IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 82 OF 2013

BETWEEN

BONNIFACE AWOUR ……...…….....1ST APPELLANT

MOSES AWOUR …….....2ND APPELLANT

AND

VICTOR OTIENO NYADIMO & GEORGE ODERO *(Suing as joint administrators*

*of the estate of the late Charles John Odinga***)……..... 1ST RESPONDENT**

BARCLAYS BANK OF KENYA LTD…….....… 2ND RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Kimondo, J.,)

dated the 9th day of October, 2012 in H.C.C.C. No. 64 of 2001)

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JUDGMENT OF THE COURT

[1] The dispute that has snowballed to the instant appeal is over the ownership of house No K21C within Jamhuri Estate being **LR No 209/6959/67** (suit property) which has pitted the family of **Monica Akinyi Odinga** (Monica) and the children of **Charles John Odinga** (Charles). Monica and Charles are both deceased. The background information is necessary to put the whole case in perspective. It was contended that Charles was married to Monica as 1st wife and **Pamella Akinyi Owour** (Pamela) 2nd wife under the Luo customary law. Monica died on 9th April, 1998 and by a strange twist of fate, eight months later, Charles also died on 15th December, the same year.

[2] Charles was survived by his second wife Pamela who obtained letters of administration jointly with George Odero on 16th June, 1999. Monica died testate having executed a **Will** on the 19th March, 1998 appointing **Barclay Trust Investment Services Ltd** (Executor) as the executor and trustee of her estate, although subsequently her estate was represented by her two brothers Boniface Awour and Moses Awour (1st and 2nd appellants) respectively vide letters of administration issued on 9th November, 1999 in Succession Cause No. 2067 of 1999. It seems Charles and Monica had no biological children but Charles and Pamela had three biological children namely Victor Otieno Nyadimo, Belinda Agatha Achieng and

Brian Joseph Awuor.

[3] The bequests in the said Will by Monica stated as follows;-

> **"I GIVE my personal and household effects as defined by the Law of Succession Act (Cap 160) to my husband CHARLES OLOO ODINGA absolutely.**
>
> **MY TRUSTTEES shall hold the residue of my estate whatsoever and whosesoever having paid my debts and funeral and testamentary expenses UPON TRUST for my mother (Mrs) ROSE AUMA AWOUR of Post Office Number 303 Ukwala Nyanza Province failing her to such of my brothers MOSES OWOUR and BONIFACE OTIENO as survive me and if they both do so in equal shares absolutely."**

The suit property was nonetheless not mentioned in the foresaid WILL. It was bought and registered in the joint names of Monica and Charles as per the lease made on 13th February, 1984. The suit property was charged to Barclays Bank of Kenya Ltd to secure certain borrowings which had not been fully liquidated by the time Monica died. Monica was an employee of the Bank up to the time of her demise, according to the appellants she was paying the loan though a check off system. There is a letter dated 10th August, 1998 in which the Executor wrote to the advocates for the respondents stating that;-

> **"…With regard to the Jamhuri Property, this office is aware the title passes by survivorship to your client, Mr John Charles Odinga and this has been explained to him.**
>
> **The house is mortgaged and charged to the bank and the outstanding loan balance as at 16th April 1998 was Ksh. 114,478.50.**
>
> **No doubt your client will arrange to clear the outstanding loan balance so that the title documents could be discharged."**

[4] A dispute that followed these unfortunate events became apparent after the letters of administration over the estate of Charles where issued to his surviving widow Pamela together with one George Odero on 16th June, 1999. They filed suit which was subsequently amended seeking certain declaratory orders to wit;-

> **a) A declaration that the charge herein in respect of LR No. 209/6959/67 House No. K2IC is fully paid up and satisfied and is thereby discharged.**
>
> **b) A declaration that the 1st defendant acted negligently and fraudulently in releasing the title documents to the suit property to the 2nd and 3rd defendants and should be condemned to pay aggravated damages therefore.**
>
> **c) A declaration that the plaintiffs are entitled to the title documents of the suit property as the same is part and parcel of the intestate estate of the late Charles John Odinga of which they are the administrators.**
>
> **d) An order directing the 2nd and 3rd defendants to release and hand over to the plaintiffs the title documents fraudulently and unlawfully released to them by the 1st defendant.**
>
> **e) An order directing the 1st defendant to execute a discharge of the said property or in the alternative this Honourable Court be pleased to execute the discharge.**
>
> **f) General damages.**
>
> **g) Costs of this suit.**

h) Interested on b, f, & g at court rates from the date of judgment until payment in full.

