



**Omwenga v Omwenga & another (Environment & Land Case
E035 of 2022) [2025] KEELC 3229 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 3229 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E035 OF 2022
LC KOMINGOI, J
MARCH 20, 2025**

BETWEEN

BEN DUKE OMWENGA PLAINTIFF

AND

ABIGAEI BONARERI OMWENGA 1ST DEFENDANT

PETER ONCHIRI OMWENGA 2ND DEFENDANT

JUDGMENT

1. By the Complaint dated 1st April 2022, the Plaintiff stated that the 1st Defendant is his wife and the 2nd Defendant his son. He claims that he was an Air Operations Officer working with the United Nations and was posted to several locations out of the country including Israel and Congo and this made it difficult for him to transact businesses in Kenya. As a result, he executed a Power of Attorney on 4th January 1994 and registered on 23rd January 2006 appointing his wife (the 1st Defendant) as his lawful attorney to manage and transact his affairs in Kenya as well as to execute necessary deeds and instruments. It is his case that on diverse dates between 1993 and 2007, the Plaintiff acquired several properties through the 1st Defendant and the properties were to be registered in his name. The properties in question were: Kajiado/Kaputiei/North/47219; Kajiado/Kaputiei/North/19618 and Kajiado/Kaputiei North/19619 which the 1st Defendant informed him that they were registered in his name as agreed.
2. Upon his retirement on or about 14th December 2011, the Plaintiff started following up on the said properties and asked for the title documents of the said properties. However, the 1st Defendant was hesitant to avail them only gave him a copy of title for Parcel Number Kajiado/Kaputiei North/47219 which the Plaintiff noticed was registered in their joint names. Sometime on 14th August 2012 he discovered that the other two properties Kajiado/Kaputiei North/19618 and 19619 were registered



solely in the name of the 2nd Defendant. Upon this discovery, he revoked the Power of Attorney on 31st August 2012 and the revocation on 25th September 2012.

3. The Plaintiff claims that 1st Defendant's action was in breach of trust by failing to act in good faith and abusing the authority entrusted in her by registering the properties in her name and that of the 2nd Defendant. The Plaintiff went on to aver that the properties were solely purchased by him and there was thus an implied trust for his benefit and if they are not registered in his name, he shall lose them. He therefore sought for the following reliefs:
 - a. A declaration that the 1st Defendant bought the suit properties Kajiado/Kaputiei-North/47219, Kajiado/Kaputiei-North/19618 and Kajiado/Kaputiei North/19619 for an on behalf of the Plaintiff.
 - b. A declaration that the registration in the names of the 1st and 2nd Defendants of properties namely Kajiado/Kaputiei North/47219, Kajiado/Kaputiei North/19618 and Kajiado/Kaputiei North/19619 was carried out in breach and violation of the fiduciary duties owed to the Plaintiff.
 - c. A declaration that the 1st and 2nd Defendants hold the suit properties Kajiado/Kaputiei North/19618 and Kajiado/Kaputiei North/19619 in trust and as the trustee for the Plaintiff.
 - d. A declaration that the Plaintiff is the sole, lawful, real, true, rightful and beneficial owner of the suit properties.
 - e. A permanent mandatory injunction restraining against the Defendants and their servants, agents and/or employees from selling/ dealing/transferring/disposing and or/ alienating the suit properties.
 - f. An order cancelling and revoking the registration of the suit properties in the name of the Defendants and / or either of them, singly or jointly be cancelled, revoked and in place thereof, the same be registered in the sole name of the Plaintiff at the cost of the Defendants.
 - g. Any other relief the Court deems fit to grant in the circumstances.
 - h. Costs of the suit and other incidental thereto.
4. The 1st and 2nd Defendants filed their statement of defence dated 27th May 2022; The 1st Defendant stated that she was the lawful wife of the Plaintiff and the 2nd Defendant is their only son and that the suit properties in question were purchased as family properties. She stated that the suit properties were purchased using her personal savings in the year 1991 and title issued in the year 1993 which was way before the Power of Attorney was executed in her favour. She further stated that upon the Plaintiff's retirement he became promiscuous and violent and was in the process of unlawfully and illegally disposing of the family properties to their detriment. It is her case that as the Plaintiff's lawful wife, only property held by the Plaintiff is held in trust for his family. She also contested this Court's jurisdiction on grounds that this was a family matter which ought to have been filed at the High Court's family division but the Plaintiff failed to do so in his quest to dispossess the Defendants. She also pointed out that the Plaintiff had gone ahead to dispose of some of their properties in Nyamira without her consent and that he had also subdivided and sold off part of Kajiado/Kaputiei North/47219 which was their matrimonial property without her consent. She thus sought for dismissal of the suit against them.



