit property should such sale become necessary, the Deputy Registrar of this court shall be at liberty to execute any document or instrument that may be necessary to facilitate the sale of the suit property and the distribution of the proceeds thereof in accordance with the orders made herein.
9. The plaintiff, the 1st defendant and the 2nd defendant or any of them shall be at liberty to purchase the suit property by private treaty if they all agree to such sale, and to bid at the auction sale.

10. Pending the partitioning or sale of the suit property as aforesaid, an injunction is issued restraining the 1st defendant subject to order number 11 below from destroying and/or demolishing the structures or buildings on the suit property without the consent of the plaintiff and the 2nd defendant.

11. In the event that the parties are unable to either partition or sell the suit property for whatever reason not attributable to any of the parties, the plaintiff and the 1st and 2nd defendants shall continue to hold the suit property as tenants in common in undivided shares and shall continue to occupy the property jointly in the same manner in which the property is occupied as of the date hereof and each party shall be at liberty to use and develop the portion in his possession until such a time that such partitioning or sale becomes possible.

12. The 1st defendant shall pay to the 2nd defendant a sum of Kenya Shillings Five Hundred Thousand (Kshs.500,000/=) as general damages for trespass.

13. Either party shall be at liberty to apply to court but limited only to procedural issues or matters arising from the foregoing orders.

14. Due to the nature of the dispute before the court, each party shall bear its own costs of the suit and the counter-claims.

Delivered and Dated at Nairobi this 21st day of November 2019

S. OKONG'O

JUDGE

Judgment delivered in open court in the presence of:

N/A for the Plaintiff

Mr. Kamau for the 1st Defendant

Mr. Leshan for the 2nd Defendant

N/A for the 3rd and 4th Defendant

C.Nyokabi-Court Assistant