[5] The suit was against the Executor who in its statement of defence took very neutral positions on the two allegations regarding the title to the suit premises and the alleged legal consequences of suit premises upon the demise of Monica. As regards the tittle documents that were handed over to the 2nd and 3rd defendants, it was contended they were given as administrators of the estate of the late Monica. However the suit against Boniface Awour and Moses Awour, brothers of Monica who were sued as the 2nd and 3rd defendants was strenuously defended. They countered the above suit with an amended defence and counterclaim by which they sought the following orders;-

a) A declaration that the said Charles John Odinga held the whole property known as LR No. 209/6989/67 or part thereof in trust for the said Monica Akinyi Odinga and that upon her death the same formed part of her residual estate.

b) An order that the said L.R. No. 209/6989/67 be registered in the names of Boniface Otieno Awour and Moses Owour the 2nd and 3rd defendants herein as tenants in common.

c) An order evicting the plaintiffs from the said L.R. No. 209/6989/67.

d) General damages and/or *mesne* profits from 10th April 1998 till date of eviction.

e) Interest on (d) at court rate till date of eviction and/or payment therefore whichever is later.

f) An order that the personal representatives of Charles John Odinga do execute transfer documents unto the names of these defendants, Boniface Otieno Awour and Moses Owour failing which the Deputy Registrar of this Hon. Court be directed to do so.

g) Payment of the said sum of Kshs. 114,478/50 with interest thereon at court rate from 1st march 2000 till full payment therefore.

h) Other further or alternative orders as this Honourable Court would in the circumstances find just and proper to grant.

i) Costs of the suit.

[6] Before the main suit was heard, there were several interlocutory applications as it has almost become a practice in contested matters such as this one invoking emotions between two families brought together by the two deceased persons. One such application fell for hearing before **Kihara Kariuki J.,** (as he then was) being a notice of motion dated 3rd July, 2007 by Boniface Awuor by which he had sought an order appointing a receiver for rents receivable from the suit property which should be paid in court. To that application the learned Judge held as follows in his ruling delivered on 25th April, 2008

"Monica Akinyi Odinga made a Will on the 19th March, 1998 under the terms of which she bequeathed her personal and household effects to Charles Oloo Odinga her husband. She gave the residue of their estate to her mother and her two brothers Moses Awour and Boniface Otieno (the defendants.) The suit property was registered in the joint names of John Charles Odinga and Monica Akinyi Odinga as joint tenants. Monica Akinyi Odinga predeceased her husband John Charles Odinga. At the date of writing her Will on the 19th March, 1998, she was well aware of her interest in the suit property. There is no reference to it in her Will. She must have undertook and appreciated the legal effort of her joint tenancy between her and her husband, Moses Owour and Boniface Otieno can in law only take specific bequests given to them by their sister Monica Akinyi Odinga under her Will. It takes quite a bit of ingenuity to turn a whole house into a residue of a deceased's estate."

[7] There was also another application that was handled by Onyango Otieno J., (as he then was) and by a ruling dated 15th May, 2001 the learned Judge posited in a pertinent paragraph as thus;

> **"It is my humble opinion that the applicants, being the administrators of the estate of the late Charles John Odinga who survived Akinyi with whom they were joint tenants of the suit property have a duty in law to ensure that they preserve whatever was left in the estate of the late Charles John Odinga for the benefit of the beneficiaries."**

[8] As regards the impugned judgement, it is apparent the matter went through many Judges before the hearing finally settled on Kimondo J., who heard the evidence from the two witnesses. The evidence was adduced by way of witness statements which were adopted during the trial by Victor Otieno Nyadimo on behalf of the plaintiffs and Boniface Atieno Awour on behalf of the defendants who had also filed a counterclaim. Upon evaluating the evidence the learned trial Judge found the respondents had proved part of their claim on a balance of probabilities ; the appellants counterclaim was dismissed and judgment was entered as follows;-

> **a) That I declare that the property known as LR No 209/6959/67 house number K21C Jamhuri Estate Nairobi devolves upon and is part of the estate of Charles John Odinga, deceased.**
>
> **b) That the 2nd and 3rd defendants shall release to the plaintiff the title of the said property and if held in this Honourable court, the Deputy Registrar shall release the said title to the plaintiffs forthwith.**
>
> **c) The 1st defendant shall cause a discharge of charge to the title to be executed and released to the plaintiffs forthwith.**
>
> **d) In view of the fact that this is a dispute between family members over the estate of the deceased, the order that commends itself to me to grant is that each party shall bear its own costs.**

