



**Hantoosh v Karama (Environment & Land Case 396 of 2016)
[2024] KEELC 1354 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1354 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 396 OF 2016**

LL NAIKUNI, J

MARCH 7, 2024

BETWEEN

MOHAMMED SWALEH KARAMA HANTOOSH PLAINTIFF

AND

KHALID SWALEH KARAMA DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by the Mohammed Swaleh Karama Hantoosh the Plaintiff herein through a Plaint dated 14th December, 2016. It was filed on court on same day against the Khalid Swaleh Karama and Hassan Abdulkadir the 1st and 2nd Defendants herein.
2. The Plaintiff as per the Plaint is described as a male adult of sound mind residing and or working for gain at Mombasa while both the 1st and 2nd Defendants are described as a male adults of sound mind residing and working for gain within Mombasa in the Republic of Kenya.
3. Upon service of the Plaint and Summons to Enter Appearance onto the Defendants they entered appearance through a Memorandum of Appearance dated 19th December, 2016 and a Statement of Defence dated 17th January, 2017 on the same day.
4. On 14th November, 2018 upon all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the Pre - Trial conference, it was fixed for full trial on 30th April, 2019. It is instructive to note that in the course of the proceedings, the Honorable Court having noted that the Plaintiff and the Defendants were blood relatives being their elder brother and Cousins to the deceased, attempted to refer the matter for the Court annexed mediation in consonance with the provision of Article 159 (2) (c) of the Constitution of Kenya, 2010 and Section 20 (1) and (2) of the Environment & Land Court Act, No. 19 of 2011. Indeed, this was to be a second attempt but the Plaintiff became



adamant that he ought to be respected by his siblings whom he insisted lacked discipline. Arising from that failure, the Court proceeded on with the hearing and a determination arrived at on merit of the case.

II. The Plaintiff's case

5. Based on the filed pleadings by the Plaintiff, the brief facts of the case are that at all material times to this suit the Plaintiff is the registered proprietor of Plot No. MSA/Block XVII/1323 in equal shares with one Omar Awadh Karama (Hereinafter referred to as "The Deceased"). He maintained that the 2nd registered proprietor died on the 12th May 2008 and no Grand Letters of Administration had been taken to the deceased estate. On or about the 8th December 2016 the 1st and 2nd Defendants without any colour of right trespassed into the said Plaintiffs plot and brought in building material and started excavating, building some structure including adding additional stories on top of the Plaintiffs building.
6. The Plaintiff maintained that the Defendant jointly and severally brought in a group of youth who were prepared for violence on the Plaintiff, particularly when the said Plaintiff wanted to stop the illegal construction on his plot. His life had been subjected to danger and the Defendants are jointly taking unlawful possession of Plaintiff's property. Therefore, the Plaintiff claim against the Defendants was for a permanent injunction restraining the Defendants, their servants, agents and or anyone working under their instructions from entering trespassing, construction, dumping materials on his plot.
7. The Plaintiff maintained that there was no suit pending between the parties in any court over the same subject matter. The Plaintiff submitted to the jurisdiction of this Honourable court. In the long run, the Plaintiff prayed for Judgment to be entered against the Defendants jointly and severally for:-
 - a. Permanent injunction restraining the defendants their agents, jointly and severally from trespassing, entering, dumping materials, construction on Plot No. Mombasa/Block XVII/1323
 - b. General damages for trespasses and interfering with the plaintiff stay on his property.
 - c. Costs of this suit.
 - d. interest on b and c above at court rates.
 - e. Any other or further relief this Honourable court may deem fit and just grant.

III. The Reply to Defence by the Plaintiff

8. The Plaintiff replied to the Statement of Defence through a Reply to Defence dated 24th January, 2017 where he averred that:-
 - a. In response to Paragraph three (3) of the defence the 1st and 2nd Defendants jointly and severally confirmed that the suit title is registered under the names Mohamed Swaleh Karama Hantoosh together with Omar Awadh Karama in equal shares.
 - b. Being the case then it confirmed that the Defendants had no right to trespass onto the said property.
 - c. Further confirmed that the property being held in equally undivided share then no party could proceed with any development, construction or even sell without the consent of the other.
 - d. In response to the contents of Paragraphs 4, 5, 6, 7 and 8 of the Defence, the Plaintiff averred that these were mere denials that could not constitute a meaningful and reasonable defence.



- e. In response to the contents of Paragraph 9 of the Defence the Plaintiff averred and maintained that it was strange from the Defendants who were not party to the property to deny that permanent injunction should not be issued against them as they were asking this court to proceed to allow them to continue to trespass and as well as take possession of his property.
- f. In response to the averments made out under Paragraph 10 of the Defence, the Plaintiff averred and maintained that there had been no suit between himself and the 1st Defendant of Plot No. MSA/Block XVII/1323 over the same subject matter.
- g. In response to paragraphs 11 and 12 of the Defence the Plaintiff averred and maintained that the jurisdiction of this Honourable court is hereby submitted in response to Paragraph 12.
- h. In response to the contents of Paragraphs 13, 14, 15, 16 and 17 of the Defence, the Plaintiff averred that the contents thereon were not raised or formed part of the Plaint and shall on or at the hearing apply for the same to be struck out of court records.
- i. In response to the contents of Paragraph 18 of the Defence the Plaintiff averred and maintained that had never been appointed as a trustee neither the Plaintiff is a registered trustee of any other person and therefore put the Defendants jointly and severally to strict proof of their allegations. The Plaintiff further averred and maintained that the Defendants admit in paragraph 18 that his Co - registered proprietor in equal shares was the deceased.
- j. In response to the contents of Paragraph 19 of the Defence the Plaintiff averred and maintained that was never consulted, informed or asked on any intended construction and had been put on the receiving and by the Defendants and put the Defendants jointly and severally to strict proof of their allegation.
- k. In response to paragraph 20 of the Defence, the Plaintiff averred and maintained that no due process was followed in the said approvals and further averred and maintained that the Defendants jointly and severally forged, misrepresented themselves to the County Government Officers as the Plaintiff herein and as well as his Co - registered proprietor a fact that was well within their own knowledge, they did in personification to be one Mohamed Swaleh Karama Hantoosh the Plaintiff herein and Omar Awadhi Karama his Co - registered proprietor so as to get a fake approval that he was not made party to the signing for the approval application of the building plans and as such the Defendants are guilty of criminal offence.
- l. The Plaintiff further averred that on the 8th December, 2016 made a formal complain to the Chief Officer Lands, Planning & Housing County Government of Mombasa who immediately confiscated the said illegal acquired building plan that was in the hands of the Defendants herein and the Plaintiff shall at the hearing thereof produce a copy of the complaint. The Defendants were strangers to his property as they were not registered and or had any share on the same and it sounded ridiculous for them to assert that whenever he constructing on his said property he expected them to raise complaint on his property and which they lacked locus to stand on its way for all purposes.
- m. The said property had not legally been sub - divided or otherwise and the Defendants claim that the Plaintiff owned one wing or the other could not rise nor exist. The Plaintiff had been living with his co-owner and there had been no issues at all.
- n. The Defendants at the hearing should produce to this court the purported registered trustee that they alluded to hold.



