



**Mungai v Mburu (Environment and Land Appeal 38 of 2022)
[2023] KEELC 17522 (KLR) (15 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17522 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 38 OF 2022**

BM EBOSO, J

MAY 15, 2023

BETWEEN

EVANSON MBURU MUNGAI APPELLANT

AND

MARY NJERI MBURU RESPONDENT

(Being an Appeal arising from the Judgment of Hon. C. A OTIENO- OMONDI (SPM) delivered at Ruiru Senior Principal Magistrate Court on 8/4/2022 in Ruiru MCELC No E1 of 2020)

JUDGMENT

1. This appeal challenges the Judgment rendered by Hon C. A Otieno-Omondi on 8/4/2022 in Ruiru SPMC MCLE Case No E1 of 2020. The appellant was the plaintiff in the primary suit while the respondent was the defendant. The respondent filed a defence and a counterclaim in the suit. The two parties in the dispute are husband and wife. They are estranged. The appellant resides in Kenya while the respondent resides in the United States of America. One of the key issues which arose for determination in the suit was whether the suit property was matrimonial property held in trust by the appellant. Before I delve into the issues that fall for determination in the appeal, I will briefly outline the contextual background to the appeal.
2. Through a plaint dated 27/10/2020 and amended on 13/11/2021, the appellant sued the respondent, seeking orders for removal of a caution which the respondent had caused to be registered against the land register relating to land title number Ruiru East/Juja East Block 2/977 [hereinafter referred to as “the suit property”]. His case was that he was the registered proprietor of the suit property and that, unknown to him, the respondent had caused a caution to be registered against the land register relating to the suit property claiming the interest of a licensee in the suit property. He contended that he was desirous of subdividing the land to give some to his children and sell some to cater for his needs, including medical expenses. He stated that he was unable to do so owing to the subsisting caution.



3. The respondent filed a defence and a counterclaim dated 23/4/2021 in which she contended that the appellant was registered as proprietor of the suit property in trust for her [the respondent] and for the children of the union. She added that they moved to the suit property as a family in 2001 before the appellant left for the United Kingdom in 2003 where he lived and worked for 11 years. In her counterclaim, she contended that she developed the suit property using her own funds as well as funds sent to her by the appellant. She added that they had earlier agreed with the appellant that the suit property would be distributed to the children of their union but the appellant had reneged on the agreement and wanted to dispose the suit property altogether. The respondent added that her interest and contribution and the interest and contribution of her children in the suit property could not be “wished away.” She prayed for a declaration that she and her children had a beneficial interest in the suit property and an order for equal subdivision of the suit property amongst the couple and “their seven children”.
4. Upon conclusion of trial, the trial court rendered the impugned judgment in the following verbatim terms:

“In the circumstances of this case where the plaintiff’s indicated that his intention was to have the land subdivided between his 5 children from his marriage with the defendant and 2 children born out of wedlock and to sell a portion to finance his medication and given the length of time the caution has been in force and as the defendant has also urged the court in her counterclaim to order for equal subdivision of the suit property between the plaintiff (now defendant), 1st defendant (now plaintiff) and their seven children and finding guidance in the case of *John Silvester Chege Kibake v Julia Wambui* [2004] eKLR and balancing the rights of the parties, I issue the following orders:

 1. A declaration that the defendant (now plaintiff in counterclaim) has a beneficial interest in the suit property Ruiru East/Juja East Block 2/977 registered in the name of the plaintiff (now defendant in counterclaim).
 2. The caution lodged by the respondent in respect of parcel No Ruiru East/Juja East Block 2/977 is hereby ordered removed on condition that the plaintiff subdivides and transfers 2¼ acres of the suit property to the defendant, his children from his marriage to the defendant and his 2 children born out of wedlock.
 3. The plaintiff shall retain the remaining 1 acre of the suit property.
 4. There shall be no orders as to costs.
5. Aggrieved by the Judgment and disposal orders of the trial court, the appellant brought this appeal, advancing the following five verbatim grounds of appeal:
 1. That the learned trial magistrate misdirected herself on the facts placed before her thereby arriving at the wrong conclusions and applying the wrong legal principles.
 2. That the learned trial magistrate misdirected herself and erred in law by proceeding under the *Matrimonial Property Act* while the parties are still married and not divorced.
 3. That the learned trial magistrate erred in law in awarding two and a quarter acres of the suit property to the defendant and the appellant’s children from his marriage and his two children out of wedlock against the weight of the evidence placed before her.