[9] Aggrieved by the foregoing orders the appellants have filed the instant appeal that is predicated on some twelve grounds of appeal to wit;-The learned judge erred in law and in fact in;-

> **1. Holding that the suit property L.R. No. 209/6989/67 (erroneously put as 209/6959/67) house No. K 21 C Jamhuri Estate Nairobi devolves upon and is part of the estate of John Charles Odinga erroneously put as Charles John Odinga, deceased.**
>
> **2. Failing to find that the suit property known as 209/6989/67 house number K 21C Jamhuri Estate Nairobi devolves upon and is part of the estate of Monica Akinyi Odinga, deceased.**
>
> **3. Failed to hold that the phrase, 'as joint tenants' was an obvious addition alteration or change to the title document which was unexplained and which changed the nature of holding and so led to the wrong judgment.**
>
> **4. Failed to find that before the unexplained insertion of the phrase, 'as joint tenants' the property L.R. No. 209/6989/67 was registered in the names of Monica's Akinyi Odinga and John Charles Odinga who were at most tenants in common before taking into account the circumstances under which the property was acquired by Monica Akinyi Odinga.**
>
> **5. The insertion of the phrase 'as joint tenants' at the margin demanded endorsements initiating and/or signatures of the parties to the document of title at or about the insertion so as to signify the approval knowledge and/or acceptance by the parties to the said document of the said addition alteration and/or change created as a result of the said insertion.**
>
> **6. Failed to hold and find that by dint of statutory provisions and/or under the common law**

and principles of Equityand in the absence of specific bequeath the property that was acquired wholly by consideration provided by Monica Akinyi Odinga alone vested in her alone and/or formed part of her residual estate.

7. Failed to find that in the circumstances under which the property was acquired John Charles Odinga was constituted and/or was deemed in law and/or in equity to be a trustee for Monica Akinya Odinga and/or her estate.

8. Misdirected himself when he accepted to be influenced by the rulings or observations made by previous judges at interlocutory stages of this case which rulings were made *obiter dictum* devolution of the suit property not having been an issue for them to decide at the interlocutory stage.

9. Failure to appreciate that the arguments and rulings in the interlocutory applications were confined to limited issues i.e. as to whether or not to surrender the documents of title into court for safe custody and as to whether or not to deposit rental income in interest earning account in joint names of the plaintiffs and the 2nd and 3rd defendants respectively pending the final judgment in the case.

10. Failing to hold that upon the death of Monica Akinyi Odinga, John Charles Odinga expressly assumed responsibility over the balance of the loan in respect of the suit property of the balance of the loan from the estate of Monica Akinyi Odinga meant that the property devolved upon and was part of her estate.

11. In consequence whereof the learned Judge erred in failing to find that the 2nd respondent should not have deducted a sum of Kshs. 114,478/50 from death benefits payable to the estate of Monica Akinyi Odinga and/or apply same to clear the title to the suit property thus denied the estate of Monica Akinyi Odinga the use of the said amount as from November, 2000.

12. Failing to find that by deducting a sum of Kshs. 114,478/50 from the estate of Monica Akinyi Odinga to pay for the balance of the loan due to the 2nd respondent on the suit property both the respondents thereby confirmed that the suit property devolved on the estate of the said Monica Akinyi Odinga.

[10] During plenary hearing, Mr Adere learned counsel for the appellants relied on his written submissions and made some lengthy oral highlights. Counsel combined the arguments in grounds 1,2,3,4, and 5 under theme of **alteration of the title document** while submitting that the ' Lease' over the suit property was altered on page 2 thereof through an insertion of the phrase "*as joint tenants*" which essentially changed the nature of holding which ought to have been tenancy in common. According to counsel, any alterations on a document required the initials of all the parties. Due to this alteration without initials the same was void as it cannot be proved who inserted the words complained of. Counsel cited some old English cases among them the case of;- **Aldous V Cornwell** [1868] VOL 111 QB 573 and **Suffel V The Bank Of England** [1882] VOL 1X QBD 555 to demonstrate that once a deed is altered in some material way by the plaintiff or by a stranger without the knowledge of the defendant it becomes void. We understood Mr Adere to say that the alteration on the title document was effected by Charles who wanted to benefit from the joint tenancy clause that altered the nature of ownership of the suit property.

