



**M'Mbwiria & another (Suing as the Legal Administrator of the Estate of M'Mbwiria M'Ruthiru) v Nkanata (Sued as the Legal Representative of M'Nkanata M'Burugu – Deceased) & another (Environmental and Land Originating Summons E002 of 2025) [2025] KEELC 6435 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6435 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2025**

**JO MBOYA, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**JOSEPH KIRIMI M'MBWIRIA ..... 1<sup>ST</sup> PLAINTIFF  
HARLES KIRIA M'MBWIRIA (SUING S THE LEGAL ADMINISTRATOR OF  
THE ESTATE OF M'MBWIRIA M'RUTHIRU) ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF M'MBWIRIA  
M'RUTHIRU**

**AND**

**JACKSON NGAKU NKANATA (SUED AS THE LEGAL REPRESENTATIVE OF  
M'NKANATA M'BURUGU – DECEASED) ..... 1<sup>ST</sup> DEFENDANT  
& JUSTER KATHAMBI [SUED AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF JOHN KIRIA M'ARITHI – DECEASED) ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. What is before me is the Originating Summons [OS] dated 13<sup>th</sup> February 2025; brought pursuant to the provisions of Order 37 Rule 8 of the *Civil Procedure Rules*; Sections 1A, 1B and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya; and wherein the Plaintiffs seek the following reliefs:
  - i. The Tenancy in common in respect of parcel No. Abothuguchi/L-Kijja/284 be severed.
  - ii. The Deputy Registrar of this Honourable court be empowered to sign any documents that the defendants may refuse to sign.



- iii. A declaration that the 1<sup>st</sup> Plaintiff is entitled to ten (10.0) acres the 2<sup>nd</sup> plaintiff is entitled to ten (10.0) acres, the 1<sup>st</sup> defendant be entitled to twenty-one decimal two (21.2) acres and the 2<sup>nd</sup> defendant be entitled to two (2) acres as per the records attached green card.
  - iv. The court be pleased to grant such further or other relief as may be just in the circumstances.
  - v. The Defendants be condemned to pay the court for the suit.
2. The Originating Summons is premised on various grounds which have been captured in the body thereof. In particular, the plaintiffs have contended that the suit property was duly registered in the names of the plaintiffs and the defendants as tenants in common [ownership in common]. Furthermore, it has been posited that the acreages for and in respect of the various tenants have been captured and highlighted in the green card.
  3. The originating summons is also supported by the affidavit sworn by the 1<sup>st</sup> plaintiff, namely; Joseph Kirimi M’Mbwiria. In addition, the deponent has annexed various documents, including a copy of the green card in respect of the suit property, showing the extent of the acreages belonging to the various tenants.
  4. The originating summons [OS] was duly served upon the defendants herein. However, the defendants herein neither entered an appearance nor filed any response to the originating summons.
  5. The instant matter came up for directions on the 28<sup>th</sup> July 2025; whereupon learned counsel for the Plaintiffs intimated to the court that same was keen to prosecute the originating summons on the basis of affidavit evidence. Furthermore, counsel indicated that same shall be filing written submissions. To this end, the court proceeded to and issued directions in line with the provisions of Order 37 Rule 16, 17 and 19 of the *Civil Procedure Rules 2010*.
  6. The Plaintiff filed written submissions dated 8<sup>th</sup> September 2025; and wherein the Plaintiffs have adopted and reiterated the grounds contained at the foot of the originating summons, as well as the averments in the body of the supporting affidavit. In addition, learned counsel for the Plaintiffs has highlighted one key issue, namely; that the suit property was duly registered in the names of the Plaintiffs; and the Defendants as owners/tenants in common. Furthermore, it has been submitted that the acreages due to and in favour of each tenant in common are captured in the register/green card.
  7. Additionally, it was submitted that in the year 1995, the owners in common, namely; the plaintiffs and the defendants, respectively, applied for consent from the land control board for purposes of subdividing/partitioning the suit property. However, it has been posited that despite the issuance of the consent, the partitioning was not undertaken because the defendants herein declined to participate. In this regard, it has been posited that the subdivision of the land has not been actualized and thus the necessity for the intervention by the court.
  8. Having reviewed the originating summons, the affidavit in support thereof, the contents of the annexures and the submissions filed on behalf of the Plaintiffs; I come to the conclusion that the determination of the subject matter turns on one solitary issue, namely; whether the plaintiffs are entitled to the orders sought and in particular, the severance of the tenancy in common.
  9. It is common ground that where parties are registered as tenants in common [owners in common], each owner has a distinct share/acreage in the designated property. For good measure, the owners have distinct shares, albeit captured in the same [one] title. In respect of the instant matter, the respective shares of the plaintiffs and the defendants are duly reflected and captured at the foot of the green card.



10. Additionally, it is imperative to recall and reiterate that where the property is registered in the names of tenants in common, the doctrine of Jus acresendi [doctrine of survivorship] does not apply. Notably, the said doctrine only applies to matters and or instances where the property is registered in joint names, namely; Joint Tenancy. To this end, it is important to posit that each of the parties, namely; the Plaintiffs and the defendants, hold their distinct shares in the suit property.
11. To buttress the foregoing position, it suffices to reference the holding in the case of *Josephine v Attorney General* (Criminal Appeal 128 of 2009) [2015] KECA 407 (KLR) (25 September 2015) (Judgment) where the Court of Appeal expounded on the principle of ownership in common and the distinction between ownership in common and joint tenancy.
12. For coherence, the court stated thus;

We have considered the appellant's contention and the learned judge's finding. The title document to the property has two names and this is concurrent ownership. There is no indication as to whether the property is held on a tenancy-in-common or joint tenancy or tenancy in entirety. When a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in joint tenancy and not tenancy-in-common or tenancy in entirety. A tenancy in common or tenancy in entirety means that the interest of each registered owner is determinable and severable; in a joint tenancy, the interest of each owner is indeterminable, each owns all and nothing.

35. A joint tenancy cannot be severed unless one of the four unities of title, time, possession or interest is broken. A joint tenant has the right to the entire property or none – since the other joint tenant also has a right to the entire property. This is expressed in latin as totum tenet et nihil tenet, a joint tenant holds everything and nothing (see *Re Foley (deceased) Public Trustee -v- Foley & Another* (1955) NZLR 702). In *Stack -v- Dowden* (2007) UKHL 17, the House of Lords expressed itself as follows: “The starting point where there is sole legal ownership (a sole name case) is sole beneficial ownership. The starting point where there is joint legal ownership (a joint name case) is joint beneficial ownership. The onus is upon the person who seeks to show that the beneficial ownership differs from legal ownership. The onus of rebutting the presumption is heavier in joint name cases. The amount of interest (s) would be declared on evidence.”
13. In so far as the parties hold distinct, albeit determinable shares in the suit property, the parties or any of the parties are at liberty to petition the land registrar. For coherence, the powers of the land registrar and the process attendant to the severance of Ownership in Common is captured and or provided for under the provisions of section 94 of the *Land Registration Act* 2012, [2016].
14. The provisions of Section 94 of the *Land Registration Act* stipulate thus;
  - (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 subdivision of land and of any covenants or conditions in a certificate of title or certificate of lease, 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.
- (3) The Registrar may, after hearing the applicant and any of the other tenants in common who wish to appear and be heard, make an order for the partition of land having regard to—
- (a) whether the provisions of this Act, any other written law regulating the subdivision of land and any covenants and conditions in a land have been or will be complied with if the partition is effected;
  - (b) the nature and location of the land;
  - (c) the number of tenants in common and the extent of their respective shares, particularly, the extent of the share of any tenant in common by whom or on whose behalf the application has been made;
  - (d) the value of any contribution made by any tenant in common to the cost of improvements to or the maintenance of the land or buildings occupied in common;
  - (e) where the tenants in common are spouses or the tenants in common who do not agree on the partition are dependants of or related to the tenants in common, whether the interests of those tenants in common who have not agreed to the partition have been or will be adequately provided for as a consequence of or after the partition is effected, and particularly, a spouse or dependants of the tenant in common who is applying for the partition will not be rendered homeless by the partition;
  - (f) in respect of an application made by a person referred to in subsection (2)(b), whether the interests of the spouse or any dependants of the tenant in common whose share is to be sold in execution of a judgment or decree, will be adequately catered for and particularly, any spouse or dependants will not be rendered homeless by the sale;
  - (g) if the tenants in common are pastoralists, whether the tenants in common who have not agreed to the partition will, after the partition, still retain grazing rights, including grazing rights created by an easement in the partitioned land, to sufficient land of the quality and nature and in the location customarily used by those pastoralists;
  - (h) the proper development and use of the land and whether it may be adversely affected by the partition applied for;
  - (i) the hardship that would be caused to the applicant or applicants by the refusal to an order in comparison with the hardship that would be caused to any other person by making the order; and
  - (j) any other matters that the Registrar considers relevant.
- (4) The Registrar may make the order for partition subject to such limitations and conditions, including conditions relating to the payment of compensation to those tenants in common who have not agreed to the partition, by the tenants in common who have applied for the partition and how the expenses and costs of the partition are to be borne, as the Registrar may consider just and reasonable.



