



NJAGA & CO. ADVOCATES

TALENTED PERSONNEL, TIRELESS PREPARATION & PERFECT EXECUTION



Co-owning **Property** in **Kenya**:

Joint Tenancy vs.
Tenancy in Common



INTRODUCTION

In Kenya law, under the [Land Registration Act](#) of 2012, two or more people can own a property, either a piece of land or a building together. Accordingly, co-tenancy is where two or more people own either jointly or in different distinct shares of a given property. Co-tenancy brings about two sister terms: joint tenancy and tenancy in common.

JOINT TENANCY

A joint tenancy arises whenever land is conveyed or devised by two or more persons without any words to show that they are to take distinct and separate shares. In a joint tenancy, the joint owners of the property form a single ownership of the property. Accordingly, any disposition of the property must be carried out by all the joint tenants as a unit. A joint tenancy carries in itself a thorough and intimate union between the joint owners, and together, they form one person.

Perhaps the leading feature of joint tenancy is that it carries the [doctrine of survivorship](#). So, when a joint tenant dies, their interest vests to the surviving tenant or tenants jointly. This

means that if you jointly co-own a property with a friend or colleague, in case you die, your share of that property will vest to the surviving joint co-owner, and the interest will not form part of your estate to be shared between your beneficiaries either through testate (will) or intestacy succession. All the surviving joint owner(s) need to do is to present a copy of the dead joint owner's death certificate to the Registrar of Lands, and the Registrar will strike out the name of the dead party from the title documents.

For there to be a joint tenancy, there must be the element of survivorship and four unities as explained below:

- a. **The unity of possession:** This unity means that each co-owner is entitled to possession of any part of the land as the other/s. One co-owner cannot point to any part of the land as their own to the exclusion of the other/s. No one co-owner has a better right to the property than the other/s, so an action for trespass cannot lie against another co-owner.
- b. **The unity of interest:** Unity of interest means that the interest of each joint tenant

is the same in extent, nature and duration, for in theory of law, they hold just one estate. As explained above, joint tenants form an intimate and thorough union where all joint owners form one person.

- c. **The unity of Title:** Unity of title means that each joint tenant must claim their title to the land under the same act or document. This is satisfied by having the joint tenants acquire their rights by the same conveyance and being so registered as joint tenants. Indeed, Section 91(3) and Section 92 of the **Land Registration Act, 2012** denote that any certificate of title being issued to two or more people as joint owners must clearly state that they are joint owners of the property at hand.
- d. **Unity of time:** Unity of time means that each tenant's interest must vest at the same time.

Joint tenancy is an ideal form of co-owning property for:

- Married couples or close family members who wish to ensure that the property remains within the family unit without the complications of inheritance law.
- Individuals seeking a straightforward succession plan for their real estate investments. Under joint ownership, the property is excluded from the estate of joint owners, and on the death of either joint owner, it automatically transfers to the surviving joint owner(s).

TENANCY IN COMMON

As opposed to joint tenancy, tenants in common hold equal and undivided shares of the property. Each tenant in common has a distinct share of property, which has not yet been divided among the co-tenants. Thus, tenants in common have quite separate

interests in the property in question. The only fact that brings them into co-ownership is that they both have shares in a single property, which has not yet been divided among them. While the tenancy in common lasts, no one can say which of them owns any particular parcel of land.

The major distinction between tenancy in common and joint tenancy is the fact that the doctrine of survivorship does not apply to tenancy in common. This means that if a tenant in common dies, their share of the commonly owned property **will not** transfer to the surviving common tenants. Rather, their shares will form part of their estate that will be later divided by their surviving beneficiaries under the law of succession. This means that the share of one tenant is not affected by the death of one of the co-owners.

Further, unlike the joint tenancy, where the four explained unities must be present, the only essential unity under the tenancy in common is the **unity of possession**.

Also, under the tenancy in common, **unity of interest** may be absent, and the tenants may hold unequal interests so that one tenant in common may be entitled to a one—fifth share and the other to four-fifths, or one may be entitled to life and another in fee simple.

Key Characteristics of Tenancy in Common in Kenya:

- **Flexible Ownership Shares:** Shares can be divided in any proportion among the owners according to their investment or agreement.
- **No Right of Survivorship:** The deceased's share forms part of their estate and devolves to their beneficiaries either through will or under the laws of intestacy, thus allowing for greater control over inheritance.

- **Independence:** Co-owners can manage their share of the property as they see fit, freely gift, sell, or transfer it, thus offering more autonomy in managing their investment.

Tenancy in common in Kenya is Ideal for:

- Investors pooling resources to buy property, where contributions and, therefore, ownership shares may differ.
- Friends or business partners who wish to maintain individual control over their investment.
- Individuals planning for a specific distribution of their assets upon death.

LEGAL AND PRACTICAL CONSIDERATIONS OF JOINT TENANCY VS TENANCY IN COMMON



owners of the land. Accordingly, it is critical for co-owners to ensure that the registration process is lawful and the names of the co-tenants appear in the title.

Most importantly, where two or more people are co-tenants, they need to specify the form of tenancy and the nature of their rights, either joint or common tenancy. Where the title documents are silent on the form of the co-tenancy, the **Act** provides for a mandatory presumption that such co-tenants hold the interest as tenants in common in equal shares.

b. Co-ownership and other relationships between spouses

Where a spouse obtains an interest in the land during the subsistence of marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the **Matrimonial Property Act** (Cap. 152). Under the **Act**, ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

c. Partitioning of property held under tenancy in common

Where tenants in common wish to partition their land so each tenant has a distinct share and title, they can apply to the Land Registrar, subject to the consent of the other tenants, to have the property held in common sub-divided. The applicant, a common tenant, or anyone who has an order in favor of an undivided share of land can also apply to the Registrar without necessarily getting the consent of the other common tenants.

Noteworthy, the partition can be voluntary, initiated by the proprietors themselves, or involuntary, ordered by the Registrar in specific circumstances. Different types of partition can be carried out, including physical division of the

land, creation of easements, or sale of the land and distribution of proceeds among proprietors.

d. Tax Complications

Co-owners should consider the tax implications of each ownership structure, particularly in terms of capital gains tax, rental income, stamp duty, etc. Consulting with a legal or tax professional will allow you to understand the various tax implications of each.

CONCLUSION

Choosing between joint tenancy and tenancy in common in Kenya depends on one's financial

goals, relationship with co-owners, inheritance plans, and long-term plans for the property. Both arrangements of co-owning property offer distinct advantages and limitations. Prospective co-owners should carefully consider their circumstances and, where necessary, seek legal counsel to ensure their property co-ownership aligns with their objectives and provides the desired legal protection and flexibility. Understanding the implications of each co-ownership type is the first step towards making informed and strategic property investment decisions in Kenya's dynamic real estate market.





SCAN ME



Our publications are designed to inform clients and the public about various legal topics. They are intended for informational purposes only and do not constitute legal advice.

We appreciate your interest in our legal insights and look forward to the opportunity to serve you. For personalized legal assistance or services, please get in touch with our skilled team of professionals using the provided details.

P : +254 701 63 55 03

w : www.njaga-advocates.co.ke

E : info@njaga-advocates.co.ke

njagaaadvocates@gmail.com

Westlands Commercial Center,
Block D (Old Block) 2nd Floor, Suite 2,
Ring Road, Parklands