[11] On grounds 6 and 7 that dealt with purchase **of suit property from Monica's money;** Mr Adere was emphatic that although Charles' name appeared on the title he was in effect a trustee for Monica who provided all the payments towards the acquisition of the suit property. To this end counsel cited **Halsbury's Laws of England**, **4th Edition Vol 22 para 1065** to buttress the argument that the suit property wholly belonged to Monica notwithstanding the joint registration. The learned authors have written;-

"No presumption of a gift from a wife to a husband…from a transfer into his name, or into

their joint names… from a purchase of property with her money…Where property is bought with money belonging to a wife and conveyed to her husband, there is a resulting trust in favour of the wife in the absence of proof by the husband of a contrary intention on her part"

[12] Grounds 8, 9, 10, 11, and 12 centred on **Monica's Will and final dues to redeem the suit property.** According to counsel, Charles was given a specific bequest in the Will and the rest of the property including the suit property which formed the residue was bequeathed to Monica's mother failing which the appellants were to benefit. That is why Charles did not institute court proceedings to repossess the same as he had resigned to the fact that the appellants were entitled to the suit property. Finally even the final payment of Ksh. 114,478/50 to redeem the charge, was deducted from the estate of Monica and in the event the same should revert to the appellants. Counsel faulted the learned trial Judge for failing to adjudicate on this issue that was raised in the appellant's counterclaim. If as the learned trial Judge held, Charles was entitled to the suit property then it was his responsibility to pay the outstanding balance to redeem the property and what was taken from Monica's account should be refunded to her estate. With this counsel urged us to allow the appeal.

[13] This appeal was opposed; Mr Mungla learned counsel for the respondents relied on his written submissions and made some oral highlights. Counsel for the appellant discounted what he termed misleading and sweeping statements by the appellants that were not supported by evidence such as; Charles and Monica were not married; that the suit property was solely acquired and paid for by Monica; that banking conditions did not allow women to purchase a house or property unless the woman was doing so jointly with a man. On the issue of alteration of title document, counsel for the respondent submitted the allegations of fraud or forgeries were generalized without pointing out any acts of fraud, alteration or unauthorized addition to the title; this went against the cardinal rule of pleadings as captured under **Order 2 Rules 4 & 10** of the Civil Procedure Rules which requires allegations of fraud to be pleaded with particularities.

[14] Counsel for the 1st respondent went on to submit that apart from failing to provide the said particulars, the appellants also did not lead any evidence in that regard, thereby failing to discharge their evidential burden; on the other hand the 1st respondent tendered a duly certified copy of the title in compliance with the provisions of **Section 23** of the Registration of Titles Act. Counsel also made reference to several authorities among them the case of;- **Dr Joseph N.K Arap Ngok Vs Justice Moijo Ole Keiwua & 5 Others** CA No. 60 of 1997 which interpreted the said **section 23** of the RTA as thus;-

"Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title holder under the Act. It is our law and law takes precedence over other alleged equitable rights of title"

[15] Regarding the joint tenancy, counsel cited excerpts from leading Text Books among them **Megary & Wade's Law On Real Property 6th Edition Page 475 FF** where the learned authors have discussed the key features of registration of property as joint tenancy. That is on death of one joint tenant, his or her interest in the land passes to the other joint tenant by right of survivorship (*jus accrescendi).* Finally on the issue of alleged deduction of Ksh 114,478/50 by the bank from the late Monica's dues; no evidence was adduced to support this claim as the appellants exclusively relied on their witness statements which did not give any evidence to support the above claim. Counsel urged us to disallow the appeal.

[16] This is a first appeal as we were reminded by both counsel in their submissions and our role is to reconsider the evidence before the trial court and subject it to a fresh re-evaluation but with the usual caution that we never saw or heard the witnesses testify and give due allowance for that. (See the case of - ***Selle And Another V Associated Motor Boat Company Ltd And Others, [1968] 1 EA 123 (CAZ) :***

"**An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it**

should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally *(Abdul Hameed Saif v. Ali Mohamed Sholan*, (1955), 22 E.A.C.A. 270)."