4. That the learned trial magistrate erred in law and in fact in relying on extraneous matters in reaching her decision completely disregarding the evidence tendered by the appellant's witnesses.
5. That the learned trial magistrate erred in law and in fact in awarding the respondent reliefs she had not sought.
6. The appellant urged the court to set aside the judgment and decree of the trial court and substitute it with an order granting the relief that was sought in the amended plaint.

Appellant's Submissions

7. The appeal was canvassed through written submissions dated 31/10/2022, filed by M/s Lokitano & Company Advocates. The submissions focused on the five grounds of appeal that were itemized in the memorandum of appeal.
8. On the contention that the trial magistrate misdirection herself and erred by proceeding under the *Matrimonial Property Act* while the parties were still married, counsel cited Section 7 of the *Matrimonial Property Act* 2013 and the decisions in *AKK v PKW* [2018] eKLR and *Kobilo Chepkok v Francis Chepkok Tuwei* [2018]eKLR and submitted that only the Family Court had jurisdiction to determine questions relating to distribution of matrimonial property and that the said jurisdiction could be exercised only upon proof of dissolution of the marriage. Counsel contended that what was before the trial court was purely a land dispute which did not call for invocation of the provisions of the *Matrimonial Property Act* 2013.
9. Counsel added that were it to be the case that the dispute before the trial court related to matrimonial property, the trial court still lacked jurisdiction to adjudicate the dispute during the subsistence of the marriage.
10. On the contention that the trial magistrate erred in law in awarding 2¼ acres of the suit land to the defendant and to the seven children, counsel invited the court to pronounce itself on the question as to whether a trial court can divide property of a party when it has not been invited to do so and when the property is not a matrimonial property. Counsel cited Section 24(a) of the *Land Registration Act* 2012 and Section 7 of the *Matrimonial Property Act* and submitted that, as the registered proprietor of the suit property, the appellant was the one to determine how to divide, share, utilize or dispose the suit property and the trial court had no powers to direct him on how to share it. Counsel added that were the property to be matrimonial, the law was clear that it would vest in the spouses only.
11. Counsel for the appellant submitted that although the appellant had indicated in his pleadings that he wanted to give part of the suit property to some of his children and dispose part of it to cater for his medical expenses, he did not indicate the portion that was to be given to the children and the portion that was to be sold and therefore the trial court had no basis for unilaterally distributing the appellant's property. Counsel faulted the trial court for distributing the appellant's property to some of his children even after it had made a finding to the effect that the children had no beneficial interest in the suit property.
12. On the contention that the trial court erred in law and in fact in awarding the respondent reliefs she had not sought, counsel cited various decisions emphasizing that parties to a suit were bound by their pleadings and added that the trial court went beyond the parties' pleadings and subdivided the appellant's property using a formula that the appellant was not privy to. Counsel added that the trial court awarded the appellant's property to two unidentified children born out of wedlock when nobody had asked the trial court to do so.



13. On the contention that the trial court erred in law and in fact in relying on extraneous matters in reaching its decision, counsel submitted that what was before the trial court was “a simple land dispute” but the trial court introduced matrimonial property issues and family law issues into the dispute.
14. On the contention that the trial court misdirected itself on facts placed before it, leading to wrong conclusions and application of wrong legal principles, counsel for the appellant reiterated that the trial court misconstrued the dispute before it as a matrimonial property dispute and proceeded to dispose it based on matrimonial property law. Counsel urged the court to allow the appeal.

Respondent’s Submissions

15. The respondent filed written submissions dated 28/1/2023, through M/s Njuguna Ng’ang’a & Associates. On the appellant’s contention that the trial court misdirected itself on the facts placed before it, leading to wrong conclusions and application of wrong principles of law, counsel for the respondent submitted that the trial court did not misdirect itself because it expressly stated in its judgment that the provisions of the *Matrimonial Property Act* 2013 could not be applied to the dispute because it came into force after the cause of action had arisen. Counsel added that by subdividing the suit property in the manner it did, the trial court “only affirmed what was already presented to it by the parties”, adding that the appellant had expressly told the court that he wanted to subdivide the suit property amongst the defendant and her children. Counsel contended that it was wrong for the appellant to fault the trial court because he was the one who told the trial court that he wanted to subdivide the suit property to his wife and children.
16. On the contention that the trial court erred in law in awarding 2¼ acres of the suit property to the respondent and to the seven children, and on the contention that the trial court erred in law and in fact in relying on extraneous matters, counsel reiterated that the appellant was the one who pleaded that he wanted the caution removed so that he could subdivide the suit property amongst his children. Counsel contended that the evidence placed before the trial court was “quite conclusive and the court only gave life to it by way of orders as the parties were unable to agree on what shares when given an opportunity.” Counsel argued that without the court determining the shares, parties would have been left in limbo. Counsel added that the trial court was guided by the evidence before it and the legal principle that litigation must come to an end and that courts do not issue orders in vain when determining the issues.
17. Lastly, on the contention that the trial court erred in law and in fact in awarding the respondent reliefs that she had not sought, counsel made reference to the prayers that were in the counterclaim and submitted that the orders that were issued by the trial court were in tandem with the reliefs that were sought in the counterclaim. Counsel urged the court to dismiss the appeal.

Analysis and Determination

18. I have read and considered the original record of the trial court; the record in this appeal; and the parties’ respective submissions. I have also considered the relevant legal frameworks and jurisprudence on the issues that fall for determination in the appeal. Parties submitted on the grounds of appeal without pointing out the concise issues that fell for determination in the appeal. Taking into account the grounds of appeal and the rival submissions of the parties, the following are the key issues that fall for determination in this appeal:

- (i) Whether the trial court misconstrued the facts of the dispute and the law applicable to the dispute;



- (ii) Whether the trial court erred in any of its findings; and
 - (iii) Whether the trial court erred in its disposal orders;
 - (iv) Whether the error(s) [if any] warrant the setting aside of the judgment of the trial court; and
 - (v) What order should be made in relation to costs of this appeal. Before I analyze and dispose the above issues, I will briefly outline the principle that guides this court when exercising jurisdiction as an appellate court.
19. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013) eKLR as follows:-
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
20. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
21. The first issue is whether the trial court misconstrued the facts of the dispute and the law applicable to the dispute. There was common ground that the appellant and the respondent were husband and wife. There was also common ground that the appellant was the registered proprietor of the suit property.
22. The respondent pleaded that the appellant held the suit property in trust for her and for the children of the union. There was common ground that the suit property was developed between 2002 and 2014 when the appellant worked in the United Kingdom. Whereas the appellant contended that he provided the funds that were used to develop the suit property, the respondent’s case was that she developed the suit property using her own funds as well as funds which the appellant, as her husband, sent to her for that purpose. Secondly, whereas the appellant contended that, as the registered proprietor of the suit property, he was entitled to deal with the suit property in the manner he wished, the respondent’s view was that the suit property was matrimonial property and that both she and the children of their union had acquired interest in it, hence the appellant could not deal with it unilaterally. Further, whereas the appellant contended that he acquired the suit property prior to their marriage, the respondent’s case was that the suit property was acquired and developed during the subsistence of their marriage and was a matrimonial home. Lastly, in so far as the primary suit was concerned, the cause of action arose when the appellant discovered that prior to travelling to the United States of America in 2017, the respondent had, in 2016, caused a caution to be registered against the register relating to the suit property. In so far as the respondent’s counterclaim was concerned, the cause of action arose when upon return from the United Kingdom in 2014, the appellant became hostile, they became estranged and it became evident that the appellant wanted to dispose the suit property.
23. Did the trial court misconstrue the above facts? It is evident from the Judgment of the trial court that it failed to comprehend the facts and the gist of the parties’ respective cases. Owing to this failure, the



trial court was not able to frame the concise issues that fell for determination. The trial court rendered itself in this regard thus:

“The issues to be determined are whether the parties are entitled to the orders sought in the plaint and the counterclaim.

24. Reading the parties’ pleadings, evidence and submissions before the trial court, it is clear that the key precise issues that fell for determination in the suit included the questions as to:
 - (i) Whether the appellant held the suit property in trust for the respondent and for the children of the union;
 - (ii) Whether the suit property was matrimonial property;
 - (iii) Whether the respondent had any recognized interest in the suit property;
 - (iv) Whether the children of the union had any recognized interest in the suit property;
 - (v) What was the extent of the interest [share] of the respondent and the children of the union in the suit property;
 - (vi) Whether the appellant’s plea for removal of the caution was merited; and
 - (vii) Whether the respondent’s plea for subdivision and sharing of the suit property amongst the appellant, the respondent and the children of their union was merited.
25. Owing to the trial court’s failure to comprehend the facts of the case and the parties’ respective cases, most of the above key issues in the dispute were neither analyzed nor determined. Analysis and determination of the key issues in dispute is what would have enabled the court to properly and effectually settle the dispute.
26. Indeed, owing to the trial court’s failure to comprehend the facts of the dispute, it proceeded to disregard the provisions of the *Matrimonial Property Act* without stating when the parties’ respective causes of action accrued. The trial court rendered itself thus:

“As the *Matrimonial Property Act* came into force on the 16/1/2014, the same cannot be applied retrospectively in this case.”
27. The caution which triggered the primary suit was registered in 2016. This was long after the Act had come into force. There was no factual basis for the conclusion that the parties’ causes of action accrued prior to 16/1/2014.
28. For the above reasons, this court finds that the trial court misconstrued the facts of the dispute and the law applicable to the dispute.
29. The second issue is whether the trial court erred in its findings. This court has observed in the preceding paragraphs that owing to the trial court’s failure to comprehend the facts of the dispute and failure to frame the concise issues that fell for determination, the key issues were neither analyzed nor determined. For instance, the trial court found that the appellant had a beneficial interest in the suit property but did not delimit the said interest. Neither did the trial court establish the extent of the respondent’s contribution to the acquisition or development of the suit property. A finding on the extent of the respondent’s contribution towards the acquisition or development of the suit property is what would have reflected the respondent’s fair interest in the suit property.



30. Failure to establish and delimit the respondent's interest in the suit property is not the only error that emerges from the judgment of the trial court. The trial court made a finding to the effect that children of the union were not entitled to the suit property. Subsequent to that, the trial court made a finding, reflected its disposal order, that the appellants and seven children were entitled to 2¼ acres of the suit property. These were clearly contradictory findings. I think I have said enough to demonstrate that there were grave errors in the findings of the court.
31. The third issue is whether there were errors in the disposal orders of the trial court. This court has observed that the trial court was expected to determine whether the respondent had a recognizable interest in the suit property and if such interest was established, the trial court was expected to delimit it in terms of a defined share of the suit property. The trial court did not do that. Further, upon finding that the children were not entitled to the suit property, the trial court, in contradiction of the finding, proceeded to order the appellant to transfer 2 ¼ acres of the suit property to the children.
32. Counsel for the respondent contended that the court was merely giving effect to the appellant's declared desire. I do not agree with that view. It is clear from the record of the trial court that whereas the appellant expressed a desire to give part of the suit property to his children, he never disclosed the share of the suit property that he desired to give to his children. It was therefore a grave error on part of the trial court when it unilaterally decided to order the appellant to give 2¼ acres to the respondent and to the children. What the trial court was expected to do was to establish the interest of the respondent in the suit property [if any] and its extent. The discretion as to whether or what portion to distribute to his children was that of the appellant. For the above reasons, this court finds that there were grave errors in the disposal orders of the trial court.
33. On the fourth issue, it is clear that the errors were grave to the extent that were this court to let the Judgment of the trial court to stand, there would be grave injustice. I say so because key issues in the dispute were not analyzed and determined but the appellant is faced with a decree requiring him to transfer 2¼ acres of the suit property to his wife and children, notwithstanding the fact that the trial court found that the children were not entitled to the suit property. Secondly, the appellant was not told the extent of the respondent's contribution and entitlement to the suit property. Put differently, the key issues in the dispute were not determined and disposal orders that were made distributing the suit property were not anchored on evidence. For these reasons, the court finds that the errors made by the trial court were grave and warrant the setting aside of the Judgment of the trial court.
34. On costs, it is clear that the errors culminating in this appeal were made by the trial court. In the circumstances, parties will bear their respective costs of this appeal.

Disposal Orders

35. For the above reasons, this appeal succeeds to the extent that the Judgment of the trial court rendered on 8/4/2022 in Ruiru SPMC MCLE No E1 of 2020 is set aside in its entirety. A fresh trial shall be conducted before a different magistrate. The Magistrate seized of the suit shall be at liberty to determine whether the dispute should be disposed under Section 17 of the *Matrimonial Property Act* as read together with Rule 6(1)(b) of the *Matrimonial Property Rules* 2022. Parties shall bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 15TH DAY OF MAY 2023

B M EBOSO
JUDGE



In the Presence of: -

Mr Lokitano for the Appellant

Mr Njuguna for the Respondents

Court Assistant: Hinga/Osodo

