



**FNW v ZK & another (Environment & Land Case 119 of 2017)
[2023] KEELC 18680 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18680 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 119 OF 2017
LA OMOLLO, J
JULY 13, 2023**

BETWEEN

FNW PLAINTIFF

AND

ZK 1ST DEFENDANT

FOB 2ND DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide the plaint dated 20th March, 2017.
2. She avers that in the year 2017 she was approached by one Francis Obanyi Bitange who informed her that he was selling land parcel number Dundori/Lanet Block 5/xxxx measuring 0.0501 hectares.
3. The Plaintiff also avers that she conducted due diligence by conducting an official search at the land registry at Nakuru to confirm that Francis Obanyi Bitange was the owner of the suit property.
4. The Plaintiff further avers that on 4th January, 2017 she entered into a sale agreement with Francis Obanyi Bitange for sale of the suit property at a consideration of a sum of Kshs. 2,500,000/=.
5. The Plaintiff avers that she paid a deposit of Kshs. 1,700,000/= to Francis Obanyi Bitange and subsequently paid a sum of Kshs. 300,000/= on 31st January, 2017, the sum of Kshs. 250,000/= on 28th February, 2017 and was ready to pay the balance of Kshs. 250,000/= on 31st march, 2017.
6. The Plaintiff also avers that it was a term of the agreement that the she would take immediate possession of the suit land.



7. The Plaintiff further avers that soon after she took possession of the suit property, the 1st Defendant trespassed onto the suit property and begun to harass her and her family generally denying her quiet and peaceful occupation of the suit land.
8. The Plaintiff avers that the 1st Defendant has trespassed on the suit property without any color of right and solely based on the fact that she was married to the vendor.
9. The Plaintiff also avers that the 1st Defendant's marriage to FOB was dissolved by the Nakuru Chief Magistrate's Court in Divorce Cause Number 29 of 2009 through a decree nisi dated 19th November, 2014.
10. The Plaintiff prays that the court restrains the 1st Defendant from interfering with her quiet possession, use and ownership of the suit property.
11. The Plaintiff prays for judgement against the 1st Defendant for;
 - a. An order of permanent injunction against the Defendant, by herself, her servants, agents and/or anyone claiming through her from interfering with the Plaintiff's ownership and peaceful occupation of land parcel number Dundori/lanet Block x/xxxx.
 - b. Costs of the suit.
 - c. Interest on (b) above at court's rate.
 - d. Any other relief that this honorable court may deem fit to grant.
12. The 1st Defendant filed her statement of Defence and Counterclaim dated 3rd July, 2017.
13. The 1st Defendant states that she acquired the suit property jointly with Mr. FOB during the subsistence of their marriage and that any purported agreement for sale without her consent was illegal, null and void.
14. The 1st Defendant also states that the suit property is matrimonial property and even though it was registered in the name of Mr. FOB, she has an overriding interest to the property and the Plaintiff's occupation is illegal since her consent was not sought.
15. The 1st Defendant denies all the other contents of the Plaint except for paragraph 12 and 14.
16. In her counterclaim, the 1st Defendant reiterates that she got married to FOB in the year 1989 under Kisii customary law.
17. The 1st Defendant states that on 1st December 2007, they solemnized the said marriage under the *African Christian, Marriage and Divorce Act* and were blessed with five children.
18. The 1st Defendant also states that in the year 1999, she together with FOB acquired plot number xxx/xx Kiamunyeki which is now known as Ndundori/Lanet Block x/xxxx Kiamunyeki and established their matrimonial home.
19. The 1st Defendant further states that FOB filed Nakuru CMCC Divorce Cause No. 29 of 2009 and that she only came to know about the said case when she was served with the decree nisi.
20. The 1st Defendant states that FOB (the 2nd Defendant) secretly tried to enter into a sale agreement with FNW (the Plaintiff) without seeking her consent.