Evidence of the Plaintiff

5. PW1, Ben Duke Omwenga the Plaintiff, adopted his witness statements dated 1st April 2022 and 25th September 2023 and produced his bundle of documents as evidence. He stated that he acquired the suit properties through the 1st Defendant and while he was away and that is the reason why he gave the 1st Defendant the Power of Attorney to facilitate the transaction. He stated that property Kajiado/Kaputiei North/47219 which measures 18 acres was acquired for Kshs. 32,000 between 1993 and 1994, while properties Kajiado/Kaputiei North/19618 and 19619 measuring 50ft by 100ft were acquired between 2006 and 2007 while he was stationed in Democratic Republic of Congo. He further stated that the 1st Defendant travelled to Democratic Republic of Congo where he gave her Kshs. 300,000 to pay for these two plots while the rest of the money was from his dollar account. When he tried getting titles to these properties, the 1st Defendant was not forthcoming with information and he resolved to conduct a search and he discovered that they were registered in the 2nd Defendant's name. He also stated that KJD/Kaputiei North/47219 was not matrimonial property. He thus wanted the titles issued in their names to be cancelled and be registered in his name.
6. On cross examination he stated when the 1st Defendant went to Democratic Republic of Congo, he gave her 3800USD for the purchase of the properties which were being sold for Kshs. 380,000 each. Further that properties; Kajiado/Kaputiei/19618 and 19619 were purchased in 2006. He maintained that he gave her the Power of Attorney for purposes of purchasing the suit properties while he was away although he did not have evidence of such instructions. He also stated that he knew the properties were acquired using the money he would send to the 1st Defendant. He holds no evidence to confirm.
7. He went on to state that the 1st Defendant lived in his house at Mountain View Estate while he resided in Runda. On being asked about her financial status, he stated that she was a teacher but left employment in 1991 and could not confirm whether upon her retirement she was given a lump sum payment which she used to purchase the properties. He could also not confirm whether the 1st Defendant carried out maize farming in Kisii. He confirmed that he sold the properties in Kisii in order to develop the ones in Kitengela and Runda. He went on to state that he was undertaking farming and rearing of animals on the Kajiado/Kaputiei /North 47219 property and had set aside five (5) acres for the 1st Defendant who had her house on it adding that she had sold part of it on her own volition.
8. On re-examination he reiterated that he executed the Power of Attorney for purposes of acquiring properties adding that he had not sublet Kajiado/Kaputiei/North /47219 to anybody and he was the one who was undertaking farming on it. He stated that title for property 19619 was issued in 2007 in favour of the 2nd Defendant who was in Texas, United States of America at the time.
9. This marked the close of the Plaintiff's case.

Evidence of the Defendants

10. DW1, Abigail Bonareri Omwenga the 1st Defendant adopted her witness statements dated 16th February 2023 and 18th April 2023 as her evidence in chief. She confirmed that the Plaintiff was her husband and that they acquired Kajiado/Kaputiei North/ 47219 together in 1991 and the title issued in 1993. The same was registered in their joint names.

She admitted that it was the Plaintiff's brother who identified it.

She testified that she was a school teacher but resigned from employment in the year 1991 and was paid her dues. She also stated that she was a farmer who would get an income from her farming activities. She further stated that in 2007 she purchased Kajiado/Kaputiei North/19618 and 19619 from the sale of



farm produce together with money sent to her by the 2nd Defendant. She maintained that the Plaintiff was not aware of this purchase. She went on to indicate that she put a structure on Kajiado/Kaputiei North/47219 but she had not visited it for a while and could not confirm whether the Plaintiff was undertaking any framing activities thereon.