[17] In line with the above principles, and having regard to the grounds of appeal, the evidence, everything that transpired before the trial court; the impugned judgment and the submissions made before us, the issues we discern are three fold; the key one being whether the title over the suit property was altered from tenancy in common to joint tenancy; whether the Will of Monica bequeathed the suit property to her mother failing to the appellants and lastly whether the learned Judge misapprehended the evidence on record regarding the refund of Ksh 114, 478/50. On the first issue whether the title document was altered, unfortunately, no evidence was led before the trial court on forgery; how or by who made the alterations, whether it was an innocent alteration or a forgery. This crucial allegation of forgery or alteration against which the appellants' case hinged was not at all conversed before the trial court. The appellant merely adopted his written statement which did not provide any evidence let alone demonstrate how, when and who altered the lease document and why the charge which was registered the same time was not altered. This is what the 1st appellant said during the trial;-

"I know Monica Akinyi (deceased). She is my younger sister John Charles Odinga is known to me. I have prepared a statement dated 15th March, 2012 and filed in court on 19th March 2012. I rely on it…This case has been filed against me and Moses Awuor as administrators of Monica's estate. We have also counter-claimed against the plaintiff and taken up the case against Barclays Bank. I pray for the prayers in the (sic) counter. I pray also that this case be dismissed."

[18] We agree with the submissions by Mr Mungla which are also supported by the provisions of **Section 107 of the Evidence Act Cap 80** that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue. See Section 107 of the same;-

"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."

[19] It goes without saying a party is bound by their own pleadings and the evidence they adduce in court. The purpose of pleadings is to ascertain with clarity the matters on which parties disagree and points of agreement so as to ascertain matters for determination. In the instant appeal, the appellant made very generalized allegations of alteration of the title document in the amended counterclaim which was made in the following words as per paragraph 5 of the defence and counter-claim;-

"Without prejudice and in the alternative to the preceding paragraph these defendants aver that if the aforesaid property was registered in the names of Charles John Odinga and Monica Akinyi Odinga as joint tenants which is denied such registration was as a result of forgery or an unauthorised alteration or addition made to the documents of title"

[20] The above pleading comprised of generalized allegations of fraud, against the settled practice that allegations of fraud are accompanied with particulars. That failure notwithstanding, even during trial no such evidence of particulars was adduced as to how the title document was forged or altered. In this case we also agree with the conclusions drawn by the trial Judge on paragraph 8 of the judgment where he stated as follows

"Although the 2nd and 3rd defendants stated there was duress or coercion or fraud in having Charles John Odinga registered as a joint tenant, there was paucity of evidence in support.

The allegations of fraud in particular called for detailed evidence to reach the threshold of proof. I am well alive to the cardinal precept of the law of evidence that he who alleges must prove it. See Koinange and 13 others V. Koinange [1986] KLR 23. The standard of proof for fraud is very high approaching but below proof beyond reasonable doubt. See Ratilal Gordhanbhai Patel V. Lalji Makanji [1957] EA 314, Ulmila Mahindra Shah v. Barclays Bank International and Nao. [1979] KLR 67 It requires proof beyond the usual standard of balance of probabilities in civil cases."

[21] We have also subjected the same evidence to fresh analysis and looking at the said lease, we agree with the trial Judge it would be difficult without evidence of the person who drew the document, or an expert in document examination testifying on the authenticity or lack of it regarding the so called alteration; that is whether the indication of *"joint tenant"* on page 2 was a genuine one or a forgery. There was no evidence to aid any conclusion in that respect. This finding is fortified by the fact that the same lease document was at the same time it was acquired, simultaneously charged to secure a loan. Incidentally the charge document and the lease are dated and registered the same day and in the charge document, Monica and Charles are described as joint tenants. The question we have asked ourselves is whether it was possible to forge or alter only the lease document and leave the charge that were registered simultaneously. Moreover these documents were executed by Monica and Charles and they were duly witnessed. The challenge is coming too late when they are both dead and as the saying goes 'the dead tell no tales'.

[22] As matters are, the appellants failed to prove forgeries or alterations of a title as registered. Furthermore under the land law regime, which is predicated under Common law, a title cannot be challenged as registered. The registration being a joint tenancy, upon the demise of the joint owner, the interest in the land passes to the joint tenant. It was unfortunate it is Monica who died first, were it that she survived Charles the shoe would have been on the other side and there is nothing that can be done in this regard as that is the principle of common law see the Text book by **Kevin Gray and Susan Francis Gray's Elements of Land Law 5th Edition** has equally given a succinct exposition of law of Joint Tenancies. The learned authors state at page 914 as follows:-

"The essence of joint tenancy consists in the theory that each joint tenant is wholly entitled to the whole of the interest which is the subject of co-ownership…… the key to understanding joint tenancy is the realization that no joint tenant holds a specific or distinct share himself but which is (together with other joint tenant or tenants) interested with the totality of the co-owned interest. The whole is not so much the sum of the parts, for each and every part is itself co-extensive with the whole…..Each holds everything and yet holds nothing."