21. The 1st Defendant also states that FNW took possession of the property without her consent pursuant to the purported agreement and occupied one of the houses built thereon and leased some houses on the suit property to tenants.
22. The 1st Defendant further states that her claim against the FNW and FOB is for a declaration that the suit property is matrimonial property and that FOB holds 50% of the beneficial interest thereof in trust and for her benefit.
23. The 1st Defendant prays for judgement against the Plaintiff and FOB for;
 - a. A declaration that Dundori/Lanet Block x/xxxx Kiamunyeki is matrimonial property and the 2nd Defendant holds 50% of the beneficial interest thereof in trust and for the benefit of the Plaintiff.
 - b. An order that Dundori/Lanet Block x/xxxx Kiamunyeki be shared equally between the Plaintiff and the 2nd Defendant and if incapable of being shared it be valued, sold and the net proceeds be shared equally between the Plaintiff and the 2nd Defendant.
 - c. A permanent injunction restraining the 1st Defendant either by herself, her agents, servants or workmen from occupying the main house or from collecting rent from the tenants occupying the several houses erected on all that parcel of land known as Ndundori/Lanet Block x/xxxx Kiamunyeki.
 - d. Costs of the counterclaim.
24. The 2nd Defendant filed his statement of defence on 14th November, 2017.
25. He states that he acquired the suit property by himself and not jointly with the 1st Defendant.
26. The 2nd Defendant also states that it was the 1st Defendant who deserted their marriage and that he remained with the children until they attained the age of majority.
27. The 2nd Defendant further states that he did not sell the property secretly because at the time of the sale, he had already divorced the 1st Defendant.
28. The 2nd Defendant states that the Plaintiff took possession of the suit property as the lawful purchaser for value and that the 1st Defendant's claim has been overtaken by events.
29. The 2nd Defendant further states that the 1st Defendant caused malicious damage to the suit property in the year 2009 and she therefore has no moral right to claim it.
30. The 2nd Defendant then denied all the other averments in the 1st Defendant's Statement of Defence and Counterclaim and sought that it be dismissed with costs.

Plaintiff's Evidence.

31. FNW, the Plaintiff, testified as PW1. Her witness statement dated 20th March, 2017 was adopted as part of her evidence.
32. It is her evidence that in January, 2017 she got information that the 2nd Defendant was selling land parcel No. Dundori/Lanet Block x/xxxx measuring 0.0501 Ha.
33. It is further her evidence that she did a search and found that the suit property was registered in the name of the 2nd Defendant and the subsequently entered into a sale agreement dated 4th January, 2017.



34. She testified that the purchase price was for 2.5 Million and according to the sale agreement, she was to pay Kshs. 1.7 Million which she did by way of transfer on 5th January, 2017 to account number xxxxxxxxxxxx held at Equity Bank and in the name of the 2nd Defendant.
35. She also testified that she holds an account number xxxxxxxxxxxx at Co-operative Bank. She went on to state that the second payment was by way of a bank transfer on 1st February 2017 and was for Kshs.300,000/=.
36. She further testifies that the third payment was on 2nd March, 2017 where she transferred Kshs. 250,000/= to the 2nd Defendant.
37. It is her evidence that the final installment was of Kshs. 250,000/=which was made on 4th April, 2017.
38. It is also her evidence that they had agreed that after the payment of the final installment, the property was to be transferred to her name and added that when she commenced the process of transfer, she found that a caution had been registered by the 1st Defendant.
39. She testified that she did not know the 1st Defendant and so she called the 2nd Defendant to find out who she was. She stated that the 2nd Defendant informed her that the 1st Defendant was his wife but their marriage was dissolved before the transaction.
40. She also testified that at the time of the transaction, she met a different wife, who she spoke with and who took her around the home.
41. She further testified that the 2nd Defendant vacated the suit property and she took possession but could not transfer the portion to herself because of the caution registered by the 1st Defendant.
42. It was her further evidence that she does not owe the 2nd Defendant any money and that though there have been some attempts at mediation between the 1st and 2nd Defendants, she was not aware if there was any resolution.
43. She produced the following documents in support of her case
 - a. Sale agreement dated 4th January 2017 as Exhibit P1,
 - b. Copy of the title deed issued on 9th November 2009 as Exhibit P2
 - c. Court order issued on 22nd September 2009 as Exhibit P3
 - d. Copy of the decree nisi issued on 19th November 2014 as Exhibit P4.
44. In her witness statement, the Plaintiff states that despite her full performance of her obligations, the 1st Defendant has without any color of right been harassing her since she took possession.
45. She prays that the court issued orders restraining the 1st Defendant from interfering with her quiet possession of the suit property.
46. Upon cross examination by counsel for the 1st Defendant, PW1 confirmed that she paid the purchase price on different dates but did not produce any evidence of the same.
47. She also confirmed that she attempted to transfer the suit property but she did not produce any transfer forms.
48. She admitted that she met another woman who claimed to be the wife to Francis but she did not get spousal consent from her.



49. Upon cross examination by counsel for the 2nd Defendant, she confirmed that she did due diligence and that at the time of sale, there was no caution registered against the suit property.
50. Upon re-examination, PW1 stated that from her due diligence, the search revealed that the title was in the name of Francis Obanyi Bitange.
51. She also stated that the transaction was on 4th January, 2017 and from the decree nisi the marriage between Zipporah and Obanyi had, at the time, been dissolved.
52. She reiterated that the wife she met is not the one who registered the caution adding that she does not owe the 2nd Defendant any money adding the issue of any money that might be owing has not been raised has not been raised by the 2nd Defendant.
53. The Plaintiff's case was then closed.
54. ZK testified as DW1. She stated that that she filed her Statement of Defence and Counterclaim and had also filed her witness statement on 11th July, 2017. She prayed that her witness statement be adopted as part of her evidence.
55. The documents on her list of documents dated 3rd July, 2017 were marked and produced as follows;
 - a. Supporting affidavit in Divorce Cause No. 29 of 2009 as Exhibit D1.
 - b. Sale agreement dated 16th June 1999 as Exhibit D2.
 - c. Original search for Dundori /Block x/xxxx Kiamunyeki 'A' dated 23rd February 2017 as Exhibit D3.
 - d. Letter dated 24th February 2017 to the Deputy Land Registrar as Exhibit D4.
 - e. Receipt No. 4629545 as Exhibit D5.
 - f. Official search for Ndundori/Lanet Block x/xxxx Kiamunyeki A dated 16th June 2017 as exhibit D6.
56. She testified that the 2nd Defendant and herself did not have any other property apart from their home in Nyamira.
57. She also testified that they came to Nakuru in the year 1998, bought the property in the year 1999 and started building their matrimonial home in the year 2000 adding that they later built three rental houses.
58. She went on to explain that the house they built had three bedrooms, a sitting room, kitchen and dining room and that they continued to improve the said house while living in it. She added that the construction work stopped in the year 2006.
59. It is her further evidence that the 2nd Defendant and herself had a wedding in the year 2007 and on 4th October, 2008, he chased her away and stated that he wanted to bring another wife. She explained that before the church wedding, they had done a customary wedding in the year 1989.
60. DW1's evidence is that they did not divide the matrimonial property and neither did the court make an order for division of matrimonial property.
61. She went on to testify that that after her husband (2nd Defendant) chased her away in the year 2008, one of their children continued to live with the second defendant at the suit property adding that it is this child who informed her that the property had been sold.



62. It is also her evidence that since the suit property is their matrimonial home further stated that she registered a caution on it.
63. In her witness statement, the 1st Defendant states that during the subsistence of her marriage to the 2nd Defendant, they were blessed with five children.
64. She also states that she found out about the fact of divorce after a decree nisi had been issued and added that the suit property was jointly acquired during the subsistence of their marriage.
65. She further stated that although the property was registered in the name of her former husband, she has an overriding interest in the property and the sale became illegal and void ab initio because her consent was not sought.
66. She states that the Plaintiff's occupation of the suit property and collection of rent is without any legal basis adding that she conducted a search on 23rd February, 2017 which search confirmed that the land was still registered in the name of her husband after which she registered the restriction.
67. She further states that subsequent to the search, she wrote a letter to the District Land Registrar Nakuru on 24th February, 2017 requesting that a restriction be placed on the suit property and upon payment of the requisite fee, the said restriction was registered.
68. She states that on 16th June, 2017 she visited the Lands Registry and conducted another search to confirm that the restriction was still in place.
69. She prays that the court dismisses the plaint and allows her counterclaim.
70. Upon cross examination by counsel for the Plaintiff, the 1st Defendant confirmed that the marriage between herself and the 2nd Defendant was dissolved in the year 2014.
71. She also confirmed that the suit property belonged to her and her husband and further confirmed that they did not go to any court for division of matrimonial property.
72. DW1 confirmed that the suit property was registered in the name of the 2nd Defendant and added that she heard that the property had been sold but when she conducted a search, she found out that the property was yet to be transferred and so she registered a caution on it.
73. She also admitted that the buyer is in occupation and that she did not know her before this suit was filed.
74. She further admitted that she was asked to talk to the 2nd Defendant to resolve the dispute between them but they were unable to agree. She confirmed that the Plaintiff had nothing to do with their dispute.
75. DW1 also confirmed that the 2nd Defendant had proposed to pay her Kshs. 400,000/= but she declined because she would have preferred that he shares the proceeds from the sale at the ratio of 50: 50.
76. She also confirms that there is no suit has been filed for division of matrimonial property.
77. She also admitted that she had a copy of the sale agreement that they entered into in the year 1999 for purchase of the suit property but it was not in her name.
78. DW1 also confirmed that the official search produced in court shows that the suit property is in the name of the 2nd Defendant.



79. Upon cross-examination by counsel for the 2nd Defendant, the DW1 confirmed that the 2nd defendant sent her away and does not support the children. She however confirmed that the court ordered that Mr. Obanyi stays with the children and to provide for them.
80. She admitted that in registering the caution in the year 2017, she gave her marriage certificate adding that she did not know that she had been divorced in the year 2014.
81. She also admitted that she only came to know about the divorce upon being served by the pleadings in this case and further confirmed that she did not object to the divorce proceedings or set aside orders made on account of those proceedings.
82. DW1 stated that at the time of writing letters to the Land Registrar she did not know that the property had been sold adding that she found out from one of her children at the beginning of the year 2017.
83. She further confirmed that she paid Kshs. 500 for the search and Kshs. 500 for the caution. She also confirmed that her name is not in the sale agreement and confirmed that the only name in the sale agreement is the 2nd Defendant.
84. She confirmed that she knows that she has the right to seek orders for division of matrimonial property after she became aware of the divorce.
85. She also confirmed that she did not know that at the time of the sale of the property that the 2nd Defendant did not have to seek for her consent.
86. Upon re-examination, she stated that they were referred to mediation but they were not able to agree.
87. She also stated that she should have been consulted before the property was sold. On the question of the purchase of the suit property by the 2nd Defendant, she stated that though her name is not in the agreement, she knew about the purchase.
88. She states that the title deed was issued after the agreement for purchase and explained that the parcel number in the 1999 agreement shows the suit parcel's number before registration.
89. She restated that she is seeking a declaration that she is entitled to 50% of the suit property.
90. The 1st Defendant's case was then closed.
91. FOB testified as DW1(2). It was his evidence that he knows both the Plaintiff and the 1st Defendant.
92. It was also his evidence that he sold the suit property to the Plaintiff and explained that the 1st Defendant used to be his wife adding that they are divorced. He produced the decree nisi as Exhibit D2(1).
93. He produced the agreement dated 4th January, 2017 for the sale of land, between himself and the Plaintiff, as Exhibit D2(2).
94. He testified that before he sold the suit property to the Plaintiff, he had purchased it through the land sale agreement dated 16th June, 1999.
95. He also testified that the title of the suit property is in his name adding that he did not buy it with anyone's help. It is his further testimony at the time of sale, the suit property was still registered in his name.
96. He further testified that during his marriage to the 1st Defendant who he married in the year 1990, they were living in Nyamira where he had built their matrimonial home.



97. He stated that he calls it a matrimonial home because there were certain traditional ceremonies that took place before they lived there. He explained that the said ceremonies included slaughtering a goat, drinking busaa (a local brew) and that his father sprinkled milk all over the house.
98. It is further his evidence that at the time of selling the suit property to the Plaintiff, he was divorced from the 1st Defendant adding that the Land Registrar did not give him an opportunity to respond before registering the caution.
99. He also testifies that he took out a loan from Kenya Commercial Bank to purchase the suit property and another loan from National Bank of Kshs. 800,000/= for development.
100. He further testifies that he also borrowed money from Harambee Sacco and Barclays Bank. He produces the letter from National Bank as Exhibit D2(3) and the pay slips as Exhibit D2(4).
101. It is his evidence that he sold the suit property to the Plaintiff because he needed money to pay debts which he had accumulated.
102. It is also his evidence that the 1st Defendant caused the tenants to vacate the building as she demolished it and so the tenants were reluctant to take occupation.
103. It is further his evidence that the 1st Defendant vandalized the suit property and he reported the matter at Central Police Station. He went on to state that 1st Defendant was charged with the offence of malicious damage to property. He produced the bail and bond receipt as Exhibit D (2)(5).
104. He further testified that the 1st Defendant should not get a share of the suit land because she did not contribute to it adding that the suit property is a commercial plot with rental houses. He stated that the 1st Defendant chased away the said tenants and he was not able to receive income from the suit property.
105. The 2nd Defendant produced the bank statement from Barclays Bank as Exhibit D2(6) and prayed that the 1st Defendant's counterclaim be dismissed.
106. Upon cross examination by counsel for the 1st Defendant, he confirmed that he got married to the 1st Defendant in the year 1990.
107. He also confirmed that they officially divorced in the year 2014 adding that they had built a house in Nyamira which is on their ancestral land.
108. He further confirmed that the 1st Defendant only visited him in Nakuru but she lived in their home in Nyamira.
109. He admitted that he lived with two of his children on the suit property.
110. When referred to Exhibit D2(3), he stated that it is a letter of offer from National Bank for a loan. He admitted that his pay slips for the year 2013, 2017, 2018 and 2019 do not show any deductions in respect of the National Bank loan.
111. He also admitted that he had no proof of the loan he got from KCB Bank but explained that from his pay slip of December 2011, it shows that he had loans from Barclays Bank, Co-operative Bank and National Bank.
112. He further admitted that he made developments on the suit property but had no proof of receipts. He stated that none of the developments were made during his marriage to the 1st Defendant. He confirmed that he has no receipts of valuation to show the cost of development.



113. He confirmed that there was no court order for division of property as he was only given custody of the children.
114. He further stated that when he sold the suit property to the Plaintiff, it was not necessary to get the 1st Defendant's consent because they were already divorced.
115. Upon cross examination by counsel for the Plaintiff, he confirmed that he sold the suit property to the Plaintiff for Kshs. 2,500,000/=.
116. He also confirmed that the Plaintiff fully paid the purchase price after which she took possession adding that the property has not been transferred to her though he had executed the transfer documents.
117. He stated that he only learnt that the property was still registered in his name when this suit was filed and added that when he sold the suit property there was no caution registered on it.
118. He further stated that at the time the 1st Defendant was placing the caution, she was not his wife.
119. He further admitted that the 1st Defendant never filed a case in court claiming a share of the suit property and that there is no other case except for the present one.
120. Upon re-examination, DW2 stated that the matrimonial home is in Nyamira but when his family visited Nakuru, they would stay on the suit property for as long as they wished.
121. He also stated that the pay slips don't show bank names but show that certain amounts would be deducted from his pay.
122. He further stated that no witness or documents have been brought to court to contradict that he was the one who solely purchased and improved the suit property.
123. The 2nd Defendant's case was then closed.

Issues for Determination.

124. The Plaintiff filed her submissions on 24th January, 2023, the 1st Defendant also filed her submissions on 17th February, 2023 while the 2nd Defendant filed his submissions on 22nd February, 2023.
125. The Plaintiff identifies only one issue for determination which is whether the Plaintiff is the bonafide purchaser for value of all that piece of property known as Dundori/Lanet Block x/xxxx Kiamunyekei.
126. The Plaintiff relies on the cases of *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR, *Eunice Grace Njambi Kamall and another v The Hon. Attorney General and 5 Others* Civil Suit No. 976 of 2012 and submits that she fully complied with her obligations under the contract for sale which took place three years after the 2nd Defendant had divorced the 1st Defendant.
127. The Plaintiff also relies on the case of *Elizabeth Wambui Gitbinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR and submits that she could not have known if the suit property was matrimonial property or not and she therefore seeks that her claim in the Plaint be allowed as prayed.
128. The 1st Defendant in her submissions gave a summary of the pleadings, the evidence of each party and identifies the following issues for determination:
 - a. Whether the suit parcel of land is a matrimonial property.
 - b. Whether the Plaintiff is a bonafide purchaser for value.
 - c. Whether the Plaintiff is entitled to the relief sought in the Plaint.



- d. Whether the 1st Defendant (Plaintiff in the counterclaim) is entitled to the reliefs sought in the counterclaim.
- e. Who should bear the costs of the suit and the counterclaim.
129. On the first issue, the 1st Defendant relies on Article 45(3) of the *Constitution* of Kenya, Section 6 of the *Matrimonial Property Act*, Section 93 of the *Land Registration Act*, Section 12 of the *Matrimonial Properties Act*, the case of *ENM v SMN & another* [2017] eKLR and submits that she acquired the suit property with the 2nd Defendant during the subsistence of their marriage and therefore the suit property is matrimonial property.
130. The 1st Defendant also submits that the 2nd Defendant admitted that the suit property is matrimonial property in his supporting affidavit in Divorce Cause No. 29 of 2009 and so her consent ought to have been sought before the suit property could have been sold.
131. On the second issue, the 1st Defendant relies on the cases of *Esther Ndegi Njiru & another v Leonard Gatei* [2014] eKLR, *Lawrence P. Mukiri v Attorney General & 4 Others* [2013] eKLR and submits the Plaintiff failed to conduct proper due diligence to establish the existence of other parties who might have had an interest in the suit property.
132. On the third issue, the 1st Defendant relies on Sections 24(a) and 26 of the *Land Registration Act* and submits that the Plaintiff has not established a prima facie case to warrant the orders sought in her Plaint.
133. On the fourth issue, the 1st Defendant relies on the cases of *Tinyefuze v Attorney General of Uganda* [1997] UGCC3 *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* (Petition 11 of 2020) [2023] KESC 4 (KLR), Sections 9, 14 and 17 of the *Matrimonial Property Act* and submits that she contributed substantially to the development of the suit property and the suit property is therefore matrimonial property.
134. On the issue of costs, the 1st Defendant relies on the case of *Jagbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2014] eKLR and seeks that the costs of the counterclaim be borne by the Defendants in the counterclaim.
135. In his submissions, the 2nd Defendant identifies the following issues for determination:
- a. Whether the court has jurisdiction to determine if the property is matrimonial,
 - b. Whether D1 ever contributed to the acquisition and/or development of the said property.
 - c. Whether the suit property had a matrimonial property on it.
 - d. Whether there was a subsisting marriage between D1 and D2 to warrant procurement of spousal consent at the time of sale of the suit property.
 - e. Whether D1 is entitled to the reliefs sought.
136. On the first issue, the 2nd Defendant submits that the issue of whether or not the suit property is matrimonial property is the preserve of the Family Division court and not the Environment and land Court.
137. The 2nd Defendant also submits that despite the 1st Defendant participating in the divorce proceedings she failed to pursue her claim for matrimonial property before the Family Division.



138. On the second issue, the 2nd Defendant submits that the 1st Defendant failed to prove how much she contributed for the acquisition of the suit property and therefore her claim for 50/50 division of the sale proceeds have no basis. The 2nd Defendant relies on the case of *EKTM v ECC* Matrimonial Cause No. E001 of 2021 [2021] eKLR in support of his arguments.
139. On the third issue, the 2nd Defendant relies on the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* [2015] eKLR and submits that their matrimonial home was established in Nyamira County and the supporting affidavit relied on by the 1st Defendant which alleges that he stated that the suit property was matrimonial property was not produced in evidence.
140. The 2nd Defendant also submits that the suit property was a commercial property and not a matrimonial home.
141. On the fourth issue, the 2nd Defendant relies on the case of *PWM v JMM & 3 Others* [2019] eKLR and submits that at the time of the sale of the suit property they were already divorced and the 1st Defendant ought to have attached a copy of the Decree Nisi and not the marriage certificate.
142. The 2nd Defendant concludes his submissions by seeking that the 1st Defendant's counterclaim be dismissed.

Analysis and Determination.

143. After considering the pleadings, the evidence and the submissions, the following issues arise for determination;
 - a. Whether this court has jurisdiction to entertain disputes relating to matrimonial property.
 - b. Whether consent of 1st Defendant was a prerequisite for the sale to the Plaintiff.
 - c. Whether the Plaintiff is entitled to the orders sought in the Plaint.
 - d. Whether the 1st Defendant is entitled to other orders sought in her counterclaim.
 - e. Who should bear the costs of this suit.

a. Whether this court has jurisdiction to entertain disputes relating to matrimonial property.

144. The Plaintiff's case is that she bought land parcel number Dundori/ Lanet Block x/xxxx from the 2nd Defendant but upon taking possession, the 1st Defendant began to interfere with her possession.
145. The Plaintiff states that the 1st Defendant is the former wife of the 2nd Defendant and that at the time she was purchasing the property from the 2nd Defendant, they were already divorced.
146. In support of her claim she has produced a land sale agreement dated 4th January, 2015 between herself and the 2nd Defendant for land parcel No. Dundori/Lanet Block x/xxxx (Kiamunyeke 'A') which sale agreement shows that she paid a consideration of Kshs. 2,500,000/=.
147. The Plaintiff also produced a copy of the title deed for the suit property issued on 9th December 2009 to FOB (the 2nd Defendant).
148. The Plaintiff further produced an Order issued in Nakuru CMCC Divorce Cause No. 29 of 2009 between FOB and ZK on 22nd July, 2009. The said order issued a temporary injunction restraining the 1st Defendant herein from interfering with the 2nd Defendant's and his tenants' occupation of plot number 176 Kiamunyeke.



149. The Plaintiff further produced a Decree Nisi issued in Nakuru CMCC Divorce Cause No. 29 of 2009 between FOB and ZK on 19th November 2014 that dissolved the marriage between the 1st and 2nd Defendants and gave the 2nd Defendant legal custody of all the issues under eighteen years of age.
150. The 1st Defendant's case on the other hand is that she was married to the 2nd Defendant when he bought the suit property. She further states that she was not aware of the divorce until the present suit was filed.
151. The 1st Defendant alleges that since the suit property was matrimonial property, her consent ought to have been sought and so she seeks a declaration that the suit property is matrimonial property and it should be shared equally between her and the 2nd Defendant.
152. The 1st Defendant produced the marriage certificate between her and the 2nd Defendant which shows that they were married on 1st December 2007.
153. The 1st Defendant also produced a supporting affidavit sworn by the 2nd Defendant in Nakuru CMCC Divorce Cause No. 29 of 2009 between FOB and ZK on 21st July 2009. At paragraph 9 and 11 the 2nd Defendant states that the suit property was acquired during his marriage with the 1st Defendant. He goes on to state that he built a matrimonial home and other residential houses for renting out.
154. The 1st Defendant further produced a sale agreement dated 16th June 1999 between Hamson Mitambo Gathura and the 2nd Defendant for the purchase of Parcel No. A 176/16 Kiamunyeki for a consideration of Kshs. 110,000/=.
155. A certificate of search dated 23rd February, 2017 was produced for Dundori/Lanet Block x/xxxx which showed that the 2nd Defendant was the owner having been registered on 9th November, 2009.
156. The 2nd Defendant's case, on the other hand, is that the suit property belonged to him having purchased it with his own money and with no contribution from the 1st Defendant.
157. The 2nd Defendant alleges that since the 1st Defendant did not make any contributions to the purchase of the suit property, it cannot be matrimonial property.
158. The 2nd Defendant argues that in any case, he sold the suit property to the Plaintiff after his divorce from the 1st Defendant and so he could not have sought her consent.
159. The 2nd Defendant produced the Decree Nisi issued in Nakuru CMCC Divorce Cause No. 29 of 2009 between FOB and ZK, (the same one that the Plaintiff had produced), a bail and bond receipt issued to ZK dated 13th February for the offence of malicious damage to property, a letter from National Bank dated 25th June, 2010 offering him an unsecured loan of Kshs. 800,000/=, his pay slips and bank statements.,
160. The following facts are undisputed:
 - a. That the 2nd Defendant is the registered owner of land parcel number Dundori/Lanet Block x/xxxx.
 - b. That the 2nd Defendant sold the suit property to the Plaintiff vide the sale agreement dated 4th January 2017.
 - c. That the Plaintiff is in possession of the suit property.
 - d. That that the 1st Defendant was married to the 2nd Defendant when the suit property was purchased and that at the time of its sale, they were divorced.



161. What is in contention is whether the suit property was matrimonial property and whether, therefore, the 1st Defendant ought to have given her consent before it was sold.
162. Before delving into the question of consent to sell, I have to consider whether this court has the jurisdiction to entertain disputes relating to matrimonial property and as a consequence make any orders.
163. The court in the case of *B W M v J M C* [2018] eKLR held as follows;

“ 18. For avoidance of doubt, the Court notes that the *matrimonial Property Act* does not to define the Court that disputes relating to the Matrimonial property disputes should be referred for determination. It is thus the current legal position that concurrent jurisdiction is given to various Courts to hear disputes relating to matrimonial property rights including this Court. The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to occupation, use and title to land. I find nothing to oust the jurisdiction of this Court...” (Emphasis Mine)

164. As was held in the above case, this court has the jurisdiction to determine such disputes but the said jurisdiction is limited to occupation, use and title to land as between married persons. Neither the 1st nor the 2nd defendant is in occupation of the suit property or in use of it. A third party (Plaintiff) is claiming proprietary interest in the suit property.

It is important to note that the Plaintiff she is not claiming it as being married to any party herein. The issue of property being matrimonial property has been canvassed by the 1st Defendant. The Plaintiff is seeking orders as a purchaser and has produced evidence of purchase from the 2nd Defendant.

The 2nd Defendant supports the case of the Plaintiff as a purchaser. My view is that division of matrimonial property should have been raised and determined in the divorce cause.

B. Whether consent of 1st Defendant was a prerequisite for the sale to the Plaintiff.

165. The next issue for determination is whether the 2nd Defendant ought to have sought the consent of the 1st Defendant before selling the suit property to the Plaintiff.
166. Both the Plaintiff and the 2nd Defendant produced in court a Decree Nisi issued in Nakuru CMC Divorce Cause No. 29 of 2009 between FOB and ZK.
167. The said Decree Nisi indicates that the marriage between the 1st and 2nd Defendants herein was dissolved on the 11th Day of November, 2014. This goes to show that at the time the 2nd Defendant was selling the suit property to the Plaintiff in the year 2017, the 1st and 2nd Defendants were already divorced.
168. The 1st Defendant merely alleges that she was not aware of the divorce proceedings but admits that she did not challenge the said proceedings upon being made aware of the same. That is to say that she did not move that court to address the question of division of matrimonial property.
169. The Court in the case of *PWM v JMM & 3 others* [2019] eKLR held as follows;

“ 85. Even if the issue of matrimonial property was to be argued, both the Plaintiff and the 1st Defendant adduced evidence that they separated in 2002 when the Plaintiff left the country and lived in the United Kingdom leaving the children with the 1st Defendant. According to the decree nisi on record, their union



stood dissolved in 2008. It therefore follows that by the time the suit land was charged in 2012, the marriage was long dissolved and the requirement for spousal consent was not legally necessary.” (Emphasis mine)

170. This decision is on all fours with the present suit. The 1st and 2nd Defendants were already divorced when the suit property was sold. The plaintiff was therefore not a spouse and it was not necessary that her consent be sought.

c. Whether the Plaintiff is entitled to the orders sought in the Plaintiff.

171. The Plaintiff seeks orders of permanent injunction against the 1st Defendant from interfering with the Plaintiff’s ownership and peaceful occupation of land parcel number Dundori/Lanet Block x/xxxx.

172. Her evidence is that she purchased the suit property in the year 2017 from the 2nd Defendant. The 2nd Defendant supports the case of the Plaintiff.

173. It also emerged in the course of these proceedings that the 1st and 2nd Defendant both have copies of an order issued in the year 2014 dissolving their marriage.

174. As at the time of purchase of the suit property by the Plaintiff, the 1st and 2nd Defendant were not spouses. The 2nd Defendant confirms that he sold the suit property to the Plaintiff who has been in occupation of it. It follows that her occupation and use of the suit property is lawful.

175. Bearing these in mind together with my finding on issue (a) above. It is my view that the Plaintiff is entitled to the orders sought in the Plaintiff.

d. Whether the 1st Defendant is entitled to the orders sought in her counterclaim.

176. As noted before, the 1st Defendant is seeking that the suit property be declared as matrimonial property and that the 2nd Defendant holds 50% of the beneficial interest in trust for her. This is prayer (a) in her statement of defence and counter claim.

177. The circumstances prevailing in this suit are that the suit property has been sold to the Plaintiff by the 2nd Defendant. The Plaintiff is in use and occupation of it. This court cannot therefore issue orders declaring the suit property as matrimonial property. It’s ownership has passed to the Plaintiff. What is left is transfer to the Plaintiff which would have happened were it not for the caution registered by the 1st Defendant. The 1st Defendant stated in her evidence that in registering the caution, she produced her marriage certificate to the 2nd Defendant. This was factually incorrect and a misrepresentation. The truth is that she had been divorced more than 5 years prior to the sale of the suit property to the Plaintiff.

178. The 1st Defendant is also seeking that an order be issued that the suit property be shared equally between her and the 2nd Defendant and if incapable of being shared, then the property be valued, sold and the net proceeds be shared equally. This is prayer (b) of her statement of defence and counterclaim.

179. In the judicial decision of *B W M v J M C* [2018] eKLR (*Supra*) it was held that this court has jurisdiction to make determination on matrimonial property but such determination is limited disputes pertaining to occupation, use and title to land.

180. I find that, even in different circumstances, this court cannot grant this prayer. It does not relate to title, use or occupation to land.

181. Prayer (c) in the counterclaim is for an order of permanent injunction restraining the 1st Defendant from occupying the main house or from collecting rent from the tenants occupying the several houses



erected on all that parcel of land known as Ndundori/Lanet Block 5/1212 Kiamunyeki. Bearing in mind my finding on issue (C) above, this prayer fails.

d. Who should bear the costs of this suit.

182. On the issue of costs, *Halsbury's Laws of England*, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes that:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”

183. Further Section 27 (1) of the *Civil Procedure Act* stipulates as follows;

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid: and the fact that that court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.

Provided that the costs of any action, cause or other matter shall follow the event unless the court or judge shall for good reasons otherwise order.”

184. The Defendants are former spouses and have children together. The Plaintiff filed this suit to enforce her rights of use and occupation as a purchaser of the suit property from the 2nd Defendant.

185. The Defendants already have a lot to resolve in respect of the marriage that stands dissolved and I do not wish to burden them any further with legal processes more than might be necessary.

186. Based on these and in order that parties forge better relations, I will make no order as to costs.

Determination.

187. In the result, the Plaintiff's suit succeeds and I hereby enter judgement in her favour in the following terms:

- a. A permanent injunction is hereby issued against the Defendants, by themselves, their servants, agents and/or anyone claiming through them from interfering with the Plaintiff's ownership and peaceful occupation of land parcel number Dundori/Lanet Block x/xxxx.
- b. Each party shall bear own costs.

188. It is so ordered.¹

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 13TH DAY OF JULY 2023.

L. A. OMOLLO

JUDGE

In the presence of: -



Mr. Akangu for the Plaintiffs.

Miss Ekesa for the Defendant.

Tanga for the 2nd Defendant

Court Assistant; Ms. Monica Wanjohi.