11. On cross examination she stated that when she resigned from employment, she was paid Kshs. 40,000. She added that property Kajiado/Kaputiei North/ 47219 which is eighteen (18) acres was purchased at Kshs. 25,000 per acre; She stated that she was in possession of the title although she did not produce it as exhibit. She also indicated that she had neither asked for a share of the property which was jointly owned neither had she been asked to vacate the matrimonial house in Mountain View Estate where she resides.
12. On re-examination she stated that she constructed a house on property 47219, and paid off the mortgages for two houses in Greenfield and Mountain View worth Kshs. 12,000 and Kshs. 112,000 respectively per month. She stated that she got the money from their joint account and from her savings. And that properties 19618 and 19619 were purchased for her son and he is the one who paid for them.
13. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's submissions

14. Counsel for the Plaintiff outlined the following three issues for determination summarised hereunder:
15. On whether the Plaintiff remitted money to the 1st Defendant to purchase properties and whether there existed fiduciary trust between the parties, counsel submitted that the Plaintiff testified that he sent money to the 1st defendant on diverse dates between 14th January 1993 and 2007 to enable her purchase the properties and register them in his name. And to enable her to carry out this task, he donated a Power of Attorney dated 4th January 1994 to her. Property 47219 measuring 18 acres was identified by the Plaintiff's brother in 1993 and it was purchased in 1994 for Kshs. 32,000 per acre.

Counsel submitted that the Plaintiff had tendered evidence to support his earnings, while the 1st defendant who alleged that the property was purchased in 1991 and that she also contributed to its purchase, did not produce evidence of her income or the money allegedly paid after her resignation. It was also submitted that the 1st defendant's monthly salary of Kshs. 2,000 could not have been enough to purchase the said property. Counsel also submitted that the 1st Defendant's allegation that she did not use the Power of Attorney when she purchased the property was false because having confirmed that she solely undertook the transaction for a property registered in their joint names, means that the Plaintiff would have also been required to execute the transfer documents. But this did not happen because she had the Power of Attorney. And it was this transaction that necessitated the donation of the Power of Attorney on 4th January 1994.

16. On the purchase of properties 19618 and 19619, counsel submitted that there were discrepancies on the 1st defendant's testimony. She pointed out that although the 1st Defendant acknowledged to having received money from the Plaintiff and there was evidence of the bank withdrawals, she contradicted this in her statement of defence where she alleged to have purchased the plots from her personal savings. And during her testimony in Court, she testified that she got the money from the 2nd Defendant but did not call him to support this statement. Counsel submitted that the only accurate position was that the properties were purchased with funds remitted by the Plaintiff as per his evidence of the bank withdrawals which occasioned to resulting trust. Therefore, the Court should find that the suit



properties were held by the Defendants in trust for the Plaintiff. Reference was made to *Moses Kariuki wachira v Joseph Muriithi Kanyita & 3 others* [2016] eKLR and *LN vs SMM* [2013] eKLR.

17. On whether the 1st Defendant was in breach of trust by registering the suit properties in their joint names and in the 2nd Defendant's name, counsel submitted that the 1st Defendant acknowledged having registered property 47219 in their joint names because it was family property and the power of attorney did not bind her to register it in the Plaintiff's sole name. This was in breach of the Plaintiff's trust and the Plaintiff had rights to the properties as per Section 25 of the [Land Registration Act](#) and should be granted the prayers sought.

The Defendants' submissions

18. Counsel for the Defendant submitted at length that the alleged Power of Attorney dated 4th January 1994 was registered on 23rd January 2006, did not adhere to the stipulated requirements as was therefore invalid. Section 44 of the [Land Registration Act](#), Section 88 of the Evidence Act, Section 19(1) of the [Stamp Duty Act](#) and Order 9 Rule 2 of the Civil Procedure Rules provide that a Power of Attorney should be executed by each of the parties. Counsel highlighted that the Power of Attorney was only executed by the Plaintiff as the donor and did not bear the 1st Defendant's signature as the donee. Counsel also submitted that property 47219's title deed shows that it was issued on 1st April 1993 which was almost a year before the alleged Power of Attorney was drawn and 13 years before it was registered. As such, it could not act retrospectively. Therefore, the Plaintiff did not have locus standi to institute the suit because he was relying on an invalid document and made reference to *Francis Mwangi Mugo vs David Kamau Gachago* [2017] eKLR.

Therefore, the Plaintiff did not discharge his burden of proof as per Section 117 of the [Evidence Act](#) because the production of a document did not necessarily amount to proving that the 1st defendant was in breach of trust.

19. Counsel also pointed out that in the documents relied on by the Plaintiff to show that the money in the joint account used to purchase the property was his contribution, only one receipt showed a specific reason for the transfer, which was school fees for his daughter. Therefore, there was no evidence that the money in the account was for purposes of purchasing any property exclusively.
20. Counsel also submitted that this Court lacks jurisdiction to determine the issues herein since they involve matrimonial property.

Analysis and Determination

21. I have considered the pleadings, evidence, submissions, statutes and legal authorities. I find that the issues for determination are:

SUBPARA i.

Whether this Court has Jurisdiction to determine the suit herein;

- ii. Whether the Plaintiff has proved his case on a balance of probability;
- iii. Whether the Plaintiff is entitled to the reliefs sought;
- iv. Who should bear costs of the suit?

22. "...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is



without jurisdiction...”as was held in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR. The 1st Defendant in her submissions questioned this Court’s jurisdiction to determine this suit on grounds that being family property, the Court that was clothed with jurisdiction was the High Court under the family Division.

23. It is not in contention that the parties to this suit are husband, wife and their son. In the Plaintiff claims that the 1st Defendant breached her trust by purchasing and registering the properties in their joint names as well as in the name of their son, the 2nd Defendant, contrary to his instructions. This was contested by the 1st Defendant who in her submissions claimed that the property registered in their joint names was matrimonial property and the other two properties registered in the 2nd Defendant’s name were purchased from funds remitted by him (2nd Defendant). While the properties in question revolve around a family, I find that the issue for determination is on the validity and legitimacy of acquisition of the said properties. The issue of whether they are matrimonial properties does not arise.
24. I find that this Court has jurisdiction to determine the dispute at hand as per jurisdiction conferred to it by Article 162 (2)(b) of *the Constitution* and Section 13 of the *Environment and Land Court Act* which provides:
- “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.”
25. The next issue for determination is whether the Plaintiff has proved his case on the required threshold.
26. The Plaintiff claims that while he was working out of the country he instructed his wife, the 1st Defendant, to purchase some properties on his behalf and register them in his name.
- To facilitate this, he donated to her a Power of Attorney dated 4th January 1994 and registered on 23rd January 2006. The 1st Defendant however contested this allegation stating that property Kajiado/Kaputiei North/47219 was purchased in 1991 and the title issued in 1993.
27. The power of attorney donated to the 1st Defendant by the Plaintiff dated 4th January 1994 was registered on 23rd January 2006. The purpose was to enable the 1st Defendant to carry out transaction on behalf of the Plaintiff as he was out of the Country.
28. It is not in disputed that the Plaintiff and the 1st Defendant had a joint account into which the plaintiff would send in money and the 1st Defendant would withdraw as instructed by the Plaintiff.
29. DW1 told the court that Kajiado/Kaputiei North /47219 was bought in 1991 and a title issued in 1993. In her testimony she stated;
- “I left employment in 1991, I resigned from employment and was paid my dues”.
- She however provided no evidence to support this.
30. She also sated “I bought Kajiado/Kaputiei North/19618 and 19619 in the year 2007 from the sale of maize produced”. Again she presented no evidence to confirm the source of funds. She stated that the 2nd Defendant sent money for the purchase of the two plots but presented no evidence.
31. From the foregoing, there was no doubt that the source of funds was the joint account held in which the plaintiff would deposit monies as he was out of the country.