At Para 7.4.3, the authors state that:

Joint owners are bound up in a thorough and intimate union of interest and possession. So comprehensive is this co-ownership that joint tenants comprise, in the eyes of the law a collective entity one composite person – together holding one and the same estate in the subject land, whether that estate be freehold or leasehold. Accordingly, any transfer of land to two or more persons as joint tenants operates so as to make them, vis a vis the outside world, one single owner."

In Birmingham CC V. Walker [2006] IWLR 2641 Blackstone J. elegantly described the right of survivorship in the following words:

"When two or more people are seised of a joint estate….

The entire tenancy upon any of them remain to the survivors; and at length to the last survivor…The interest of two joint tenants is not only equal or similar, but also one and the same. One has not originally a distinct moiety from the other…but each has a concurrent interest in the whole; and therefore on the death of his companion, the sole interest in the whole remains to the survivor."

[23] Moving to the next issue regarding the Will by Monica, the suit property was not mentioned in the Will there was no specific bequest made of the same. Counsel for the appellant argued the suit property formed part of the residue of her estate that was bequeathed to her mother failing which it was the appellants. The legal question that we have asked ourselves is assuming Monica had made a specific bequest of the suit land to the appellants (which she did not do) what would have been its effect when the title was registered as joint tenancy and as it is she was survived by the surviving tenant. Apart from that legal question, we wondered why the suit property which appears to us as the most valuable asset that Monica had, and which was also charged to her employer whom she appointed as the executor of her Will was not mentioned. Is it because Monica was aware the suit property was not available for distribution due to the nature of the its registration? All those questions were not answered by the pleadings and the evidence tendered before the trial court.

[24] The last issue was in regard to the counter-claim **of Ksh 114,478/-** which the appellants claimed was deducted from Monica's final dues to clear the loan over the suit property. We have gone through the evidence before the trial court and we are unable to specifically point out the above sum which was allegedly deducted from Monica's final dues. There is evidence to the effect that certain payments were made by the respondents, and there was an outstanding sum but it is not clear who settled it as the title documents were released to the appellants. Perhaps the loan account was settled from Monica's final dues; however as she was a joint tenant it was incumbent upon the appellants to adduce evidence to specifically identify how the said sum which was due to them was irregularly or unlawfully used to pay the loan. We think the trial Judge appropriately addressed this issue on paragraph 10 of the judgment: -

> **"I will now turn to the claim against the 1st defendant bank. The Barclays Trust Services on 10th August 1998 (letter at page 3 of plaintiff's bundle) acknowledged that:**
>
> **With regard to the Jamhuri property, this office is aware that the title passes by survivorship to your client, Mr. John Charles Odinga and this has been explained to him.**
>
> **That letter was copied to the 1st defendant. The outstanding loan on 16th April 1998 was Kshs. 114,478.50. On 29th November, 2001, the 1st defendant returned a cheque from the plaintiffs' lawyer of Kshs. 20,000 in loan repayment. The 1st defendant stated the loan had been fully redeemed from the death benefits of Monica Akinyi. This is evident from documents at pages 8 to 18 of the plaintiffs' bundle. I then find it surprising that the 1st defendant released the title document to the wrong party, the defendants."**

[25] In conclusion we are satisfied the learned Judge did his best faced with the kind of evidence and pleadings before him, he identified the key issues which he set out; he analysed the evidence against the pleadings and the relevant law and arrived at the right conclusions. We find no justifiable reasons for departing from the said findings.

In the upshot we are in agreement with the learned Judge that the appellants' case was without merit so is this appeal which we order dismissed. We make no order as to costs as we recognize this matter involves family members whom we do not want to set against each other any longer.

Dated and delivered at Nairobi this 8th Day of December, 2017.

ALNASHIR VISRAM

……..…....

JUDGE OF APPEAL

W. KARANJA

……..…….....

JUDGE OF APPEAL

M. K. KOOME

…….....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR