Mbuthia v Njuguna (Environment & Land Case E018 of 2023)
[2024] KEELC 5854 (KLR) (26 August 2024) (Judgment)

Neutral citation: [2024] KEELC 5854 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE E018 OF 2023

LN GACHERU, J

AUGUST 26, 2024

BETWEEN

ISABELLA WANJERI MBUTHIA ..... APPELLANT

AND

JAMES WILFRED WAWERU NJUGUNA ..... RESPONDENT

(Being an Appeal from the Judgement of Hon. E. Muriuki Nyaga, SPM delivered on 31st May 2022, at Muranga MELC NO. 35 of 2028)

JUDGMENT

1. The Appellant herein, Isabella Wanjeri Mbuthia, filed this Appeal vide a Memorandum of Appeal dated 17th October, 2023, against decision of the Senior Principal Magistrate E. Muriuki Nyaga, which was delivered on 31st May, 2022, at the Chief Magistrates Court at Murang'a in ME.L.C Case No 35 of 2019. The trial court had entered a judgement in favour of the Plaintiff (Respondent herein) and the Defendant thereon (Appellant) was aggrieved by the said findings and filed this Appeal. The Appellant has sought for the following Orders:

    i. That the Appeal be allowed and the Judgement be quashed and set aside with costs.

2. The genesis of this Appeal is the Plaintiff's (Respondent) claim brought via a Plaint dated 21st November 2019, wherein the dispute was over land parcel No. LOC.11/Maragi/48, which measures approximately 1.25 Hectares.

3. The Plaintiff thereon had averred that on or about the year 1972, jointly with his brother, Nahashon David Mbuthia (deceased), who was husband to the Defendant(Appellant), contributed the sum of KSH 3,100/=, and bought all that parcel of land situated in Murang'a County and known as LOC.11/ Maragi/48, measuring approximately 1.25 Hectares. wherein they were registered as joint proprietors. That upon the demise of Nahashon David Mbuthia, his half share was transmitted to his wife(the

Appellant herein), and currently the parcel of land is registered to the joint names of Appellant and Respondent as tenants in common ,with each holding half share of 0.625 H.

4. That in 2017, the Respondent in an endeavor to have the title partitioned into two equal shares, filed the suit in the Chief Magistrates Court at Murang'a, pursuant to which the impugned judgment was delivered in favour of the Plaintiff(Respondent).

5. Further, the Plaintiff had claimed that he has, on several occasions, implored upon the Appellant (defendant) to have the suit property partitioned into two equal shares of 0.625 Hectares, to enable each party be registered separately, but the Defendant(Appellant) has without any colour of right and/or justification declined to release the original certificate of title, execute the necessary documents and/or consent to the partition process and consequently the Defendant(Appellant), by her action has hindered the Plaintiff(Respondent), from carrying out developments on his portion.

6. The Appellant (defendant) in her Defence and Counter- claim dated 8th January 2020, averred that she solely bought the suit land vide an sale agreement made on 12/8/1972, for Ksh.3,100/= paid in deposits of Ksh 2,000/= paid on 12/8/1972, Ksh 300/= paid on 28/9/1972, Kshs 100/= paid on 2/3/1972, Kshs 100/= paid on 3/11/1972, Kshs 200/= on 10/11/1972, Kshs 100/= paid on 1/12/1972 and balance of Kshs 300/= paid on 28/12/1972.

7. Further, the Defendant(Appellant herein), had averred that the only reason the Plaintiff(Respondent herein), was registered as a joint owner was out of fear that the land may be disposed of , and was only a trustee to that extent, a fact well known by the Plaintiff(Respondent). Therefore, that the Plaintiff's use of land as collateral and or securing a loan was illegal abinitio. The Defendant(Appellant) had concluded that the purpose of the Plaintiff being registered in trust has been extinguished, and the Defendant(Appellant), should be registered as the sole owner.

8. The matter proceeded for trial via viva voce evidence before the trial court and on 31st May 2022, the trial court delivered a judgement in favour of the Plaintiff(Respondent herein).

9. Dissatisfied with the trial court's decision, the Appellant, filed this Appeal via the Memorandum of Appeal dated 17th October 2023 on the following grounds:

    i. The learned magistrate erred in law and in fact by failing to consider that the contribution of each party was not reflected in the judgement in relation to each parties share.

    ii. The learned magistrate erred in law and in fact by failing to take into consideration development and occupation by the appellant since 1972.

    iii. The learned magistrate erred in law and in fact by failing to take into fact or consider counter-claim before the court.

    iv. The learned magistrate erred in law and in fact by failing to consider the evidence on record.

    v. The learned magistrate judgement was not in consonance with the evidence on record.

10. The Appellant urged this court to allow the appeal and that the Judgement of the trial court be quashed and set aside with costs.

11. The instant Appeal was admitted on 22nd November 2023, and thereafter the court directed that the Appeal be canvassed by way of written submissions. The parties did file their rival written submissions, in support and opposition of the respective positions.

12. The Appellant filed her written submissions on 5th March 2024, through the Law Firm of Kimwere Josphat& Co Advocates, and submitted that the Appellant was the sole contributor of the purchase

price for the suit land. She further submitted that the only reason the Respondent herein was given by his brother title to use as collateral was due to their close friendship.

13. It was the Appellant's further submissions that if each parties owned individual shares to the suit land, it ought to have been separated during the lifetime of Appellant's deceased husband, one Nahashon David Mbuthia, which was not done. Further, the Appellant submitted that in lieu of this, any claim thereafter by the Respondent was barred by limitation of actions and was not sustainable.

14. The appellant further submitted that the trial court failed to take into account the development and occupation of the suit land by the Appellant since 1972. She alleged that the evidence before the trial court alluded to the said fact, that the Appellant had been in occupation of the suit land continuously, and peacefully since 1972.

15. Further, the Appellant submitted that the Respondent had never occupied nor utilized the suit land before and after the demise of the Appellant's deceased husband, because the Respondent had no right of entry to the suit land. Further, the Appellant submitted that in the Defence and Counter-claim, she had proposed that the trust under which the Respondent had been registered be extinguished and the Appellant be declared as the sole proprietor.

16. It was her further submissions that the trial court, in its Judgement, failed to establish if the trust was created or not. Further that it was incumbent upon the trial court to examine and decide whether the trust was created or not.

17. The Appellant also submitted that the trial court failed to consider the evidence produced by her, for instance the agreements written in Kikuyu language taking int account how difficult and/ or important it was for the Appellant to have maintained the agreements executed in 1972. She also submitted that on the other hand, the Respondent had not produced any evidence other than words.

18. On his part, the Respondent filed his written submission dated 7th March 2024, through the Law Firm of Muchoki D. M& Co Advocates. It was the Respondent's submissions that contrary to the Appellant's pleading that she is the one who bought the parcel of land, the exhibited handwritten sale agreements were between her husband and the vendor, despite the fact that she had alleged in her Defence and Counter- claim that her husband only came in to be registered at the far end .She did not allude in her evidence that she equally requested her husband to execute the sale agreements on her behalf.

19. Further, the Respondent submitted that he gave uncontroverted evidence that his late brother, Nahashon David Mbuthia approached him and informed him about the suit Land which was on sale, and thereafter, they both contributed the purchase price to the suit land, they appeared before the land Control Board, and then the title was registered in their joint names on 17th November 1972 ,as per the abstract of title.

20. In addition, the Respondent submitted that the Appellant never raised any issue with the said joint registration of suit property and upon her husband's demise in the year 1999,she duly filed a Succession Cause, wherein the Respondent in good faith surrendered the title to her, and consequently they were registered as tenants in common on 13th March 2017,with each holding half share as per the abstract of title and search certificate.

21. In light of the above, the Respondent was in agreement with the decision of the trial court, and he submitted that the said decision cannot be faulted since the court was never called upon to decree on each parties contribution to the suit premises and/or shareholding.

22. It was the Respondent submissions that it is trite law that a party is bound by its own pleadings, and therefore, the Appellant cannot seek in this Appeal to introduce new issues and/or attempt to invite this Court to pronounce itself on the ownership of the suit property. To support this argument, the Respondent cited the case of Kurshed Belgium Mirza v Jackson Kaibunga [2017]eKLR where the Court held that:

> " ...If anything, even the plaint itself spoke of shares having been undivided. It is trite law that pleadings are not only binding on the parties, but on the court as well. A party is thus disallowed from departing from the contents of its pleadings in the course of trial.

23. To buttress this point further, the Respondent relied on the case of Captain Harry Gandy v Caspair Air Charters Ltd (1956)23EACA, where the court held;

> " .....The object of pleadings is of course to ensure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given.."

24. In response to ground 2, the Respondent submitted that the Appellant failed in her pleadings, and evidence to raise the issue of being solely entitled to suit land by virtue of continuous occupation of the suit property and/or the developments therein. Further, the Respondent submitted that the Appellant was, all along, aware that the Respondent was entitled to a half share of the suit land, and thus the reason why even after the demise of her husband, he was interred in his half portion of the land.

25. The Respondent also submitted that the continuous occupation of the suit land did not entitle the Appellant to the Respondent's share. He argued that since the Appellant had wished to rely on long occupation of the suit land, then her remedy lay in an action for adverse possession, and not extinguishing of trust.

26. In response to ground 3, the Respondent submitted that it is not enough for the Appellant to allege the existence of a trust, but she had the obligation to prove the existence of such a trust. In light of this averments, the Respondent relied on the case of Ngugi vs Kamau & another [ELC 30 of 2020], wherein the Court held;

> " The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must proof that:-
>
> (a) the suit properties were ancestral and/or clan land;
>
> (b) during adjudication and consolidation, one member of the family was designated to hold on behalf of the family;
>
> (c) the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.

27. Further, the Respondent relied on the case of Njenga Chogera -vs-Maria Wanjira Kimani & 2 Others [2005]eKLR, which quoted with approval the holding in the case of Muthuita-vs- Muthuita [1982-88] 1 KLR 42, where the Court of Appeal held that customary trust is;

> " proved by leading evidence. Trust is a question of fact, which must be proved by whoever is claiming a right under customary trust. A trust can never be implied by the Court, unless there was intention to create a trust in the first place."

28. Further in the case of Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR, the Court held;

> " The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parities to create a trust must be clearly determined before a trust is implied."

29. In response to grounds 4& 5 the Respondent submitted that the trial court, in its Judgement aptly captured the parties evidence. It further submitted that despite the Appellant listing 5 witnesses, who allegedly witnessed the execution of the sale agreements, none of them came to testify in court or give their written witness statements.

30. Therefore, the Respondent submitted that though the Appellant had alleged that during her husband's illness, the Respondent refused to part with the title to be used as a collateral in the hospital due to huge hospital bills, which prompted the Appellant to use a friends title as a collateral , the said friend was not called as a witness.

31. Consequently, the Respondent submitted that the Appellant's evidence was not credible at all and the allegation that the said evidence was not considered does not hold any water. Further, the Respondent submitted that his testimony concerning purchase of suit property was collaborated by that of NELSON GATHIGE MACHARIA, his witness.

32. In conclusion, the Respondent urged this court to find that in the totality of evidence on record, the trial's court decision ought not to be disturbed, since the Appellant had failed to establish the existence of a trust over the suit land. It was his further submissions that this being a family matter relating to land, each of the parties should bear their own costs.

33. The above is the summary of the Pleadings, before the trial court, the findings of the trial court, the evidence as contained in the Record of Appeal, the rival written submissions, which this court has carefully read and considered.

34. Further, this court having carefully read and considered the Record of Appeal, the Grounds of Appeal, the written submissions by the parties, the court finds the single issue for determination is; Whether the Appeal is merited?

35. In determining the above issue, this court will have to consider each and every ground of appeal, and then juxtapose it with the available evidence as contained in the Record of Appeal , then arrive at its own conclusion, while bearing in mind that it never saw nor heard the witnesses, as did the trial court.

36. As this is a first Appeal, it is the duty of this court, as an appellate one, to re-analyze and re-assess the evidence on record and then reach its own independent decision in the matter as provided by Section

78 of the *Civil Procedure Act*. See the case of Selle ...Vs... Associated Motor Boat Co. [1968] EA 123 where the Court held that;

> " 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

37. Further as the Court determines this Appeal, it will take into account that it can only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial court misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of Mbogo & Another vs Shah, [1968] EA, p.15, where the court held that:

> " An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."

38. From the available evidence, it is evident that the Respondent was initially registered as a joint proprietor of the suit land Loc 11/ Maragi/ 48, together with his brother, Nahashon David Mbuthia, who is the deceased husband of the Appellant herein. As joint registered proprietors under the Registered *Land Act*, Cap 300(repealed), they were considered as the absolute owners with all rights and privileges appurtenant thereto, as provided by section 27 of the said Act (repealed)which provides;

> " (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
>
> (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease."

39. There is evidence that Nahashon David Mbuthia, the husband to the Appellant died in 1995, as testified by the Respondent and the Appellant. It is also not in doubt that after the demise of Nahashon David Mbuthia, the Appellant herein filed a succession cause on behalf of the estate of her deceased husband. Consequent to the filing of the Succession Cause, the suit land was registered in the joint names of the Appellant and the Respondent, each to half shares.

40. This registration of the Appellant and the Respondent as joint proprietors, each holding half share was affected on 13th March 2017. Therefore, this registration is the one commonly known as tenants in common, as opposed to joint tenants.

41. As tenants in common, each tenant has a right to possess and use the entire property, and either party may sell or transfer his/ her share of the property to any person for any reason. See section 2 of the *Land Act*, 2012, which defines tenancy in common as a form of co-ownership in which two or more people possess land simultaneously where each person holds an individual, undivided interest in the property and each party has the right to alienate or transfer their interest.

42. This registration was done after the Appellant filed the Succession Cause, and she is therefore very aware that the suit land is registered in the joint names of herself and Respondent, each holding half share. There is no evidence that this registration was done without the knowledge of the Appellant. It is therefore evident that the Appellant and the Respondent are tenants in common, each holding their distinct undivided half share of the suit land.

43. Under the *Land Registration Act*, tenants in common can seek to partition the land occupied in common. Section 94(1) of the said Act provides;

> "(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."

44. Therefore, from the above provisions of law, it is clear that a tenant in common may wish to partition his land so that each tenant has a distinct share and title, and to do so, he may apply to the Land Registrar, subject to consent of the other tenant to have the property held in common sub divided.

45. The Respondent herein in his claim had alleged that he wished to have the suit land which is held in common, partitioned or sub divided, but the Appellant refused to grant such consent or cooperate in having the suit land partitioned. For that reason, the Respondent moved to court and urged the court to allow the partitioning.

46. However, the Appellant opposed the claim and alleged that the suit land was solely purchased by herself without any contribution from the Respondent. It was her claim that the Respondent was registered as a joint proprietor to hold the suit land in trust for his brother's family, and thus the trust was now extinguished, and the suit land should be registered solely in the name of the Appellant.

47. However, after interparties hearing, the trial court found in favour of the Respondent, which determination aggrieved the Appellant and thus this Appeal. So, is the Appeal merited?

48. On ground No.1, the Appellant alleged that the trial court erred in law and fact by failing to consider that the contribution of each party was not reflected in the judgement, in relation to each party. In her submissions, the Appellant submitted that she was the sole contributor of the purchase price, which she obtained by selling porridge to construction workers at Mumbi estate.

49. This allegation was denied by the Respondent, who submitted that the purchase price of the suit land was ksh 3100/=, and he contributed 2000/= and his late brother contributed 1100/=. However, the Appellant had alleged that she paid the full purchase price. However, the exhibits produced by her were handwritten sale agreements written in kikuyu language, and the said agreements did not specify the land being purchased.

50. The Appellant is the one who had alleged, and therefore the burden of proof was upon him as provided by section 107 and 108 of the *Evidence Act*. This position was buttressed by the Court of Appeal the case of *Jennifer Nyambura Kamau vs 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."

51. The claim by the Respondent was for the Appellant to be compelled to partition the suit land which is held jointly by the Appellants and the Respondent, each holding half share. The Respondent had alleged that he contributed for the purchase of the suit land. Though no exhibits of how the purchase price was paid, the court takes judicial notice that the said purchase was done in 1970s, and it would be tall order to expect the Respondent to have kept records of how he paid the purchase price.

52. Given that the suit land was registered in the joint names of the Respondent and his brother Nahashon David Mbuthia in 1975, then this court will find and hold that it is more probable than not that the suit land was registered in the names of both brothers because they had jointly contributed for the payment of the purchase price. The issue of how much contribution each made was a none issue. The Appellant cannot be heard to say she was the sole purchaser of the suit land, because her exhibits show that the payments were made by Nahashon David Mbuthia, for purchase of unidentified land.

53. Therefore, the court finds that the Appellant was bound by her pleadings, and she could not produce exhibits to the contrary and expect the court to find in her favour. See the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, where the Court held;

> " It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must align with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.

54. For the above reasons, ground No.1 fails, as the trial court was not bound to make any findings or determination on each party's contribution.

55. On Ground No.2, the Appellant alleged that the trial court failed to take into consideration the development and occupation of the suit land since 1972. As the court pointed out, it is clear that the Respondent's claim was for compelling the Appellant to allow the partitioning of the suit land which is a tenancy in common.

56. The Appellant in her counter-claim alleged that the Respondent was registered as a joint proprietor to hold the suit land in trust, and she sought for the said trust to be extinguished. The Appellant claim was not based on adverse possession. It is only a claim of adverse possession where the trial court is bound

to consider the duration of occupation and development on the suit land. See the case of Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR stated as follows:

> " At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See Littledale v Liverpool College (1900)1 Ch.19, 21."

57. A claim on existence of trust has to be proved by calling of evidence. A court cannot infer existence of trust by mere allegations. A claimant for existence of trust must call sufficient evidence to prove such claim. See the case of Juletabi African Adventures Limited & another v. Christopher Michael Lockey (2017) eKLR., where the Court held;

> " It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because: -
>
> "The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

58. Since the Appellant had not raised the issue of being entitled to the suit land by virtue of continuous occupation of the suit land, then this court as an Appellate one, cannot hold and find that the trial court failed to consider the development and occupation of the Appellant over the suit land. Therefore, ground No2 fails too.

59. On Ground No3, the Appellant alleged that the court failed to consider her Counter-claim. In her submissions, she averred that though she had raised the issue of trust in her Counter- claim, the judgement of the court was silent and or mute on that issue, though the evidence pointed to existence of a trust.

60. This court had considered the impugned judgement, and it is indeed correct that the trial court was mute on the alleged existence of trust, and that the same was extinguished. However as pointed above, allegation of trust is not enough to prove existence of trust. The party alleging trust has an obligation to prove the said trust exist by calling of evidence. The burden of proof is on the person alleging existence of trust. See the case of *Kamau v Thiga (Environment and Land Appeal 5 of 2021)* [2022] KEELC 2839 (KLR) (21 July 2022) (Judgment), the Court reasoned as follows:

> " The legal burden of proving the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person claiming must [prove] that: -
>
> (1) the suit properties were ancestral clan land;
>
> (2) during adjudication and consolidation, one member of the family was designated to hold on behalf of the family;

(3) the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant."

61. The Appellant herein did not call any evidence to prove that the Respondent was registered as a joint proprietor to hold the suit land in trust for the Appellant and/her family. With the above analysis, ground No3 fails too.

62. On ground No. 4 that the trial court failed to consider the evidence on record, the court has considered the impugned judgement, the court note that on the last page of the judgement, the trial court held;

> "the defendant produced some agreements which show that her late husband made contributions towards the purchase of the property.. From the evidence adduced herein and the submissions made by the parties, it is my finding that the plaintiff has established his claim on a balance of probabilities."

63. From the above excerpts of the trial court's Judgement, it is evident that the trial court did consider the available evidence before it, and the fact that the said court did not find in favour of the Appellant is not enough to claim that the trial court failed to consider the available evidence on record.

64. On ground No5, the Appellant alleged that the impugned Judgement was not in consonance with the evidence on record. The word consonance means harmony or agreement among components. By alleging that the impugned judgement was not in consonance with the evidence, then the Appellant means that the judgement was not in harmony with the available evidence.

65. From the claim filed by the Respondent and the Defence and Counter-claim raised by the Appellant, the trial court had two options; either to find in favour of the Respondent and allow his claim, or dismiss his claim and find in favour of the Appellant herein.

66. After analyzing the available evidence, the trial court found that the Respondent had proved his case on the balance of probabilities and allowed his claim. Though the Appellant had alleged that she solely bought the suit land, she did not avail any evidence to support her allegation. The Respondent alleged that he bought the suit land jointly with his brother Nahashon David Mbuthia. The evidence of this averment is the title deed issued on 1975, in the joint names of the two. During the lifetime of Nahashon David Mbuthia, the said title was not challenged, and if it was challenged, no such evidence was availed before the trial Court.

67. Further, there is evidence that even after filing for Succession cause, the Appellant did not have the whole suit land in her name, but was only registered as a proprietor of the undivided share of the suit land that belonged to her late husband. Therefore, it is evident that the trial court did not believe the Appellant evidence, but was persuaded by the Respondent evidence, and thus found in favour of the Respondent. Grounds No5 fails too.

68. Having failed in all the grounds, then what is evident is that the Appellant's Appeal cannot stand. However, even with the grounds of Appeal having failed, this court has a duty co reconsider and re analyze the available evidence and come to its own independent conclusion.

69. As adduced by both parties, the suit land is in joint names of the Appellant and Respondent as tenant in common, each holding half share. The Respondent initially owned the suit land jointly with his brother, who is now deceased. Though the Appellant had alleged that the Respondent must have been

registered through fraud, or was registered to hold it in trust, there was no evidence availed to support that allegation.

70. The suit land herein is held in tenancy in common concept. The issue of tenancy in common was elaborated in the book entitled "The Law of Real Property ; Sweet & Maxwell , Eighth Edition pages 496 to 503 to mean.....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."

71. In the tenancy in common, there are four unities and these 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.

72. In the instant suit, the Appellant and the Respondent are tenants in common, and each of them is entitled to possession of his or her share as the other. The Respondent had testified that his late brother, who was a husband to the Appellant was buried on his portion of land. This evidence was not controverted by the Appellant.

73. As stated earlier on, the suit land was initially in the name of the Respondent, and his late brother Nahashon David Mbuthia, and after the death of Nahashon, the Appellant got registered as a joint proprietor through transmission.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. The Appellant thus took the place of her husband after his death.

74. The Respondent wished to terminate the tenancy in common and thus the reasons why he filed the suit before the trial court. It is evident that Section 94 of the *Land Registration Act* provides for a severance of a common tenancy by way of partition. It provides that:

    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.

75. In the case of Muhuri Muchiri –vs- Hannah Nyamunya (Sued as the Administrator of the Estate of Njenga Muchiri also Known as Samuel Njenga Muchiri (Deceased) [2015] eKLR, the Court held as follows;

> "the law on termination of a tenancy allows co-owners to by agreement sever the co-ownership by partition; by acquiring the interests of another co-owner and thus become solely entitled; or by the sale of the common property and division of the proceeds of the sale.

76. From the available evidence, the suit land is capable of being partitioned into two equal portions. The Respondent wishes to have the suit land portioned, but the Appellant is opposed to it and had even alleged that the Respondent is holding the suit land in trust. This allegation was not proved, and thus the Respondent is entitled to his prayers of partitioning of the suit land which the Appellant and Respondent hold as tenants in common. Since the Appellant cannot give consent as stipulated by Section 94(1) of *Land Registration Act*, then the trial court was right in allowing the prayer of compelling her to do so.

77. Having come to a conclusion that the Respondent is entitled to seek for severance or partitioning of the suit land held in common tenancy, and having found that there was no evidence of existence of trust, which trust was capable of being extinguished as prayed by the Appellant in her Counter- claim, this court finds and holds that this Appeal is not merited.

78. Consequently, this court as an Appellate one, finds no reasons to upset the findings of the trial court that was delivered in its Judgement of 31st May 2022. Therefore, this court upholds the said judgement of the trial court and proceeds to dismiss this Appeal entirely with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26TH DAY OF AUGUST, 2024.

L. GACHERU

JUDGE

26/8/2024

Delivered online in the presence of: -

Joel Njonjo - Court Assistant

Kimwere & Co Advocates for the Applicant

N/A - Respondent