32. I find that the 1st Defendant breached the trust bestowed upon her by the Plaintiff by registered the suit properties in the name the 2nd Defendant. The 2nd Defendant though present did not testify to confirm the source of funds.
33. I am satisfied that the 1st Defendant failed to act in good faith and to the advantage of the Plaintiff in exercise of the authority given to her.
34. There is no doubt that there existed trust between the Plaintiff and the 1st Defendant given that they were married.

In the case of Peter Ndungu Njenga Vs. Sophia Watiri Ndugu (2000) eKLR the Court observed thus;

“The concept of trust is not new. In case of absolute necessity, 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 parties to create a trust must be clearly determined before a trust is implied.”

35. Similarly in Moses Kariuki Wachira Vs. Joseph Muriithi Kanyita & 3 others (2016) eKLR, it was held that;

“A resulting trust is a trust arising by operation of law.

Such a trust arises where A makes a voluntary transfer of property to B or pays (wholly or in part) for the purchase of property which is vested either in B along or in the joint names of A and B, when there is a presumption that A did not intend to make a gift to B, the property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. This has been described as a presumed resulting trust “

The Court in LN Vs. SMM (2013) eKLR Civil Case No. 21 of 2011 eKLR 2013 stated as follows

“Indeed,”resulting” and “constructive” trusts have been imposed by the court the world over to cure injustices where someone has benefited or has been enriched at the expense of another and the enrichment is unjust and without legal justification.”

36. I rely on the above authorities in finding that the payment for the purchase of the suit properties were made by the 1st Defendant on behalf of the Plaintiff and that she holds part of the Kajiado/Kputiei-North/47219 in trust for the Plaintiff while the 2nd Defendant holds Kajiado/Kaputiei-North/19618 and 19619 in trust for the Plaintiff.
37. I find that the Land Parcel Kajiado /Kaputiei-North/37219 is registered in the joint names of the Plaintiff and the 1st Defendant.

The Plaintiff confirmed that she sub-divided the same and sold five acres to develop another property. I have also taken into account of the fact that while the Plaintiff was away, making money, the 1st Defendant was in Kenya taking care of the children and holding the family together. She was also the one undertaking the transactions on behalf of the Plaintiff. Even though she could not prove monetary contribution to the purchase of the said properties ; I find that her role cannot be underscored. It is for this reason that the suit property Kajiado/Kaputiei-North/47219 ought to remain in the joint names of the Plaintiff and the 1st Defendant. Whatever they decide to do with it is upto them.

38. In the Conclusion I find that the plaintiff has proved her case as against the Defendants on a balance of probabilities.



39. According, Judgment is entered for the Plaintiff as follows;

- a. That a declaration is hereby issued that the 1st Defendant bought the suit properties; Kajiado/Kaputiei-North/47219, Kajiado/Kaputiei-North/19618 and 19619 for and on behalf of the Plaintiff.
- b. That declaration is hereby issued that the registration in the names of the 1st and 2nd Defendants of the suit properties Kajiado/Kaputiei/North/47219, Kajiado /Kaputiei/North/19618 and 19619 was carried out in breach and violation of the fiduciary duties owed to the Plaintiff.
- c. That the declaration is hereby issued that the 2nd Defendant holds the suit properties; Kajiado/Kaputiei/North/19618 and 19619 in trust for the plaintiff
- d. That a permanent injunction is hereby issued restraining the Defendants, their servant, agents and or employees from selling, transferring, disposing or alienating the suit properties.
- e. That an Order is hereby issued directing, the Land Registrar Kajiado to cancel and or revoke the registration of the suit properties; Kajiado/Kaputie /North/19618 and 19619 in the name of the 2nd Defendant and register in the sole name of the Plaintiff forthwith.
- f. That as the parties herein are family members, I order each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 20TH DAY OF MARCH, 2025

L. KOMINGOI

JUDGE

In The Presence Of:

Ms I. Kiarie for the Plaintiff

Mr. Musa for Mr.Masara for the Defendants

Court Assistant: Mutisya

