



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kihara v Gichuhi & 2 others (Environment and Land Case Civil Suit  
753 of 2012) [2023] KEELC 19807 (KLR) (30 August 2023) (Judgment)**

Neutral citation: [2023] KEELC 19807 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 753 OF 2012  
EK WABWOTO, J  
AUGUST 30, 2023**

**BETWEEN**

**JANE NJOKI KIHARA ..... PLAINTIFF**

**AND**

**JOSEPH KIHARA GICHUHI ..... 1<sup>ST</sup> DEFENDANT**

**GIBSON IRUNGU MUIYURO ..... 2<sup>ND</sup> DEFENDANT**

**NGARA MUCHOKANIRIIRA CO LTD ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff sought the following orders against the Defendants in her amended plaint dated 2<sup>nd</sup> April 2019:
  - a. A permanent injunction be granted restraining the defendants by themselves, their servants and /or agents from disposing by way of sale or in any manner transferring and or/ interfering with Plot Number Ruiru/ Kiu Block 12/485 on L.R. No. 8788/9 Kasarani- Nairobi.
  - b. The 2<sup>nd</sup> Defendant to vacate Plot Number Ruiru/kiu Block on Plot No 8788/9 Kasarani Nairobi.
  - c. Cost of this suit.
  - d. Any other order that this court may deem fit and just to grant
2. The suit was contested by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who filed their defences. The 1<sup>st</sup> Defendant filed a statement of Defence dated 9<sup>th</sup> December 2021 and prayed for dismissed of the suit with costs. The 2<sup>nd</sup> Defendant also filed an amended statement of Defence and counterclaim dated 17<sup>th</sup> May 2019. The 2<sup>nd</sup> Defendant sought the following orders in his counterclaim;



- a. A declaration that the transaction relating to the sale of plot No 495A now Plot Number Ruiru/ Kui Block 12/485 was proper and above board and therefore, the 2<sup>nd</sup> Defendant is rightful and legitimate owner of plot No. 495A now Plot Number Ruiru/Kui Block 12/485.
  - b. An order of perpetual injunction restraining the plaintiff whether by herself, agents or servants from interfering with the 2<sup>nd</sup> Defendant's quiet possession of the Plot No 495A (Plot Number Ruiru/Kui Block 12/48 .
  - c. Special damages amounting to Ksh. 10,000.
  - d. In the alternative the 1<sup>st</sup> Defendant be ordered to reimburse the 2<sup>nd</sup> Defendant the full amount of the purchase price of land at current Market value.
  - e. In the alternative and in addition to (d) above the 1<sup>st</sup> Defendant be ordered to reimburse the 2<sup>nd</sup> Defendant all monies incurred as a result of the transaction on the suit property including the Ksh. 15,000/= that he paid as transfer fee to the 3<sup>rd</sup> Defendants offices.
  - f. Costs of and incidental to the whole suit.
3. The 3<sup>rd</sup> Defendant never filed any pleadings nor participated in the suit.

#### **The Plaintiff's case**

4. It was the Plaintiff's case that the 3<sup>rd</sup> Defendant was the registered owner of L.R 8788/9 Kasarani, Nairobi which was subdivided into several sub-plots that were sold to many people who were issued with share certificates as proof of ownership.
5. It was averred that on or about 1980 the Plaintiff and the 1<sup>st</sup> Defendant bought plot No.495A and 495B from the 3<sup>rd</sup> Defendant and were issued with share certificates No. 160 and 161. They agreed that the 1<sup>st</sup> Defendant be registered to hold Plot No 495A while the plaintiff was registered to hold Plot No. 495B for and on behalf of each other and their children as they had contributed towards the purchase of the said plots. Subsequently, the said plots were given new numbers being Plot Number Ruiru/Kiu Block 12/485 and Plot Number Ruiru/Kiu Block 12/486 and that to date the title to the said plots have not been issued.
6. The Plaintiff averred that together with her husband, the 1<sup>st</sup> Defendant they fenced the said plots with wire mesh and started construction on the same wherein the Plaintiff constructed foundation for sixteen rooms and completed four rooms and bought eight lorries of stones, one lorry of ballast and sand to enable them to complete the construction.
7. It was also averred that the dispute commenced when the Plaintiff completed four rooms and the 1<sup>st</sup> Defendant insisted that he wants to take control of the construction and she allowed him to do so but to date he has never completed what the Plaintiff had started.
8. It was also averred that on the 9<sup>th</sup> October 2012 the Plaintiff was called by one of her neighbours who informed her that some persons unknown to them were fencing her plot. Upon receiving the information, she went to the site the following day and found fencing posts and she also met the 2<sup>nd</sup> Defendant herein whom she was informed that he had purchased the plot from her husband the 1<sup>st</sup> Defendant herein.
9. During trial the Plaintiff testified as PW1 and the sole Plaintiff's witness. She adopted and relied on her witness statement dated 25<sup>th</sup> October 2012 together with her bundle of documents dated 25<sup>th</sup> October 2012 and further bundle dated 20<sup>th</sup> July 2022 as her evidence in chief.



10. It was her testimony that that she bought the two plots with her husband at a time when she was working with Nairobi City Council. She also stated that her husband later sold one of the plots to the 2<sup>nd</sup> Defendant without her consent and knowledge. She also added that no school fees was paid by her husband from the proceeds of sale.
11. When cross examined by counsel for the 1<sup>st</sup> Defendant she stated that the two plots were bought from 3<sup>rd</sup> Defendant though she could not remember the exact amount she paid as the purchase price. She also stated that even though she bought the plot together with her husband, her name doesn't appear at the plot 495 "A". She also stated that she made some developments on the plot which were demolished by the 2<sup>nd</sup> defendant. She also stated that her husband never informed her when he sold the plot. She further stated that she was never given any money from the proceeds of sale. She also stated that the plot was sold in 2012 and she parted way with her husband in 2013.
12. When cross examined by counsel for the 2<sup>nd</sup> Defendant she stated that she first met the 2<sup>nd</sup> Defendant at the police station after he had lodged a complaint against her. She also stated that she has a share certificate for the Plot Number 495A. She also stated that she had photos to confirm that she had actually developed the plot and she had finished construction in 1995 having constructed 4 classes.
13. When re-examined, she stated that the two plots were bought from the 3<sup>rd</sup> Defendant. She also stated that plot B was written in her name while plot A was written in her husband's name. She also stated that she was given the share certificate after she cleared the balance. She also stated that she wanted to put up classrooms in the second plot.
14. She further stated in re-examination that she was arrested pursuant to allegations made by the 2<sup>nd</sup> Defendant. She reiterated that the 1<sup>st</sup> Defendant never paid any school fees for their children after selling the property. She also maintained that she was not involved in the sale of any plot to the 2<sup>nd</sup> Defendant.

#### **The case of the 1<sup>st</sup> Defendant.**

15. It was the 1<sup>st</sup> Defendant's case that he bought the disputed property Plot Number 495A from Patrick Wanjohi on 8<sup>th</sup> May 1980 for Kenyan Shillings Ten Thousand (10,000/-) and he paid the balance of the Kenya Shillings Two Thousand (2,000/-) later which the owner acknowledged receipt. It was also averred that the Plaintiff herein, was a witness to the said agreement and transaction. The 1<sup>st</sup> Defendant also averred that after purchase he was issued with a certificate for Plot Number 495A.
16. It was also the 1<sup>st</sup> Defendant's case that he later bought the next Plot 495B which he paid for and registered it under Plaintiff's name. At that time the Plaintiff was working as a messenger at the then Nairobi City Council and she resigned in 1982. It was also his case that sometimes later they decided to acquire a loan facility through Budget Building Society using the two certificate of Plot Number 495A and 495B as security. Due to school fees constraints, he decided to sell the said plot 495A to the 2<sup>nd</sup> Defendant herein to clear school fees for the two sons. One of the son was in Strathmore University while the other son was at Multimedia University.
17. The 1<sup>st</sup> Defendant also averred that he consulted the Plaintiff and he informed her that he was going to sell the said plot. At first she had no objection, but later objected on the grounds that the property was sold without her consent.
18. During trial he testified as DW1 and relied on his witness statement and bundle of documents dated 9<sup>th</sup> December 2021 as his evidence in chief.



19. On cross-examination by counsel for the 2<sup>nd</sup> Defendant he stated that he sold the plot to the 2<sup>nd</sup> Defendant pursuant to the sale agreement dated 1<sup>st</sup> October 2012. He also stated that he sold the plot for Kshs 1,300,000 Million and was paid the entire purchase price. He further stated that the Plaintiff never contributed anything towards the purchase of the said property and she had no evidence to confirm the same.
20. On further cross examination by counsel for the 1<sup>st</sup> Defendant he stated that he constructed 4 rooms in the said plot which were being used for rentals and that he was the one collecting rent. He also stated that at the time of sale of the property to the 2<sup>nd</sup> Defendant there were no tenants.
21. He also stated that he sold the property together with his wife and that when the matter had been referred to mediation which unfortunately wasn't successful, they had proposed to sale the plot and refund to the 2<sup>nd</sup> Defendant Kshs 2,000,000/- and the balance be shared amongst them but this proposal wasn't accepted by the Plaintiff.
22. On cross-examination by the counsel for the plaintiff he stated that he bought the property in 1980 from the 3<sup>rd</sup> Defendant. He also stated that he was given a share certificate and he had bought the property while still working at Hilton Hotel.
23. When re-examined he stated that he couldn't remember if he had the document confirming purchase of plot 495A. He also stated that their children joined university in 2012 and 2013 and the proceeds from the sale of the plot were used to pay for their school fees.

#### **The case for the 2<sup>nd</sup> Defendant**

24. The 2<sup>nd</sup> Defendant case was that he did due diligence before purchasing the plot 495A from the 1<sup>st</sup> Defendant. He also averred that he entered into a sale agreement dated 1<sup>st</sup> October 2012 with the 1<sup>st</sup> Defendant to purchase the plot for Ksh 1,300,000/-. It was also averred that he was given vacant possession of the property and that he immediately embarked on fencing it off. However, the Plaintiff destroyed his fence thus compelling him to report at Githurai Kimbo Police Station and the Plaintiff was arrested for malicious damage to property. However, the said charges were dropped to allow the parties amicably resolve the dispute.
25. During trial he adopted his witness statement dated 27<sup>th</sup> February 2021 and bundle of documents dated 22<sup>nd</sup> May 2013 as his evidence in chief. He also added that the property had 4 single rooms which were incomplete.
26. It was his testimony that he fenced the plot upon purchase but when his workers went to the site, they encountered resistance from the Plaintiff and he was forced to report the matter to the police.
27. On cross- examination by the counsel for the 1<sup>st</sup> Defendant he stated that he had not met the 1<sup>st</sup> Defendant before the transaction. He also insisted that he did due diligence before the purchase of the property and that the 1<sup>st</sup> Defendant told him that he had agreed with his wife to sale him the said property. He also stated that when the dispute arose he sought for a refund of Kshs 1,635,000/= but the same was never refunded.
28. On cross-examination by counsel for the Plaintiff he stated that he first met the 1<sup>st</sup> Defendant in 2012 and that the Plaintiff for the first time when she had gone to the site to destroy his fence. He also stated that the property had 4 single rooms which were incomplete and had no tenants at the time of purchase. He further stated that the officials from the 3<sup>rd</sup> Defendant confirmed that the property belongs to the 1<sup>st</sup> Defendant before it was sold.



29. On re- examination he stated that he had a share certificate to confirm that the property belonged to the 1<sup>st</sup> defendant before purchasing the same.

**The Plaintiff’s submission:**

30. The Plaintiff filed written submissions dated 31<sup>st</sup> May 2023 through the firm of Kamere and Co Advocates.
31. It was the Plaintiff’s submission that the Plaintiff in her evidence had stated that together with the 1<sup>st</sup> Defendant they bought several plots and had them registered in her name and 1<sup>st</sup> Defendant’s name on each other’s behalf and on behalf of their children. The suit property 495A was no different. The 1<sup>st</sup> Defendant sold the plot without her consent yet she had an interest in the plot and was doing construction.
32. It was submitted that Plot Number 495A was bought during the subsistence of their marriage. The Plaintiff was listed as a witness in the sale agreement signed upon purchasing plot number 495A. The Plaintiff undertook construction in the two plots and got approvals to construct a school.
33. It was further submitted that the Plaintiff had testified that she was not made aware of the sale of the plot 495A and was alerted by a neighbour who saw strangers fencing her plot. She stated that she did not sign any document consenting to the sale of plot 495A. The 1<sup>st</sup> Defendant in a replying Affidavit sworn on 2<sup>nd</sup> November 2012 at para 16 attached Affidavit of consent marked “JKG-5” allegedly signed by the Plaintiff but not presented to a Commissioners for oaths for commissioning.
34. It was argued that the 1<sup>st</sup> Defendant while testifying in court stated that the Plaintiff never signed a spousal consent because the plot was not a matrimonial property. The Plaintiff referred to Section 93 of the *Land Registration Act*, Act No. 3 of 2012, to the effect that where the property is obtained during the subsistence of a marriage, it is to be dealt with under the *Matrimonial Property Act*, Act No. 49 of 2013.
35. Counsel for the Plaintiff submitted that, the marriage and acquiring of the properties between the 1<sup>st</sup> Defendant and the Plaintiff was before the enactment of the Matrimonial Properties Act, and reliance was placed on the position held by the court in JKN vs JWN & 3 OTHERS [2022] eKLR which quoted court of appeal in the case Mugo Muiru Investments Limited vs E W B & 2 Others [2017] eKLR as follows;
- “ Even before the *Land Registration Act* came into force on 2<sup>nd</sup> May 2012, the equitable beneficial interest of a spouse in a matrimonial home occupied by such spouse was an overriding interest and therefore transfer of the title to the matrimonial home was subject to such overriding interests. It is immaterial that there was not at time statutory provision expressly declaring it an overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on registered proprietor and on a person who acquires an interest in the property”.
36. It was also argued that the 2<sup>nd</sup> Defendant cannot be a bonafie purchaser for value because he did not do due diligence before acquiring the plot. He did not produce evidence to show that the 1<sup>st</sup> Defendant was had any record of the 3<sup>rd</sup> Defendant as the owner of Plot Number 495A. further, he did not enquire from the 1<sup>st</sup> Defendant whether the Plaintiff had consented to the sale. He was in a rush to complete the transaction even after the Plaintiff protested. Whereas the completion period as per the produced agreement was 30 days, the sale agreement was signed on 1<sup>st</sup> October 2012, the balance of the purchase



price was paid on 8<sup>th</sup> October 2012 and the transfer effected on the same day this was one day after the Plaintiff had protested to the sale and was arrested. Had the 2<sup>nd</sup> Defendant carried out due diligence he would have known that plot number 495A was a matrimonial property and the Plaintiff's consent was required before the sale.

37. Reliance was also made to the case of Samuel Kamere vs Land Registrar (2015) EKLK the court of appeal held that;

“In order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid the valuable consideration for the purchase of the suit property.

Section 93 (3) (b) then provides that:

‘Where a spouse who holds land or a dwelling house in his name undertakes individually a disposition in that land the transferee shall if that disposition is a transfer of land that transferee shall if that disposition is a transfer of land be under a duty to inquire of the transferor of whether the spouse (s) has consented to that transfer...’

38. The Plaintiff concluded her submissions by urging this court to dismiss the 2<sup>nd</sup> Defendant's counterclaim and grant her the prayers sought in her amended plaint.

#### **The 1<sup>st</sup> Defendant's submission**

39. The 1<sup>st</sup> Defendant never filed any written submissions despite being granted an opportunity to do so.

#### **The 2<sup>nd</sup> Defendant's submission**

40. The 2<sup>nd</sup> Defendant submissions were dated 19<sup>th</sup> June 2023 and were filed by Kabathi and Co Advocates. The 2<sup>nd</sup> Defendant submitted on the following issues; Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendant lean entered into a valid sale agreement, whether the 1<sup>st</sup> Defendant could dispose off plot no. 495A without consulting the Plaintiff, Whether the Plaintiff's activities amount to/constitute of trespass and whether the 2<sup>nd</sup> Defendant is entitled to his prayers sought in the counter claim.
41. It was submitted that the 2<sup>nd</sup> Defendant entered into a sale agreement dated 1<sup>st</sup> October 2012 for the sale of plot number 495A which fact had been confirmed by the 1<sup>st</sup> Defendant in his testimony. It was also submitted that the Plaintiff had confirmed that the property in question had been sold to the 2<sup>nd</sup> Defendant who took possession immediately.
42. It was also submitted that the 2<sup>nd</sup> Defendant entered into a valid agreement pursuant to Section 3 (3) of the *Law of Contract Act*. The sale agreement dated 1<sup>st</sup> October 2012 had met all the elements of validity of a contract as per the cited legal provision.
43. It was also submitted that the 2<sup>nd</sup> Defendant testified that he carried out due diligence by visiting the 3<sup>rd</sup> Defendant's office to establish ownership of the said plot and he confirmed that the 1<sup>st</sup> Defendant was the sole owner of the said plot as per a share certificate number 160 and that this evidence was corroborated by the 1<sup>st</sup> Defendant who indicated that he bought the suit property in the year 1980. He testified that the Plaintiff acted as a witness in the transaction that took place 1980.
44. It was also submitted that the Plaintiff is the registered owner of the adjacent Plot Number 495B and that if she had any propriety interests in the suit property, the same would have been registered in



her name and 1<sup>st</sup> Defendant jointly. The 1<sup>st</sup> Defendant therefore had every right to deal with the suit property as he wished, the more reason he sold it to the 2<sup>nd</sup> Defendant. It was his testimony that the suit property was never part of the matrimonial property and therefore there was no need to reduce the Plaintiff consent into writing. The Plaintiff indeed confirmed that the suit property was not part of their matrimonial property.

