



**Rosa v Crutzen (Sued as the Legal Representative of the Estate of the Late Ruth Wanjiru Mwithia)
(Environment & Land Case 331 of 2012) [2024] KEELC 1400 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1400 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 331 OF 2012**

**AA OMOLLO, J
MARCH 14, 2024**

BETWEEN

FEDERICO ROSA PLAINTIFF

AND

**MARC M. J. CRUTZEN (SUED AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF THE LATE RUTH WANJIRU MWITHIA) DEFENDANT**

JUDGMENT

1. Vide a plaint dated 7th July, 2008, the plaintiff sued Ruth Wanjiru Mwithia in the High Court case Nairobi HCCC No. 375 of 2008. After the promulgation of *the Constitution* in 2010 and establishment of the specialized courts, the suit was transferred to the Environment and Land Court and registered as ELC No. 331 of 2012. The Plaintiff pleaded that he was involved with the Defendant in a serious and intimate relationship which was to culminate into a marriage. He pleaded that they agreed to purchase a house in Kenya where the marriage would be conducted and also serve as their matrimonial home.
2. Consequent to this agreement, the parties identified a pent house at the apartment erected on L.R No. 330/98 situated around the junction of Kingara/Gitanga roads in Lavington within Nairobi. The purchase price for the house was Kshs.15,000,000 and which the Plaintiff paid 10% of price as deposit directly to the vendor via electronic transfer. The plaintiff averred that he allowed the Defendant to operate his account with Commercial Bank of Africa from which a cheque for the balance of the purchase price was drawn.
3. The Plaintiff stated that the Defendant preferred the lease of the house be registered in their joint names since it was going to be their matrimonial home, it would belong to both of them. Thus the lease was registered in both names despite the fact of his paying the whole price alone. He pleaded further that later he learnt the Defendant was living with another man in the suit house and that she was no longer enthusiastic to get married to the plaintiff.



4. It is averred by the plaintiff that due to the change of heart/mind of the Defendant, he asked her to vacate the suit premises since there was going to be no marriage between them. The plaintiff pleads that the Defendant's conduct has at all material times been fraudulent, malicious and actuated with unjust enrichment at the plaintiff's expense. He gave the particulars thus;

“The Defendant's conduct has at all material times been fraudulent, malicious and actuated by a desire at unjust enrichment at the Plaintiff's expense.”
5. The Plaintiff prayed for judgment against the Defendant for;
 - a. Vacant possession of the penthouse number D7 LR No. 330/98 (Original No. 330/40/9/2).
 - b. Severance of the joint tenancy and the vesting of the penthouse number D7 LR No. 330/98 (Original No. 330/40/9/2) into the name of the plaintiff as the sole proprietor.
 - c. Costs of this suit and interest.
6. The Defendant filed her statement of defence on 6th August, 2008 which was amended on 25th October, 2011. There was an application filed to re-amend the defence dated 6th July, 2015 but which the court record show was not prosecuted. I will therefore summarize the amended defence dated 25th October, 2011 as constituting the defence to the claim by the Plaintiff.
7. The Defendant admitted she was engaged in an intimate relationship with the Plaintiff but denied any allegations of any plans to marry. She pleaded that pursuant to this relationship, the plaintiff (who was the manager and Federico & Associates) requested her to be his personal assistant in his line of duty. That the duties of the plaintiff included training local athletes and organizing for their foreign trips whenever there was a marathon or games on behalf of Federico & Associates.
8. The Defendant averred that she diligently performed her tasks including accompanying athletes abroad where she would be joined by the plaintiff. That owing to their intimate relationship, the plaintiff did not pay her any remuneration but he promised to compensate her in the course of time and full particulars are within the plaintiff's knowledge.
9. It is her contention that it was agreed between them that instead of giving the Defendant money for her services, the plaintiff would utilize the money towards purchase of the suit house and have it registered in their joint names in undivided equal shares. She asserted that the joint registration was not made on a promise to marry as alleged. Still, the Defendant pleaded that the registration into joint names was a misstate of their advocate because the agreement was for each party to have distinct shares in the property.
10. The Defendant stated that the plaintiff was aware she was already married and there is no way she would have agreed to have the property registered under joint tenancy if the Defendant had not made any contribution towards the purchase price and attendant costs. The Defendant admitted refusing to vacate the suit premises because she was a co-owner. She concluded that the plaintiff's claim is bad in law, discloses no reasonable cause of action and ought to be dismissed.
11. The oral hearing commenced on 15th June, 2023 with each party calling the evidence of a single witness. The plaintiff stated that he is an Italian Citizen aged 53 years. He avers that he is a sports medical doctor and sports agent for athletes. He adopted his written witness statement dated 20th March, 2012 as his evidence chief. The plaintiff said he met the Defendant around February of 2005 through a friend of his.



12. He continued that when he met the Defendant, she was no longer working hence her flexibility to travel. That they went for holiday in Thailand in December, 2006 during which trip they purchased household furniture. The witness said the Defendant accompanied him several other trips – twice to Beijing, New York, Tokyo and Paris. It is his assertion that during these travels, they carried on as man and wife and even began making marriage arrangements.
13. The plaintiff avers that in proving his sincerity in the relationship he purchased the suit house that was to be their matrimonial home. And to facilitate the purchase, he gave the Defendant a power of attorney as well as authority to operate his account. It is his evidence that the Defendant paid for the purchase price from his account and also paid the advocates fee of 600,000/-. The witness produced the documents in his bundle as exhibits in support of his case.
14. Under cross-examination by Kimondo – Mubea counsel for the Defendant, the plaintiff said they stayed together with Ruth (Defendant) when he was in Kenya and she also visited him in Italy. The plaintiff denied the Defendant was his personal assistance and that she was not involved in any business activity. The witness said Ruth had told him she was divorced. He asserted that when he bought the property, he was not married to Ruth.
15. He continued in cross-examination that the property was registered in their joint names as joint tenants. That in paragraph 19 of his witness statement, he offered to pay the Defendant because she was living in the house but she is not willing to make any offer to Ruth's Children. He denied agreeing to apply any funds to the Defendant towards purchase of the suit house. He also denied that the Defendant owns 50% share of the suit property.
16. The defence evidence was given on 31st October, 2023 by MARC JOSEPH MARIE CRUTZEN, the administrator of the estate of Ruth Wanjiru Mwithia-deceased. He introduced himself as an ICT Consultant for Telecommunications Projects and currently based in Belgium. DW said the Defendant Ruth Wanjiru – deceased was his wife. The witness was aware the plaintiff and the deceased had a property registered in their joint names. Mr. Crutzen adopted the witness statement recorded by Ruth dated 22nd May, 2012 and produced the documents filed as D ex 1 – 3.
17. The witness stated that Ruth – deceased said she was an employee of the plaintiff and her salary was her contribution towards purchasing the suit house. It is his contention that he took care of Ruth while they were married. The marriage certificate is produced as D ex 2. That they were blessed with two children. He wants Ruth to get an equal share in the suit property. He also denied that the foreign trips made were as girlfriend – boyfriend as they (Plaintiff and Defendant) travelled in large groups.
18. In the written statement, Ms. Wanjiru – deceased said she knew the Plaintiff as they were involved in intimate relationship since 2005. That arising from this relationship, the plaintiff who was a manager at Federico Associates requested her to be his Personal Assistant. She added that her duties as Personal Assistant included training of athletes and organizing/arranging for their foreign trips whenever there was competition. That she also accompanied athletes abroad.
19. It is her further evidence that due to their intimate relationship, she was said he was married to the Defendant between 2004 – 2013 but they were separated in 2007. He said they separated in 2007 because she fell in love with another man (who was not the plaintiff). Referred to paragraph 2 of the deceased witness statement, Mr. Crutzen answered that he was not aware of the intimate relationship between Ruth and the Plaintiff. That he was disappointed to read that since he never paid any remuneration but they agreed the plaintiff would utilize the money to purchase the suit property. The Defendant denied the allegation by the plaintiff that she misrepresented herself as being free to



- marry. It is also her averment that it is falsehood to state the suit house was to be their matrimonial home and that the plaintiff solely paid for its purchase.
20. In cross-examination DW said he was only aware of the deceased working for the plaintiff. He continued that they lived together (with Ruth) between 2004 – 2007. That the deceased was not trained in any formal profession but had natural talent. According to Ruth, she met the plaintiff through mutual friend. He had not produced evidence of Ruth doing Personal Assistant work for the Plaintiff. He admitted the lease was in joint names of the plaintiff and the Defendant. The witness said he cannot confirm all travels made by the deceased were for work. He never lived with Ruth in the suit property. This marked the close of the hearing.
 21. The learned counsels filed their respective submissions with the Plaintiff's dated 7th December, 2023 and the Defendant submissions 23rd January 2024 respectively. The Plaintiff outlined the material facts and juxtaposed his evidence tendered in support of the case with that of the Defendant's. He framed the issues for determination to be whether the Plaintiff is the sole and lawful proprietor of the suit-property, whether there was a mistake in the registration of the suit property as a joint tenancy, whether the deceased's interest in the suit property was acquired through an employer employee remuneration arrangement between the deceased and the Plaintiff or through fraud and unjust enrichment and whether the plaintiff is entitled to the orders sought.
 22. The Plaintiff stated that the suit property was held under a joint tenancy in the names of the Plaintiff and the deceased thus upon the deceased's death the Plaintiff became the sole and lawful proprietor of the same as per Section 2 of the [Land Act](#). That a crucial feature of joint tenancies is the gradual transmission of an undivided interest in the joint tenancy to the last surviving owner as was succinctly explained by the Court of Appeal in *Bonniface Awour & another v Victor Otieno Nyadimo & 2 others* [20171 Eklr and same sentiment expressed in *C P M v V K M* [20081 eKLR.
 23. The Plaintiff added that the deceased's estate has no interest whatsoever in the suit property as the property never devolved to the said estate and in reliance on Section 60 of the [Land Registration Act](#) and Section 40 of the [Land Act](#) to submit that a deceased' owner's interest in a jointly registered property abates on their death and does not devolve to their estate as proprietary interest is vested in the surviving owner or owners.
 24. With regard to whether there a mistake in the registration of the suit property as a joint tenancy, the Plaintiff submitted that the Defendant did not adduce even one iota of evidence to prove that the suit property was mistakenly registered as a joint tenancy instead of a common tenancy thus remains a mere allegation and in support cited *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J.* citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997* held that apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein therefore the evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations.
 25. The Plaintiff further stated that deceased voluntarily executed the lease which clearly indicated that the suit property would be held by the Plaintiff and the deceased as joint tenants and during her lifetime she made no effort to have her interest in the suit property rectified so that the joint tenancy would be severed, and a common tenancy instead effected.
 26. On the issue as to whether the deceased's interest in the suit property was acquired through an employer-employee remuneration arrangement between the deceased and the Plaintiff the Plaintiff submitted that the deceased was not at any time an employee of the Plaintiff and did not make any



monetary or non-monetary contribution towards the consideration of the suit property, the costs thereon or the furnishing of the suit property.

27. He stated that there was no evidence produced to show that the deceased was his employee and relied in the decisions of *Stephen Edwin Okoth v Attorney General* [2019] eKLR and *Justus Kavisi Makosi v Wema Technical Services Limited* [2013] Eklr where it was emphasized that sufficient evidence must be adduced to prove an alleged employment relationship.
28. The Plaintiff noted that the Defendant testified that the deceased possessed no professional qualifications but at paragraph 4 of the deceased's Witness Statement dated 22nd May 2012, the deceased averred that her employment duties included training the Plaintiff's athletes which is not possible owing that the Plaintiff would not employ an individual with no professional qualifications whatsoever to train professional athletes. He clarified that the deceased accompanied him on his travels as his girlfriend for her own leisure evidenced by her travel visa for the Thailand trip which clearly indicated that the purpose of the travels was for tourism.
29. The Plaintiff submitted that there is no agreement or any other evidence to show that the deceased's interest in the suit property was as a result of some employer-employee remuneration arrangement between her and the Plaintiff as alleged by the Defendant. He added that if that were true, which is not, it would mean that the deceased earned Kshs.7,500,00 in two years (2005-2007) an equivalent of Ksh. 312,500 per monthly salary to an unqualified personal assistant which is bizarre.
30. The Plaintiff submitted that all evidence demonstrates that he solely paid the consideration for the suit property and all other costs associated with acquiring and furnishing the suit property thus the deceased did not make any monetary or non-monetary contribution towards the consideration of the suit property. He also submitted that the manner in which the deceased acquired her interest in the suit property amounted to unjust enrichment, amounted to fraud and consequently, he is the rightful and sole proprietor of the suit property as the deceased's estate cannot claim the proprietary interest that the deceased acquired unlawfully.
31. He submitted that the deceased had met all the elements for unjust enrichment as outlined by the Court of Appeal in *Chase International Investment Corporation and Another v Laxman Keshra and 3 others* [1978] Eklr that first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit.
32. That with regard to the third element, there was voluntary conferment of a benefit for total failure of consideration and relied in the case of *Monicah Njuguna v Rose W. Githua* [2014] eKLR, where the Court of Appeal authoritatively listed "voluntary conferment of benefit for total failure of consideration" as a factor rendering a party's enrichment unjust. He added that he conferred on the deceased an interest in the suit property on the joint understanding that she would retain it in contemplation of their marriage and she deceived him as she was already married to another man and did not have the capacity to marry thus unjustly enriched herself at the expense of the Plaintiff and in support cited the case of *P M M v V C* [2016] Eklr.
33. The Plaintiff submitted that the deceased acquired an interest in the suit property fraudulently evidenced by deceit which was manifestly calculated at deceiving the Plaintiff into paying the consideration for the suit property and causing the same be registered jointly in their names on the promise of marriage and starting a family. That the Plaintiff had no prior knowledge of the deceased's marriage to the Defendant nor of her other romantic relationship with a third party.



34. The Defendant also gave a brief summary of the Plaintiff's case against his own case. He framed the issues for determination to be whether the deceased interest in the suit property was acquired through fraud, malice and unjust enrichment, whether the registration of the suit property as a joint tenancy was a mistake and whether the Plaintiff is entitled the reliefs sought.
35. The Defendant submitted that the Plaintiff has argued that he wholly purchased the property with the intention that it would serve as their matrimonial home for them with the deceased and also stated that the deceased acquired an interest by unjustly enriching herself thus has not discharged his burden of proof in proving the allegations of fraud. He relied in the definition of fraud as described in Black's Law Dictionary, 8th Edition at page 685 and held by the Court of Appeal in *Kinyanjui Kamau v George Kamau Njoroge* (20151 Eklr that allegations of fraud must be strictly pleaded and strictly proved to a standard that is higher than a balance of probabilities in civil cases but lower than beyond reasonable doubt.
36. The Defendant submitted that there is no evidence by the Plaintiff to corroborate his claims of any engagement to marry the deceased as alleged nor that he was living as man and wife with the Deceased in the numerous work-related trips he would take in the company of the Deceased. He submitted that considering the admission by the Plaintiff that his work called for a lot of travel around the world, and that the deceased would accompany him in those trips, a professional relationship arose rather than a marriage relationship as claimed by the Plaintiff in his witness statement.
37. The Defendant stated that he was married to the deceased at all material times and encouraged the deceased to seek employment and was well fit for the business needs of the Plaintiff due to her background in public relations. Further, that there was an agreement between the Plaintiff and the Deceased that she was to get half the share of the suit property as remuneration for her services to the Plaintiffs business and as a result the Deceased acquired an interest in the suit property by virtue of her work as the personal assistant involved in planning the itinerary details of the athletes represented by him which tasks would otherwise have had to be carried out by the Plaintiff himself or by another person hired by the Plaintiff. The Defendant further submitted that that the registration of the suit premises as a joint tenancy in lieu of a tenancy in common was a mistake. That it was the deceased intention as was corroborated by the Defendant at trial to preserve her share of the suit property and pass it on to her kids and that the issue of the joint ownership only arose when she had a fallout with the Plaintiff.
38. He stated that he knew of the professional relationship between the deceased and the Plaintiff and he provided for her maintenance needs during that time. That in return of her service to the Plaintiff's business she would have a joint registration of the suit property as compensation due her showing that during her lifetime, the deceased's only interest in the suit property was for a share as a tenant in common contrary to the registration procured by the parties' advocates in the transaction.
39. The Defendant submitted that the Deceased was travelling overseas in the service of the Plaintiffs athletes during the year 2007 and prior to the filing of this suit, he admitted to have offered the Deceased a settlement to vacate the suit property, which settlement was in her opinion way below the market value and way below her contribution to the acquisition of the property.
40. He stated that the registration of the suit property as joint tenants after the execution of the lease documents was primarily a mistake and ought to be rectified as provided in law under section 80 of The *Land Registration Act* and relied on the doctrine of non est factum as was discussed by the Court of Appeal in *Josephine Mwikali Kikenye v Omar Abdalla Kombo & another* [2018] eKLR wherein the court expressed itself thus where, however, the plea of non est factum is available, the promises contained in the document are completely void as against the signatory entitled to plead the defence,



no matter into whose hands that document may come and the reason is said to be that the mind of the signatory did not accompany his signature, so that the mistake renders his consent, as represented by his signature, a complete nullity.