- o. He personally knew the 2nd Defendant by name and had been on the ground personally and that board any contractor was required under the National Construction Authority was not displayed during the construction and as such the works were further illegal.
 - p. He sued the right and correct party on the ground and shall ask the court to issue the orders sought.
 - q. If the construction was basically for the heirs of the estate of OMAR AWADHI KARAMA his co-owner herein then the Defendants should at least give the following reply for their action.
 - i. Why did they jointly and severally apply for a plan without asking for the Plaintiff's signature on approval?
 - ii. Why did they jointly and severally fail to inform the Plaintiff of any action they intended to take on that land?
 - iii. Why did they jointly and severally send some youths to threaten the Plaintiff for inquiring?
 - iv. Why did the right heirs fail to inform the Plaintiff of the intended construction?
 - r. The Defendants jointly and severally were trying to cover up their illegality on the heirs and this court of equity it should not entertain any further lies before it.
 - s. The Defendants had no defence at all and were guilty of all the alluded facts in the Plaint.
 - t. The Defendants had not shown any reasonable defence and the Plaintiff shall at any appropriate time apply for the defence to be struck out for being frivolous, vexatious and a blatant abuse of the due process of this court.
9. The Plaintiff called its first witness on the 30th April, 2019 where the Witness testified as follows:-

A. Examination in Chief of PW - 1 by Mr. Nyamboye Advocate.

- 10. PW – 1 was sworn and testified in Kiswahili language. He was called - Mohammed Swaleh Hantoosh. He lived in Kilifi, Florini Estate, Bondeni within the County of Mombasa. He was self - employed. He was the Plaintiff herein. He sued the 1st and 2nd Defendants Khalid Swaleh Karama and Hassan Abdulkadir, his contractor because they have built a house inside his Plot No. Mombasa/Block/ XVII/1323. He had bought the Plot together with his brother in law, Omar Awadh Karama who was now deceased having died on 8th May, 2008. The Defendants constructed on their property. He had the title deed in their names. He did not consent to the Defendant's construction. The 1st Defendant was his brother who was their 3rd born. They did not have authority to construct a house in their plot. He went to the municipal council to find out but did not get assistance. He then filed the suit. He would like for the Court to order the demolition of the structures erected by the Defendants and the removal of their materials as well as damages.
- 11. He told the Court that he had photographs of the illegal constructions. The Defendants had not denied carrying out the constructions. They did not have his permission. The plot belongs to him and the deceased. The deceased constructed the ground and 1st floor and he had built on the 2nd floor. The Defendants built on an empty space. At the time he bought the suit, none of the deceased's family had gotten letters of administration. Nobody had their authority to put up a structure on their plot.
- 12. Anisa Swaleh Karama was his sister and also the sister to the 1st Defendant. The decree in Kadhi's Court succession Petition No. 164 of 2018 was given on 13th February, 2019. Anisa and himself were



appointed as the Legal Administrators of the Estate of Omar Awadh Karama and Anisa gave the Power of Attorney to the 1st Defendant on 21st February, 2019, long after he had filed this case. They did not tell him anything. They never got approval for the said constructions. He had never consented. The 1st Defendant had no claim over the property. He was seeking the reliefs in the Plaint

A. Cross examination of PW - 1 by Mr. Oduor Advocate

13. PW – 1 testified to the Honourable Court that he had a title deed for the suit property. He owned the property together with the deceased who was his brother in law. The deceased had a family including his sister and children, according to him and the Sharia Law, the deceased's widow had no power to carry out any development. The deceased had constructed on the ground and 1st floor. The children of the deceased stayed on the ground floor. He did not know who lived on the 1st floor. He had constructed a toilet on the 2nd Floor. He did not know if the constructions in dispute were done by her sister.
14. He stated that he knew it was her sister, he would not have come to Court. he had paid for rates and subdivision. In the decree from Kadhi's Court, it was stated that they both pay rates. He had never objected to any succession case. He however participated as a witness to see what was going on. He wanted the constructions that they did to be removed and an order restraining the Defendants from trespassing.
15. On 30th April, 2019 the Plaintiff through his counsel Mr. Nyamboye marked the close of their case.

IV. The Defendants' case

16. On 17th January, 2017, the Defendants filed their Statement of Defence dated the same day. The Defendants confirmed the averments of Paragraph 4 of the Plaint and in particular that the suit property being Plot No. MSA/Block XVII/1323 is held in equal shares with one Omar Awadh Karama. The Defendants denied the averments of Paragraph 5 of the Plaint and in particular that the 2nd Defendant died on the 12th May, 2008 and that no letters of administration had been taken. The Defendants denied the averments of Paragraph 6 of the Plaint and in particular that on 8th December, 2016 that the 1st and 2nd Defendants without any colour of right trespassed into the Plaintiff's plot and brought in building material and started excavating, building some structures including some structures including adding additional stories on top of the plaintiff's building.
17. The Defendants denied the averments of paragraph 7 of the Plaint and in particular that the Defendants' jointly and severally brought in a group of youth who were prepared for violence on the Plaintiff, particularly when the said Plaintiff wanted to stop the illegal construction on the plot. The Defendants denied that the Plaintiff's life was in danger and that the Defendants were jointly taking unlawful position of law. The Defendants denied the averment of Paragraphs 8 and 9 and in particular the claim for a permanent injunction restraining the Defendants their servants , agents and or anyone working under their instructions from entering, trespassing, constructing or dumping materials on the Plaintiff's plot. The averments of paragraph 10 of the Plaint was denied and the Defendants averred that there was a civil suit number "CMCC No. 2420 of 2015" filed in Mombasa between the Plaintiff. The Defendants denied the averments of paragraphs 11, 12 and 13 of the Plaint. The Defendants had no right to construct, trespass and/ or otherwise dealing on the Plot No. Mombasa/ Block/ 1323 and that the property belonged to him.
18. The Defendants denied the averments of Paragraph 14 of the Plaint and in particular that there had never been any dispute between the Plaintiff and the late Omar Awadh Karama. The Defendants denied the averments of Paragraph 15 and in particular that they were trying to take possession of the



Plaintiff's land forcefully. The Defendants denied the averments of Paragraphs 16, 17 and 18 of the Plaintiff. The jurisdiction of the court is admitted.

19. The suit property is registered between the Plaintiff and the late Omar Awadh Karama as trustees of the Hantoosh Family. The construction was carried out with the blessings of the Plaintiff and all other family members who were the heirs of the late Omar Awadh Karama. The construction carried out was done after due process of the law was followed and the necessary approvals obtained from the County Government of Mombasa. The Plaintiff had put up a flat or extra rooms on his wing on top of his residential house without any complaint from the Defendants or any other family member including the heirs of the deceased. The 1st Defendant appointed as a trustee of the deceased's heirs property and was supervising the construction carried out by the 2nd Defendant who was wrongly sued since he trades as Quantum Construction Company Limited duly registered under the companies Act. The Plaintiff's house was located a few meters away from where the construction was carried out and not on top of his house as alleged. The Plaintiff was a busy body trying to halt one extensions and improvements put up by the heirs of the deceased who was his brother in law.
20. The Defendants prayed that the Plaintiff's suit be dismissed.
21. On 12th July, 2023, the Defendant called his first witness DW - 1 who testified as follows:-

A. Examination in Chief of DW - 1 by Mr. Oduor Advocate.

22. DW – 1 was sworn and testified in Kiswahili language. Her name is Anisa Swaleh Karama. She was a holder of the Kenyan national identify card bearing numbers 8382767. She was born on 27th January, 1962. She lived at Kilifi near Florini, Bondeni within the County of Mombasa. She wrote her witness statement on 23rd October, 2019. Mr. Mohamed Swaleh Karama – the Plaintiff herein - was her blood brother. Her husband was Omar Awadh Karama (who was their Cousin). The Plot – MSA/Block XVII/1323 was registered in the joint names of the Plaintiff and the deceased. There was a house and the ground floor was occupied by Omar Awadh Karama. The 1st floor had three bedrooms, sitting room and dining room. The Plaintiff had been building on the suit property. He had continued to do so even as the matter was proceeding going on in Court. The problem was that there was leakage on the top floor. They engaged a contractor to help. He wanted plans and a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) in order to fix it but she only paid him a sum of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/-). He bought the materials but the Plaintiff Blocked him from undertaking any construction works by coming to Court. Now the materials were a total waste. She had been pursuing the property of the deceased from the Kadhi's Court. She told the Court that there was a decree to that effect, they wished to produce it as Defendants Exhibit 1 and they also gave Khalid Swaleh Karama (who is their blood brother), a Power of Attorney. They produced it as Defendant Exhibit - 2.
23. The Plaintiff was ordered to surrender the title to the Kadhi's Court but he had refused to do so. Further, although they had been called by the Court Annexed Mediator but Mohamed Swaleh Karama refused to attend. He had not been co - operative.

B. Cross examination of DW - 1 by Mr. Nyamboye Advocate.

24. She confirmed to the court having recorded a statement. The Plot belonged to Mohamed Swaleh Karama and Omar Awadh Karama (deceased). The deceased was the brother in law to Mr. Mohamed Swaleh Karama who was her brother. Her husband died on 10th May, 2008. She never applied for letters of Grant of Administration. The case was filed in the year 2016 but she could not remember the exact date. With reference to the decree, she told Court that from it she had been appointed as a



Legal Administrator of her husband's estate. She got the decree on 13th February, 2019. Khalid Swaleh Karama the 1st Defendant is her brother. It was not true that he was building on the suit property.

25. According to the witness it was the contractor who was building. The 1st Defendant was busy elsewhere and had nothing to do with the construction. She donated the Power of Attorney to her brother, the 1st Defendant. She had travelled around 18th February, 2019. By that time the matter was already in Court. She gave him the Power of Attorney after 3 years. It was her Children who instructed on the development on the property. They were abroad and they would send her money to undertake the construction. By then she had not gotten the Letters of Administration. When she started the construction, she consulted the Plaintiff and they agreed.
26. Unfortunately, according to the witness they never documented the consent. All the family his wife and children were aware of this development. But they had no specific witnesses. With reference to her recorded statement, her two daughters allowed her to commence the building. They worked and lived in Qatar. They had a good and cordial relationship between the Plaintiff and themselves. With reference to paragraph 10 of the statement, there had been a disagreement between his brother and the Plaintiff. She admitted that when she went to NEMA she get the approval/consent and she never involved the Plaintiff.

C. Re - Examination of DW - 1 by Mr. Oduor Advocate.

27. DW – 1 told the Court that she was not a party to the case; neither were any of her children. They agreed with the Plaintiff but he only decided to sue her brothers, the 1st and 2nd Defendant. She was given the Grant, Letters of Administration by the Kadhi's Court. He was always involved in the dispute.

A. Examination in chief of DW - 2 by Mr. Oduor Advocate.

28. DW – 2 was sworn and testified in Kiswahili language. His name is Khalid Swaleh Hamtoosh. He was a holder of the Kenyan national identity card bearing numbers 2246384. His was born on 4th February, 1963. He lived at Bondeni – Folini area. He recorded the witness statement dated 17th January, 2017 which he intended to rely on as his evidence. He also produced the Defendant List of Documents and which were marked as Defendant Exhibit Numbers 3 to 10. They were admitted. He stated that the Plaintiff was his elder brother. Omar Karama was his brother - in - law. He knew the Plot MSA/Block XVII/1323. He knew the registered owner as the Plaintiff and the deceased.

B. Cross examination of DW - 2 by Mr. Nyamboye Advocate.

29. He testified that he was bound by the witness statement filed. The suit property was for Mohamed Swaleh Karama and Omar Swaleh Karama. One of them was his brother while the other one was his cousin and brother in law who died on 12th May, 2008. He left the widow and two children. The deceased had built an extension on the ground floor before he died. He had never built on the plot. His role was to oversee the construction. With reference to paragraph 9 of the statement he stated that they gave him instructions to procure the documents on the constructions from the municipality.
30. With reference to paragraph 10, he stated that he had gotten the approvals from NEMA; he never involved the Plaintiff but the widow and the daughters of the deceased involved him throughout the process. It was a family matter and not necessary to put them same in writing and since the ground floor structure was already there. It was not a new structure. The Contractor was engaged by the widow and the two children. He had never asked her whether she had obtained the Grant Letters of Administration of the Estate of the deceased. The children were in Qatar. The construction had not started but it was in the process. They were building the house for the future of the children. The



Plaintiff was her elder brother. The Plaintiff had always had issues with him. From his opinion the Plaintiff claimed that he was never consulted about the construction.

31. On 12th July, 2023, the Defendants through his advocate Mr. Oduor marked their case closed.

V. Submissions

32. On 12th July, 2023 the Honourable Court in the presence of all the parties gave directions on filing of written submission. Pursuant to that on 5th October, 2023 after the Honourable Court confirming compliance set the Judgment date on 4th March, 2024. However, it was deferred to 7th March, 2024 accordingly.

A. The Written Submissions by the Plaintiff

33. The Plaintiff through the Law firm of Messrs. Mburu Nyamboye & Company Advocates filed their written submissions dated 8th August, 2023. Mr. Nyamboye Advocate commenced his submission by stating that the Plaintiff had approached this Honourable Court vide a Plaint dated 14th day of December, 2016 suing Khalid Swaleh Karama as the 1st Defendant and Hassan Abdulkadir as the 2nd Defendant. The Plaint was accompanied a Notice of Motion application dated 14th December, 2016 which was seeking for orders of temporally injunction restraining the Defendants by themselves, their servants, agents and or anyone working under their authority from trespassing, entering constructing, dumping materials excavating on Plot No Mombasa/Block XVII/1323 pending the hearing and determination of the application.
34. The Plaintiff also sought for a permanent injunction be issued against the Defendants, their servants, agents and or anyone acting under their authority from trespassing, entering, constructing dumping building materials, -excavating on Plot No Mombasa/Block XVII/1323 pending the hearing of this suit. The Plaint and the Notice of Motion was accompanied with the Plaintiff's witness in support of the Plaintiff's claim. The Orders sought in the application dated 14th December, 2016 are the same orders being sought in the Plaint of even date that is a permanent injunction be issued restraining the Defendants, their servants, agents jointly and severally from trespassing, entering, dumping construction materials on Plot No. Mombasa/Block XVII/1323.
35. The Learned Counsel averred that the Plaintiff sought from the Defendants General Damages for trespassing and interfering with the Plaintiff stay on his property apart from seeking for costs of this suit plus interest service to add prayers (e) in the Plaint the Plaintiff prays for any other or further relief this Honorable court may deem fit and just granted. The Plaintiff in the Notice of Motion application dated 14th December, 2016 has based his application on the grounds that;-
- a. The Plaintiff is the Registered owner of the Plot No Mombasa/Block XVII/1323 in equal shares with OMAR AWADH KARAMA
 - b. The Plaintiff continue to aver and retain that the said Omar Awadh Karama died on 12th December, 2008 and no letters of administration on his estate have been taken against his estate or heirs.
 - c. On or about the 8th day of December, 2016, the Defendants moved on the Plaintiff's plot with a group of youths and started offloading materials and eventually started excavating on the plot.
 - d. The Plaintiff/Applicant tried to stop the constructions but was informed that the youths were working under instructions of the Defendants and was barred from moving near the said construction site which the constructions continued day and night among other reasons. The



court did grant temporary orders of injunction restraining the Defendants from continuing with the aforesaid construction which orders is dated 3rd October, 2018.

36. The Learned Counsel submitted that the Defendants filed their statement of defence dated 17th January, 2017. In the Statement of Defence they had admitted the contents of paragraph 4 of the Plaintiff, which stated that at all material times in this suit the Plaintiff is the registered owner/proprietor of Plot No Mombasa/Block XVII/1323 in equal shares with one Omar Awadh Karama who had since died on or about 12th May, 2008 and no letters of Administration had been taken by the heirs of the deceased estate as the time of this suit was filed and the time the defendant herein was filed. The suit proceeded for hearing and the Plaintiff herein did testify before Hon. Justice Yano on 30th April, 2019. From his evidence, it was clear that he was suing the Defendants Khalid Swaleh Karama and Hassan Abdulkadir his contractor because they had built a house inside the Plaintiff Plot No Mombasa/Block XVII/1323 which plot is jointly owned by the Plaintiff's brother-in-law, Omar Awadh Karama who is now deceased having died on 8th March, 2008.
37. According to the Learned Counsel, it has come out clearly that the 1st Defendant in this suit is the Plaintiff brother being the 3rd born in the family. This came out clearly during the Defence hearing of this case when one DW - 1 Anisa Swaleh Karama did testify that she was the sister to the Plaintiff and the wife to Omar Awadh Karama (deceased) who were joint owners of the land Mombasa/Block XVII/1323. The reason why the Plaintiff had approached this Honourable court was that the Defendants entered and started construction on the suit land without the Plaintiff's consent or authority to construct a house on the suit Plot. The Plaintiff's witness statement and his testimony in court was very clear that the 1st Defendant's witness was a sister to both the Plaintiff and the 1st Defendant in this suit. It came out clearly that the Plaintiff in this suit and the 1st Defendant witness Anisa Swaleh Karama were appointed, joint Administrators of the estate of Omar Awadh Karama in the Kadhi's Court Succession Petition No 164 OF 2018 which was given on 13th February, 2019 long after the filing of this case.
38. It was therefore the Learned Counsel's submission that the 1st Defendant's assertion the 1st Defendant's witness Anisa Swaleh Karama gave Power of Attorney to the 1st Defendant to build on the subject Plot on 13th February, 2019 was long after the Plaintiff had filed this suit. It was the Plaintiff's testimony that the 1st Defendant had no claim over the property being Mombasa/Block XVII/1323 and hence he was a trespasser and this Honourable Court ought to come to that conclusion.
39. The testimony of the Plaintiff in Chief and cross-examination by the Defence it was clear that the Plaintiff has the Title deed for the suit property which is jointly owned by the deceased whom the 1st Defendant's witness is sister to the 1st Defendant and the Plaintiff. It was also clear that there was no evidence to prove that consent to construct the building on the suit property was given by the Plaintiff and if ever the 1st Defendant was building under the instructions of the 1st Defendant's witness instructions, it is evident that she had no authority or permission to so do as she had not obtained a Grant of Letters of administration and had not obtained the consent of the Plaintiff to enable her instruct the 1st Defendant construct any structure on the said property. Therefore, the acts of the 1st Defendant amounted to trespass and an interference with the Plaintiff's stay on the said land.
40. The Learned Counsel submitted that taking into account of the above facts, his submission was that the Plaintiff had proved his case beyond any reasonable doubt. The Plaintiff had proved that he held the suit property in common with the deceased also by the time of filing the suit there were no letters of administration issued to the estate of Omar Awadhi. Thus, no consent was sought prior to the constructions undertaken by the Defendants. To buttress on this point, the Learned Counsel cited the case of:- "Misc. Civil Application No. E011 of 2020 - Ambwere T.S & Associates – Versus - Mohamed



Swaleh Karama” at Mombasa the court made the following observation of the current property before the Honourable Court;

“I have considered the ruling by the Deputy Registrar on its merits. I find no fault with it. My opinion is that it is not possible. to execute against the Respondent's portion of the land without falling foul of Section 91 of the Land Registration Act no. 3 of 2012 that provides as follows:

“No tenant in common shall deal with that undivided share in favour of any person other than a tenant in common, except with the consent in writing of the remaining tenants, but such consent shall not be unreasonably withheld.”

41. The Learned Counsel contended that as demonstrated by the Plaintiff that the action of the Defendants in carrying out the constructions without the consent of the Plaintiff were illegal and unlawful. After the Plaintiff's and the Defendant's testimony in court, it was clearly demonstrated that the Plaintiff is the registered proprietor of the land the Defendant trespassed on to the same. To support his point herein, the Learned Counsel referred Court to the case of:- “ELC Eno. 34 of 2018 at Meru Rhoda S. Kiilu – Versus - Jiangxi Water and Hydropower Construction K. Limited” the court observed as follows:-

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stocks or permits stock to be on, private land without the consent of the occupier therefore shall be guilty of an offence.”

42. It was the Learned Counsel's submission that the Defendants were guilty of trespass and the court further held as follows on permanent injunction:-

“The Defendant has no mandate to use the suit land in any manner. As such this prayer is meritorious.”

43. The court proceeded to award damages for trespass and damage to the property. He urged Court to award the Plaintiff the sum of Kenya Shillings Three Million (Kshs. 3,000,000/-). This Honourable court having heard the evidence of the 1st Defence witness and the 1st Defendant himself, it was the Learned Counsel's submissions that the evidence never came out clearly wherein they obtained the consent or authority of the Plaintiff to construct on the subject land and the Defendants were trespassers on the Plaintiff's land. The Plaintiff was therefore praying that this Honourable Court do issue;

- a. A permanent injunction restraining the Defendants their agents, jointly and severally from trespassing entering, dumping materials construction on Plot No Mombasa/Block XVII/1323.
- b. General damages for trespass and interference with the Plaintiff's stay on his property at a sum of Kenya Shillings Three Million (Kshs. 3,000,000/-).
- c. Costs of this suit.
- d. Interest on (b) and (c).
- e. Any other or further relief that this Honourable court may deem fit and just to grant.

44. In conclusion, it was the view of the Learned Counsel that this Honourable Court orders that this suit property in issue being Plot No Mombasa/Block XVII/1323 be sub - divided in equal titles between



the Plaintiff in this suit and the 1st Defendant's witness Anisa Swaleh Karama who they can have the same distributed to the heirs of the late Omar Awadh Karama the joint owner of the subject property.

B. The Written Submission by the 1st and 2nd Defendants.

45. While opposing the suit, the Learned Counsel for the 1st and 2nd Defendants, the Law firm of Messrs. Oduor Siminyu & Company Advocates filed their written Submissions dated 23rd October, 2023. Mr. Oduor Advocate commenced his submission by informing the Court that what was scheduled for determination was the Plaintiff's Plaint dated 14th December, 2016 seeking the afore – stated orders. He stated that from the witness statement by the Plaintiff and his evidence, it was clear that the registered owners for Plot No. Mombasa/Block XVII/1323 was is jointly owned by the Plaintiff and the Plaintiff's brother in law Omar Awadh Karama who died on 8th May, 2008.
46. Additionally, based on the evidence adduced, it was clear that there was construction on the suit property. The Plaintiff denied having been consulted denied having been consulted by the late Omar Awadh Karama's children who were putting up some building on the suit property. The Notice of Motion dated 14th December, 2016, its prayers and results were all with by the Honourable Court. Therefore, the same never applied at this time the same was interlocutory in nature to preserve the status of the suit property the court saw it fit.
47. The Defendants filed a written statement of Defence which was filed on 17th January, 2017. Together with the witness statement and list of documents. It had been alleged that Defendants had been trespassing, entering dumping construction materials on Plot No. Mombasa/Block XVII/1323. It was evident that the deceased had already put up two houses on the ground floor and first floor and the Plaintiff put up a structure on the second floor. The constructions made were in the ground floor by the heirs of the deceased.
48. The Plaintiff testified on the 30th April, 2019 that he sued the Defendants - Khalid Swaleh Karama and Assan Abdulkadir who allegedly were his contractor as the person who was trespassing on his property without any authority. He further testified that he was related to the 1st Defendant who was his brother and the witness (the deceased's wife) was his sister one of the joints owners of the suit property being Plot No. Mombasa/Block XVII/1323. The Plaintiff's main reasons to approach the court was that the Defendants entered and started construction on the suit land without the Plaintiff's consent or authority to construct a house on the suit plot. The Plaintiff's assertion has been that the Defendant's witness Anisa Swaleh Karama had given instructions to the 1st Defendants who was the supervisor for the Construction that was being carried out by the heirs of the estate of the late Omar Awadh Karama. On the Issue of mediation, this Honourable Court had in the every early stages and in a bid to try and had the matter settled referred the matter for mediation. It was clear that the Plaintiff made the mediation impossible from the report of the Mediator.
49. On the issue of trespass. The Learned Counsel referred Court to the provision of Section 3 (1) of the Trespass Act Cap. 264. He averred that the issues for determination were as follows
 - a) Whether the Defendants trespassed into the suit property.
 - b) Whether consent was given by the Plaintiff to the heirs of the Co – owner to put up the structures on the suit property and if so was it withdrawn at any point?
 - c) Whether a permanent injunction restraining the Defendants from dealing with the suit property should be given?
 - d) Whether the Plaintiff sued the right parties or there was a misjoinder of parties?



- e) Whether the Plaintiff was entitled to general damages as claimed for the said trespass.
50. On all these, the Learned Counsel asserted that the Defendant and the Plaintiff conformed that the instructing client and persons were deceased's who were proceeding on the construction work. Yet, none of them were named as parties in the suit. It was a clear case of misjoinder of parties. The 2nd Defendant was never instructed by the 1st Defendant or the witness. To buttress on this point he cited the case of:- "Goodwill and Trust Investment Limited – Versus – Will & Bush Limited (2011) LCN/B820) SC" where the Court held that:-

"It was trite law that to be competent and have jurisdiction over a matter proper parties must be identified before the action could succeed, the parties must be shown to be proper parties whom rights and obligations arising from the cause of action attach.

The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court, the court lacks jurisdiction to hear the suit and where the court purports to exercise jurisdiction which it does not have the proceedings before it, and its Judgment will amount to a nullity no matter how reasoned.

51. The Learned Counsel averred that the issue of permanent injunction would not affect the Defendants as there was no nexus between the Defendant's and the suit property at all and it would be of no consequence at all. On this point, he cited the case of:- ELC No. 34 of 2018 - Meru Rhoda S. where the court referred to "Phillip Ayaya Aluchio – Versus - Crispinus Ngoyo (2014) eKLR where the court held as follows:-

"The Plaintiff is entitled to general damages for trespass. The issue which arises is as to "what is the measure of such damage". It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration whichever was less. "Hostler – Versus - Green Park Development Co. 986 S.W 2d 500

The Court held that there is no mathematical or scientific formula in these types of cases and that there are guiding factors are the circumstances in each case.

52. Finally, he argued that the Plaintiff had not proved trespass by the Defendants and the damages caused by the Defendants. He urged the Court to dismiss the suit with Costs.

VI. Analysis and Determination

53. I have carefully read and considered the pleadings herein by the Plaintiff and the Defendants, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
54. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has condensed the subject matter into three (3) issues for its determination. These are:-
- a. Whether the suit instituted by the Plaintiff through the Plaint dated 14th December, 2016 against the Defendant has any merit or not.
 - b. Whether the Plaintiff is entitled to the orders sought
 - c. Who will bear the Costs of suit.?



Issue No. a). Whether the suit instituted by the Plaintiff through the Plaint dated 14th December, 2016 against the Defendant has any merit or not.

55. Under this sub title, the Honourable Court examines if the Plaintiff has made out a case to be entitled to the orders sought. The main issues from the cause of action from the pleadings are:-

- a). The Tenancy in common and joint tenancy; and
- b). the allegation of the trespass meted by the Defendants onto the Plaintiffs land.

56. As regards, Tenancy in Common and joint ownership to property are two sister concepts. The distinction between the two concepts was stated by Sir Robert Megarry and Sir William Wade in their work entitled – “The Law of Real Property; Sweet & Maxwell, Eighth Edition Pages 496 to 503.They stated that:-

“A joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares.....”. Further, that “there is a thorough and intimate union between joint tenants. Together, they form one person.” A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities”.....

.....In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential.”

57. The four unities of a joint tenancy are the unities of possession, interest, title and time. The unity of possession implies that each joint tenant is as much entitled to possession of any part of the land as the others. He cannot point to any part of the land as his own to the exclusion of the others. No one joint tenant has a better right to the property than another. In other words, the issue at hand here is whether from the instant case there exist any of the stated Co – Ownership to the suit property between the Plaintiff and the 1st and 2nd Defendants herein and if so whether they were entitled to the half share of the suit property. The nature, scope and meaning of the Concept of Joint Tenancy and Tenancy in common are both recognized from the provision of Section 91 of the land Registration Act, 2012. It provides as follows:-

91. Meaning and incidents of co-tenancies

- (1) In this Act, co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.
- (2) Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.



- (3) An instrument made in favour of two or more persons and the registration giving effect to it shall show-
 - (a) whether those persons are joint tenants or tenants in common; and
 - (b) the share of each tenant, if they are tenants in common.
- (4) 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; and
 - (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.
- (5) If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.
- (6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.
- (7) Joint tenants, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joining ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenants in common.
- (8) The Registrar may upon receipt of adequate proof dispense with the consent under subsection (6) if the Registrar considers that the consent cannot be obtained or is being withheld unreasonably and the Registrar shall note on the register and on the instrument the reasons for dispensing with the consent.
- (9) A person who is aggrieved by the decision of the Registrar may apply to the Court for the necessary orders.

58. The provision of Sections 94 of the Land Registration Act, No. 3 of 2012 provides for a severance of a common tenancy by way of partition inter alia:-

- (1) Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a sub-division of land and of any covenants or conditions in a certificate of a land, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.
- (2) An application, may be made to the Registrar, in the prescribed form, for an order for the partition of land owned in common by—
 - (a) any one or more of the tenants in common without the consent of all the tenants in common; or



- (b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree.

59. It is also provided in Halsbury's Laws of England, Fourth Edition (Reissue) Volume 39(2) at paragraphs 214-215 as follows in this regard:

“214. Determination of union of interests in one person. A tenancy in common may be determined by the union of the various interests, whether by acquisition inter vivos or by testamentary disposition, in the same person, who therefore holds the entirety of the land.

215. Determination by partition. A tenancy in common may be determined by partition. The legal term 'partition' is applied to the division of land, tenements and hereditaments belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership between some or all of them.”

60. Under section 96 of the Land Registration Act, if for any reason the land sought to be partitioned is incapable of being partitioned, or the partition would adversely affect the proper use of the land, and the applicant for partition or one or more of the other tenants in common require the land to be sold, and the tenants in common cannot agree on the terms and conditions of the sale or the application of the proceeds of the sale, the tenants in common may make an application to the court for an order for sale and the court may—

- “(a) cause a valuation of the land and of the shares of the tenants in common to be undertaken; and
- (b) order the sale of the land or the separation and sale of the shares of the tenants in common by public auction or any other means which appears suitable to the court; or
- (c) make any other order to dispose of the application which the court considers fair and reasonable.”

A. Joint Tenancy

61. Based on the above legal rationale, the characteristics of a joint tenancy, the court has surmised as follows:- In the case of *Cornella Nabangala Nabwana – Versus - Edward Vitalis Akuku & 2 others* [2017] eKLR (Nairobi ELC)) Court held that:-

“The key distinguishing features of joint tenancy are the right of survivorship and the "four unities". The right of survivorship implies that upon the death of one joint tenant, his interest in the land passes to the other joint tenants by the right of survivorship ("jus accrescendi). This also implies that an interest held by a joint tenant cannot pass to another person through a will or through intestacy. It automatically passes to the surviving joint tenant(s). The four unities of a joint tenancy are the unities of possession, interest, title and time. The unity of possession implies that each joint tenant is as much entitled to possession of any part of the land as the others. He cannot point to any part of the land as his own to the exclusion of the others. No one joint tenant has a better right to the property than another,



so that an action for trespass or for rent or for money had and received or an account will not normally lie.

62. Vide the doctrine of “jus accrescendi”, upon the death of a Joint tenant, the deceased tenant’s interest vests in the surviving tenant or tenants jointly as a right of survivorship takes precedence, except in instances where the interaction of joint owners with the property showed that they intended for a deceased co-owner to maintain exclusive ownership of the suit property, in which case it falls to the administrators of his estate. On this point, I am guided by the decision of:- Mwangi Gakuri – Versus - Bernard Kigotho Maina & Another [2016] eKLR (Nairobi High Court) . Matrimonial property jointly owned remains to be the property of the joint owners even after divorce see the case of “C.M.N – Versus - A.W.M [2013] eKLR (Nairobi ELC); J.N.M. Versus - W.W.M.[2014] eKLR (Embu High Court).
63. By dint of the provision of Section 91(7) of the Land Registration Act, joint tenants are free to sever the tenancy which severance must be completed by registration. A joint tenancy can therefore be converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders so remain. (Isabel Chelangat – Versus - Samuel Tiro Rotich & 5 others (2012) eKLR (High Court at Eldoret))

B. The Tenancy in Common

64. Although this issue is not prevalent in the instant case, I feel strongly the need to assess it for clarity sake and also distinguishing it to the Joint tenancy. The characteristic feature of a tenancy in common is that two or more holders of the property hold the same in equal undivided shares. Each share in the property is distinct and has not yet been divided between the co-tenants. The co-owners have separate interests that remain undivided, thereby holding the interest together.
65. The distinguishing aspect of the tenancy in common is the absence of the doctrine of survivorship. The shares of a tenant are unaffected by the death of a co-owner. Upon the death of the co-owner, the share of the deceased devolves to estate of the deceased. See the case of “Isabel Chelangat – Versus Samuel Tiro Rotich & 5 others (2012) eKLR (High Court at Eldoret)).
66. Having elaborately spelt out the concept of the two joint tenancies, it is critical that the Honourable Court applies them to the instant case herein. It is evident from the Certificate of title dated 11th January, 2002 produced herein that the original proprietors the Plaintiff and the deceased were tenants in commons. Section 61 of the Land Registration Act, 2012 provides for the procedure for dealing with a tenancy in common where the proprietor has died. It provides that the personal representative(s) is entitled to be registered by transmission as proprietor in the place of the deceased, and further, that such registration relates back to and takes effect from the date of the death of the proprietor. As was the case in the instant suit.
67. From the pleadings, testimony and submissions, both parties have proceeded with this suit as if the suit property was a tenancy in common and not a joint tenancy. The Land Act, defines joint tenancy is defined as;

“ a form of concurrent ownership of land where two or more persons each possess the land simultaneously and have undivided interest in the land under which upon the death of one owner it is transferred to the surviving owner or owners.”
68. According to Halsbury Law of England Fifth Edition, 2012 Volume 87, where land is granted to two or more persons for the same estate and where there are no words in the title document indicating that the



registered owners hold separate interests, then that parcel of land is held as a joint tenancy. Four main features mark this type of ownership: (1) the joint tenants own an individual interest in the property as a whole; each share is equal, and no one joint tenant can ever have a larger share. (2) the estates of the joint tenants are vested (meaning fixed and unalterable by any condition) for exactly the same period of time in this case, the tenant's lifetime. (3) the joint tenants hold their property under the same title. (4) the joint tenants all enjoy the same rights until one of them dies. Under the right of survivorship, the death of one joint tenant automatically transfers the remainder of the property in equal parts to the survivors (*jus accrescendi*). When only one tenant is left alive (as is the case in this instance), he or she receives the entire estate. If the joint tenants mutually agree to sell the property, they must equally divide the proceeds of the sale.