- (5) Any co-tenant aggrieved by the decision of the Registrar may apply to the Court for a review of that decision.
15. The provisions under reference deploy the word ‘may’. In this regard, a tenant in common is at liberty to apply to the land registrar for purposes of partitioning of the property held in common. Furthermore, where a party chooses the process by applying to the Land Registrar, then such a party is obligated to exhaust the process prescribed under Section 94 of the *Land Registration Act*; and same can only invoke the Jurisdiction of the Court vide Judicial Review.
16. On the other hand, and taking into account the usage of the word may in the provisions of section 94 of the *Land Registration Act* (supra), the tenants in common or any of them is at liberty to approach the court for purposes of an order to partition and or subdivide the property held in common.
17. In this regard, it is my finding and holding that the application beforehand is rightly before the court. Nevertheless, I beg to underscore that where there is a prescribed mechanism provided for under statute, it is imperative that a party deploys such a process before approaching the seat of justice. [See the decision of the Supreme Court in the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment) where the court underlined the necessity to adopt a nuanced approach.

We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.

18. Flowing from the foregoing, I therefore find and hold that the defendants herein cannot hold the Plaintiffs at ransom. Furthermore, it is imperative that the plaintiffs have a right to excise and or cause the suit property to be sub-divided in an endeavor to partake of and benefit from the rights accruing from ownership of Land.
19. Further and in any event, there is no gainsaying that the issuance of separate and distinct title[s] will go a long way in granting the parties and more particularly, the plaintiffs, the freedom to use their respective parcels of land. [See the provisions of Section 24; and 25 of the *Land Registration Act*, 2012]
20. In the premises, I find and hold that the originating summons beforehand is meritorious. Furthermore, the provisions of Article 40 (3), as read together with Article 65 of the *Constitution*, necessitate the grant of the relief sought.

### **Final Disposition**

21. Having dealt with and considered the solitary issue that was isolated for consideration; I come to the conclusion that the suit beforehand ought to be allowed.



22. Consequently, and in the premises, I hereby proceed to and do allow the Originating Summons on the following terms:
- i. The Tenancy in common in respect of the suit property No. Abothuguchi/L-Kijja/284 be and is hereby severed.
  - ii. A declaration be and is hereby issued that the 1<sup>st</sup> Plaintiff is entitled to ten (10.0) acres the 2<sup>nd</sup> plaintiff entitled to ten (10.0) acres, the 1<sup>st</sup> defendant be entitled to twenty-one decimal two (21.2) acres and the 2<sup>nd</sup> defendants be entitled to two (2) acres as per the records attached green card.
  - iii. The District Surveyor be and is hereby ordered to undertake subdivision of the suit property in accordance with the distinct acreages shown/captured in the green card; and more particularly as highlighted in clause 2 hereof.
  - iv. The Defendants herein be and are hereby ordered and or directed to execute the mutation form, the land control board consent application and the requisite documents of conveyance.
  - v. In default by the defendants to execute the instruments of conveyance in terms of clause (iii) hereof; the Deputy Registrar shall be at liberty to execute the named documents on behalf of the Defendants.
  - vi. Costs of the suit be and are hereby awarded to the Plaintiffs.
  - vii. Costs in terms of clause (iv) shall be agreed upon; and in default, same to be taxed by the Deputy Registrar in the conventional manner.

23. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].**

**JUDGE.**

In the presence of:

C/A: Hussein

Miss Riungu for the Plaintiffs

No appearance for the Defendants