41. As to whether the Plaintiff is entitled to the reliefs sought the Defendant submitted that having established that the Deceased acquired a genuine interest in the suit premises devoid of any fraud or unjust enrichment, and that the suit property was mistakenly registered as a joint tenancy instead of a tenancy in common, the Plaintiff is not entitled to the reliefs sought.
42. He stated that on account of the mistake in the registration of the suit property, the order of a severance of the joint tenancy would confer an unjust enrichment to the Plaintiff as he has had the benefit of the deceased's labour in his business without any due consideration paid out to her. In support the Defendant cited the Court of Appeal in *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR which stated that equity shall suffer no wrong without a remedy and equity detests unjust enrichment.
43. The Defendant also submitted that Plaintiff having failed to prove the allegations of fraud as pleaded, his claim against defendant for the reliefs sought must fail and in support referred the court to the case of *Eviline Karigu (Suing as Administratrix of Estate of Late Muriungi M'Chuka alias Miriungu M'Gichuga) v M'Chabari Kinoro* [2022] eKLR where the court at paragraph 43 and 44 on page 7 of the decision dismissed a claim where allegations of fraud were not proven.
44. From the pleadings and the submissions, the questions framed for determination are;
 - a. Whether the plaintiff is entitled wholly to the suit property or
 - b. The title of the property should be severed for sharing 50:50 between the plaintiff and the Defendant.
45. The copy of the lease dated 14th May, 2007 produced confirms that the suit property was registered in the joint names of the plaintiff and the Defendant (Ruth Wanjiru Mwitha-deceased). The evidence of the parties adduced does not challenge this registration. The Defendant however stated that she contributed to the purchase of the suit property via remuneration due to her from the services rendered as personal assistant of the plaintiff. She wanted the lease severed and she be given equal share out of the suit property.
46. The applicable law at the time of registration of the suit property in the joint names was the Registered *Land Act* (Cap 300 (repealed) At Section 102(1) it provided that;

“Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently –

 - a. dispositions may be made only by all the joint proprietors; and
 - b. on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly.”
47. In the persuasive case of *Cyrus Muchira Ndambiri vs Faith Wanjiru Ndambiri* (2020) EKLR Cheron J. held that the provisions of Section 91 (8) of the *Land Registration Act* only came into effect after the effective date of the new law and cannot operate retrospectively. The judge



quoted Munyao Sila J. in Isabel Chelangat vs. Samuel Tirop Rotich & 5 Others (2012) eKLR thus;

“If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—

- (a) dispositions may be made only by all the joint tenants;
- (b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; or
- (c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.”

48. Consequently, the position in law was that the parties as joint tenants, the tenancy can only be severed by mutual consent or survivorship or if one of the four unities is broken. This was also expressed by the Court of Appeal in the case of Mukazitoni Josephine vs. Attorney General (2015) eKLR thus;

“A joint tenancy cannot be severed unless one of the four unities of title, time, possession or interest is broken.”

49. Further, the Australian Law Reform Commission Reports (1994) WALRC 4 had this to say on severance of joint tenancy;

“Severance of a joint tenancy may be effected by destroying either the unity of title or unity of interest. The locus classicus of the rules of severance is the following passage in the judgment of Sir William Page-Wood V-C in *Williams v Hensman*:

“...in the first place, an act of anyone of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi*. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund - losing, of course, at the same time, his own right of survivorship. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common”

50. At the time of filing of this suit, the parties did not invoke the process of severing the joint tenancy by mutual consent. In her written statement, the deceased admitted the intimate relationship she shared with the plaintiff. According to her, it is pursuant to this relationship that she was made a Personal Assistant but was never paid a salary. Thus, the deceased admitted the monies for paying the suit property came from the Plaintiff’s account although she wanted an inference drawn on her contributions from monies due to her as salary.

51. The evidence on record show there was a common interest to acquire the property and on the demise of one of the joint tenancy, it terminated the joint tenancy by the doctrine of survivorship. Consequently, where the defence argued that the interest should be severed to provide for her 50% share after the intimate relationship was broken, the burden shifted on the Defendant to lay a basis that the joint registration was a mistake and also show her contribution (as a way of proving tenancy in common or breaking of the four unities of title, interest, time and possession). From the evidence on record, the plaintiff and the Defendant met in the year 2005. The Defendant does not give specifics in her



statement of defence or witness statement of when she began working for the plaintiff as a personal assistant.

52. Her witness produced a passport document to show evidence of travel for work. I have looked at the copies of visas attached to the Passport and the stamped dates of travel. There are visas for Schengen dated 2003 and 2004 issued to the Defendant showing that she had travelled outside of Kenya even before she met the Plaintiff. Her witness who was her husband and is a Belgium Citizen confirmed that the Defendant did visit him previously but not for work. He also stated that the deceased did not have any professional training but asserted to natural talent. This brings doubt on the capacity of the Defendant to train athletes (one of the duties she included as part of the roles performed as the personal assistant). Secondly, having travelled outside Kenya prior to meeting the Plaintiff, the Defendant was required to provide additional evidence to corroborate the assertion that while travelling accompanying the Plaintiff was for work and not pleasure on the basis of their intimate relationship.

53. The other unities that need to be broken to sever the joint tenancy was time and possession but which does not apply in this case because the time of acquisition was common to both. In the Australian Report *supra* stated that joint tenancy can be severed by course of dealing. The report cited the case of *William Vs. Hensman* on severance by course of dealing;

If all the joint tenants mutually agree to hold as tenants in common the joint tenancy is severed. There is valuable consideration for the agreement in that each joint tenant agrees to relinquish the beneficial interest in the common property, including the right of survivorship, in return for a share of a tenancy in common. The fact that the agreement is oral or otherwise incapable of specific performance does not appear to be important:

54. The intention of the plaintiff was to use the property as a matrimonial home. However, that was cut short when he says he found the Defendant living with another man, and the Defendant denies any intention to get married to the plaintiff. As soon as the relationship broke down the plaintiff filed this suit to be declared as the sole owner of the suit property. There is no evidence presented by either of the parties that showed they presented themselves before the filing of this suit that they were holding the suit property as tenants in common. It is my considered view that the joint tenancy was thus determined by the doctrine of survivorship and nothing else. There is nothing to pass on to the estate of the deceased defendant.

55. In the *Mukazitoni Josephine* case *Supra*, the court of Appeal observed thus;

“A joint tenancy cannot be severed unless one of the four unities of title, time, possession or interest is broken. A joint tenant has the right to the entire property or none – since the other joint tenant also has a right to the entire property. This is expressed in latin as *totem tenet et nihil tenet*, a joint tenant holds everything and nothing (see *Re Foley (deceased) Public Trustee -v- Foley & Another (1955) NZLR 702*). In *Stack -v- Dowden (2007) UKHL 17*, the House of Lords expressed itself as follows:

“The starting point where there is sole legal ownership (a sole name case) is sole beneficial ownership. The starting point where there is joint legal ownership (a joint name case) is joint beneficial ownership. The onus is upon the person who seeks to show that the beneficial ownership differs from legal ownership. The onus of rebutting the presumption is heavier in joint name cases. The amount of interest (s) would be declared on evidence.”

56. In light of the foregoing analysis, I hold that the Defendant’s estate is not entitled to an equal or any share in the suit property. This is because the four unities of title, time, interest and possession was not broken during her lifetime. Further, if this court were to proceed that the intentions of the parties as



deduced from the pleadings by the Defendant that it was a tenancy in common, there was no evidence of the Defendant's contribution towards payment of the purchase price that would have entitled her to a share. Therefore, I find no reason to deny the plaintiff the reliefs contained in the plaint.

57. Judgment is entered for the plaintiff in the following terms;

- a. An order is made for severance of the joint tenancy (by doctrine of survivorship) and the vesting of the penthouse number D7 LR No. 330/98 (Original No. 330/40/9/2) into the name of the plaintiff as the sole proprietor.
- b. Vacant possession of the penthouse number D7 LR No. 330/98 (Original No. 330/40/9/2). If there is any relation of the deceased in the suit premises, they are given 45 days from the date of service of this decree to surrender vacant possession. In default, the Plaintiff is at liberty to evict them using lawful means.
- c. Each party to bear their Costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH, 2024

A. OMOLLO

JUDGE