69. The Plaintiff has moved the Court to have the Defendants prohibited from dealing with his property. According to DW 1 she had donated her Power of Attorney (Defendant Exhibit No. 2) to the 1st Defendant because she would be travelling frequently. Indeed, she had travelled around 18th February, 2019. By that time the matter was already in Court. He gave him the power of Attorney after 3 years. It was her Children who instructed the development on the property. They were abroad and they would send her money to undertake the construction.
70. The provision of Section 60 of the Land Registration Act does not require a joint tenant to obtain Grant of Letters of Administration of the estate of a deceased joint tenant before he can deal with such a property. This section of law provides that upon the death of a joint tenant, the Land Registrar shall, upon proof of the death, cancel the name of the deceased tenant from the register by registering the Certificate of death.
71. DW - 1 testified that the deceased was the brother in law to Mr. Mohamed Swaleh Karama who was her brother. Her husband died on 10th May, 2008. She never applied for letters of Grant of Administration. The case was filed in the year 2016 but she could not remember the exact date. With reference to the decree, she told that from it she had been appointed as a Legal Administrator of her husband's estate. She got the decree on 13th February, 2019. Khalid Swaleh Karama the 1st Defendant is her brother, it was not true that he was building on the suit property. Both PW - 1 and DW - 1 agreed that the Plaintiff and DW - 1's deceased husband owned the suit property together. It follows that the demise of Omar Awadh Karama the property solely devolved upon the Plaintiff and the Deceased's estate and the proprietors of the suit property.
72. DW - 1 has told the Court that she donated the Power of Attorney to the 1st Defendant. According to Black's Law Dictionary, a Power of Attorney is:

“ An instrument authorizing a person to act as the agent or attorney of the person granting it.”
73. The Power of Attorney in Kenya is used to legally authorize another person to act as if it was the person that is giving the Power of Attorney. Examples are in transactions for sale of land, registration of intellectual property, filing of lawsuits, signing off on documents, opening of a bank account etc.
74. The question is whether an unregistered power of attorney to deal with immovable property is valid in law or whether it be used to carry on any business on behalf of the Donor. In other words, what legal effect does it have on subsequent transactions?
75. To respond to that query, I sought refuge from the case of:- “Kenneth Omollo Simbiri & another – Versus - Daniel Ongor [2020] eKLR” where Dr. M.A.Odeny J of the Environment and Land Court,



Eldoret, citing Ombwayo J in “Sanjay Varma & 2 others – Versus - Jackson Eshiwani Likoye & 7 others [2020] eKLR” where Ombwayo J. held as follows and I concur:

“The Powers of Attorney that the 1st Plaintiff sought to produce were executed in the United Kingdom and not registered in Kenya as required under Section 44 (4) of the Land Registration Act, therefore he lacked the capacity to be enjoined in the suit and the evidence he tendered ought to be disregarded.”

Section 44(4) provides that an instrument executed outside Kenya shall not be registered unless it has been endorsed or is accompanied by a certificate in the prescribed form completed by a notary public or such other person as the Cabinet Secretary may prescribe. There was no evidence that this requirement was complied with.

76. Dr. Odeny J stated:

“Further, section 9 of the Registration of Documents Act Cap 285 provides that every document the registration whereof is compulsory shall be registered within two months after its execution, and if executed outside Kenya it shall be registered within two months after its arrival in Kenya. There is further no evidence that this provision was complied with.

Section 4 of the Registration of Documents Act Provides that:

“All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:’

77. Dr. Odeny J additionally stated thus:-

“A Power of Attorney being one of the said documents that confers rights, it then follows that as the instant Power of Attorney in issue herein was dealing with immovable property hence it needed to be registered before it could be used.”

78. On whether the issue of the registration of the Power of Attorney could be raised at that stage in the proceedings, the Learned Judge stated:

“The issue that the appellant has issue with is that the point of registration of the Power of Attorney was never raised in the pleadings or at the time of admitting the document as an exhibit. The Respondent submitted that it is trite law that a point of law can be raised at any time before Judgment.

In the Court of Appeal case of John K. Malembi – Versus - Trufosa Cheredi Mudembei & 2 others [2019] eKLR the court held that:

“An issue urged in this appeal is that the trial judge considered matters not raised in the pleadings. The appellant contends that the issue of validity or otherwise of the sale agreement between the appellant and the deceased was never pleaded by either party. That the Judge erred in considering the issue and invoking the provisions of the Section 3 (3) of the Law of Contract Act when the matter had never been pleaded.”

“On our part, we find it was proper for the trial court to suo motu raise and determine the issue of its own jurisdiction. The suit before the trial court was instituted on 23/10/2000 at the High Court prior to the 2010 Constitution before and establishment



of the Environment and Land Court. We are of the view that the learned High Court Judge misdirected himself that he had jurisdiction pursuant to Paragraphs of the Practice Directions on Proceedings in the Environment and Land Court vide Gazette Notice No. 5178 dated 25/7/2014.”

“Regarding new issues that may arise in the course of a trial, the Court of Appeal in *Kinyanjui Kamau – Versus - George Kamau Njoroge* [2015] eKLR held:

“Of course if an issue arises in the course of hearing, and the same is fully canvassed by the parties, then even if that issue was not pleaded, then the court will make a determination on the matter. As was held in *Odd Jobs – Versus - Mubia* [1970] EA 476, “a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.”

In the present case, the Respondent did not raise the issue of the legality of the power of attorney or the standing of the Appellant’s Attorney in their statement of defence or during the hearing. The court is under an obligation to evaluate the case in its totality and if there is any anomaly or illegality with the process which is mandatory in nature then the court cannot sanitize such anomaly or illegality even though it was not raised as an issue for determination. The court also has an obligation to frame issues from the pleadings or summarize the issues put forth by the parties.

The parties might ignore pertinent issues which the court may find to be the real issue for determination. This does not mean that the court would be dealing with unpleaded issues for determination. I find that the trial Magistrate was right in finding that the suit was incompetent as the power of attorney was not registered as required. The issue could be raised at any time and even if it was not raised the trial Magistrate in evaluating the evidence in totality would have noticed the anomaly and flagged it out.”

79. Further, the Court of Appeal in the case of:- “*Anaet Kalia Musau – Versus - Attorney General & 2 Others* [2020] eKLR” upheld the decision of this court (ABURILI J) that a court of law can on its own motion consider a point of law which the parties have not raised and determine a suit on the basis of that point of law. Clearly from the evidence presented in this Court, the Power of Attorney donated to the 1st Defendant was not registered by the widow of the deceased proprietor of the suit property but was acknowledged by the deceased widow. Having said all the above, it is clear to this Honourable Court that the 1st Defendant had a valid Power of Attorney and or authorization to represent Anisa Awadh in the disposition and any other business conducted on the suit property and in this Court notwithstanding its lack of registration.

Issue No. b). Whether the Plaintiff is entitled to the orders sought

80. Under this sub heading, the law places the burden of proof on the Plaintiff to prove his case on a balance of probability. The provision of Section 107 of the Evidence Act (Cap 80) provides that whoever desires the court to give judgment on the basis of existence of certain facts, must prove that such facts exist. Further, the provision of Section 108 provides that the burden of proof in a suit or civil proceedings lies on the person who would fail if no evidence was led at all by either party. In this regard, the Plaintiff bore the burden to prove his case against the Defendants on this issue.
81. Additionally, the provision of Section 109 of the Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. In this case, the Defendants especially the 1st Defendant wanted the Court to believe that the Deceased’s widow had donated the Power to him and even though the widow testified as DW 1, the same had not been



registered and the 2nd Defendant had no reason as to why they were dealing with the suit property being that they were not part of the joint tenancy of the land. Therefore the burden of proof shifted to the Defendants.

82. The fact that evidential burden of proof can shift depending on the circumstance of the case, was stated by the Supreme Court in the case of:- “Raila Amolo Odinga & Another – Versus - Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR”, thus:-

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

83. This adage was enunciated in the Court of Appeal decision of “Jennifer Nyambura Kamau – Versus - Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010[2013] eKLR” as follows;

“We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.

84. During his testimony, the Plaintiff testified that had sued the 1st and 2nd Defendants - Khalid Swaleh Karama and Hassan Abdulkadir, his contractor because they have built a house inside his Plot No. Mombasa/Block/XVII/1323. He had no cause of action against him at all. In saying so, I hold that the Plaintiff bought the Plot together with his brother in law, Omar Awadh Karama who was now deceased having died on 8th May, 2008. The 1st and 2nd Defendants constructed on their property. He had the title deed in their names. The Plaintiff never gave consent nor authority the Defendant’s construction. The 1st Defendant was his brother who was their 3rd born. They did not have authority to construct a house in their plot. He went to the municipal council to find out but did not get assistance. He then filed the suit. He would like for the Court to order the demolition of the structures erected by the Defendants and the removal of their materials as well as damages.

85. The Defendants never denied carrying out the constructions. They did not have his permission. As already stated, the suit property belongs to him and the deceased. The deceased constructed the ground and 1st floor while the Plaintiff had built on the 2nd floor. The assertion was that the Defendants built on an empty space. At the time he bought the suit, none of the deceased’s family had gotten letters of administration. Nobody had the Plaintiff’s authority to put up a structure on their plot. Anisa Swaleh Karama was his sister and also the sister to the 1st Defendant. The decree in Kadhi’s Court succession Petition No. 164 of 2018 was given on 13th February, 2019. Anisa and himself were appointed as the duly appointed Legal Administrators of the Estate of Omar Awadh Karama. On her part, Anisa gave the Power of Attorney to the 1st Defendant on 21st February, 2019, long after he had filed this case. They did not inform the Plaintiff of anything. They never got approval for the said constructions. He had



never consented. The 1st Defendant had no claim over the property. He was seeking the reliefs in the Plaintiff. The deceased had a family including his sister and children, according to him and the Sharia Law, the deceased's widow had no power to carry out any development. The deceased had constructed on the ground and 1st floor. The children of the deceased stayed on the ground floor. He did not know who lived on the 1st floor. He had constructed a toilet on the 2nd Floor. He did not know if the constructions in dispute were done by her sister.

86. For this reason, the argument by the Learned Counsel on the misjoinder of parties does not hold waters. However, the Plaintiff's claim only exists with regard to the Contractor, the 2nd Defendant as the 1st Defendant through the Power of Attorney has a right to undertake construction on the suit property from the other administrator of the estate of Omar Karama.

87. The Plaintiff in his submissions sought to for this Honourable Court to order that this suit property in issue being Plot No Mombasa/Block XVII/1323 be subdivided in equal tiles between the Plaintiff in this suit and the 1st Defendant's witness Anisa Swaleh Karama who they can have the same distributed to the heirs of the late Omar Awadh Karama the joint owner of the subject property.

88. It thus clear that the Plaintiff has testified that he is in use and occupation of the suit property. He is not seeking for sale of the said property, and therefore he is entitled to partition which belongs to him and he is not to interfere with the portion that belongs to the deceased. Therefore, it is not in doubt as the Court has provided the procedure through which the same can be accomplished by way of partition. Consequently, the Plaintiff herein is thus required to follow the laid down procedure as per the provisions of Section 94 of the Land Registration Act in this regard. Under the section 94 the power to partition land held under common tenancy is given to the Registrars appointed under Sections 12 and 13 of the Land Registration Act, for the above reasons, this Court therefore finds that it cannot grant the order sought of severing the common tenancy as there is a procedure set down in law.

89. In the case of "Paul Muraya Kaguri – Versus - Simon Mbaria Muchunu [2015] eKLR" the Court held that;

“It is now trite law that where a statute establishes a dispute resolution mechanism, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say her rights were denied.”

90. Having carefully considered the available evidence and the available provisions of law, the Court finds and holds that the Plaintiff is only entitled to the sought in regards to the 2nd Defendant as the 1st Defendant has authorized permission to be on the suit property by the widow of the deceased proprietor who is also one of the legal administrators of the estate of the deceased Omar Karama.

91. As to the prayer seeking for trespass, the provision of Section 3 (1) of the Trespass Act, Cap 294 provides that:-

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

92. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. Being that this is a family matter and there may be a disagreement between the Plaintiff and his brother and also considering that the 1st Defendant has permission to be in the suit property. I find no reason to grant the prayer on general damages on trespass.



93. The prayer on the permanent injunction is only meritorious with regards to the 2nd Defendant for the fact that the Plaintiff has proved that he has no right to be in the suit property.

Issue No. c). Who will bear the Costs of suit

94. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

95. The proviso of Section 27 of the Civil Procedure Act, Cap. 21 holds that costs ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

96. By event it means the result or outcome of the legal action or proceedings.

97. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

98. In this case, as this Honourable Court has opined above, the parties shall bear their own costs.

VII. Conclusion and Disposition

99. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has not established her case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgement be and is hereby entered partially in favour of the Plaintiff as pleaded in the Plaint dated 14th December, 2016 as against the 2nd Defendant.
- b. That a Declaration be and is hereby made that the interest in the property is a leasehold interest by virtue of first registration on the 15th April 1994.



- c. That an order made that this suit property in issue being Plot No Mombasa/Block XVII/1323 be sub - divided in equal titles between the Plaintiff in this suit and the 1st Defendant's witness Anisa Swaleh Karama who they can have the same distributed to the heirs of the late Omar Awadh Karama the joint owner of the subject property.
- d. That a Permanent injunction restraining the 2nd Defendant their agents, jointly and severally from trespassing, entering, dumping materials, construction on Plot No. Mombasa/Block XVII/1323
- e. That there are no orders as to general damages for trespass as against the 1st and 2nd Defendants as the Plaintiff has not proved any interference or barring by the Defendants on the peaceful enjoyment of his property.
- f. That the parties shall bear their own costs of the suit.

It is so ordered accordingly.

JUDGMENT DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT Mombasa THIS .7TH DAY OF MARCH 2024.

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HON. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
Mombasa

Judgement delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Nyamboye Advocate for the Plaintiff.
- c. Mr. Oduor Advocate for the Defendants.