45. It was also submitted that both the Plaintiff and the 1<sup>st</sup> Defendant had confirmed during trial that they had not established a family home on the suit plot and as such, the suit plot does not qualify to be matrimonial home. The Plaintiff did not produce any documentary evidence to prove that she contributed in any way towards the acquirement of the suit property. Even if it were matrimonial property at the time of the transaction, the provisions of the *Matrimonial Property Act* 2013 could not apply as the Act has not been shown to have retrospective effect. Reliance was made to the case of Peninah Wambui Mugo –vs- NMK and MMN-Nakuru HCCC No.238 of 2004 as quoted with authority in the case of Peter Kagunza Adaji vs Sikuku Martin Maiyo and Another [2017] eKLR. Justice Mwangi Njoroge thus held;

“The court noted in that case that other than establishing that the property was bought during the marriage, the wife of the 1<sup>st</sup> Defendant in the case did not expressly prove any trust by way of monetary contribution or otherwise. The court stated as follows:

46. It was submitted that it was both the Plaintiff's and 1<sup>st</sup> Defendant's evidence that there was no home on the suit property and that they were not residing there and that this was a clear indication that the Plaintiff did not prove that the suit property qualified to be matrimonial property. As such, no spousal consent was required before the 1<sup>st</sup> Defendant could sell the plot to the 2<sup>nd</sup> Defendant. Further, the Plaintiff did not produce any document to prove that the plot was jointly owned between her and the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant produced a share certificate indicating he was the sole owner of the suit plot. The Plaintiff did not demonstrate any genuine and arguable case to prove that she has any proprietary rights over the suit property. The Plaintiff claimed that she was the one who bought the suit property from the 3<sup>rd</sup> Defendant. However, she did not produce any documentary evidence to prove that she had either made any contributions and/or made any payment towards purchase of the suit property. She did not produce any share certificate that was in her name and/or joint ownership with the 1<sup>st</sup> Defendant in as far as the suit plot is concerned. Plaintiff further argued that the purchase price offered to the 2<sup>nd</sup> Defendant was below market value. However, she did not produce any valuation report to support her claim.
47. It was also submitted that the Plaintiff did not produce any receipts to prove the contributions. She did not produce any approvals from relevant authorities in her name proving that she had obtained approvals to erect rental houses on the suit land. Her contentions were mere and baseless claims meant to deny the 2<sup>nd</sup> Defendant to peacefully utilize the suit land.
48. It was further submitted that the 2<sup>nd</sup> Defendant indicated that he paid the full purchase price. As per clause 3 (i) of the agreement, the 1<sup>st</sup> Defendant confirmed having acknowledged receipt of Kshs. 1,000,000. The balance of Kshs. 300,000 was settled on 9<sup>th</sup> October 2012. During cross examination, the 1<sup>st</sup> Defendant confirmed having received the full purchase price. The Plaintiff as well confirmed in her testimony that the 2<sup>nd</sup> Defendant had paid full purchase price and was actually offering a refund of the money after the dispute arose. It was the 2<sup>nd</sup> Defendant's evidence that after he took possession of the plot and fenced it off, the Plaintiff destroyed it and he had to report the matter at Githurai Kimbo police station. The Plaintiff was apprehended by the police with view of charging her with malicious



damage property. The Plaintiff was apprehended by the police but was later released after she promised not to interfere with the 2<sup>nd</sup> Defendant's peaceful possession of the suit property.

49. It was also submitted that It was the 2<sup>nd</sup> Defendant's testimony that he had fulfilled his part of bargain by settling the full purchase price. He indicated that he has never been able to develop the suit property due to existence of the present suit. Over the years, the suit property has appreciated in terms of value but the 2<sup>nd</sup> Defendant continues to suffer loss of user. It was the 2<sup>nd</sup> Defendant's testimony that he entered into sale agreement dated 1<sup>st</sup> October 2012 for the sale of Plot No. 495A. The sale agreement contains all the ingredients of a valid contract the same having been in writing, signed by all parties, and attested. The 1<sup>st</sup> Defendant having sold the plots to the 2<sup>nd</sup> Defendant is bound by terms of the contract. The Plaintiff having been aware of the sale was not justified to enter the sold land and destroy 2<sup>nd</sup> Defendant's fence since the 2<sup>nd</sup> Defendant is the legitimate owner of the suit plot having paid the full purchase price. The 2<sup>nd</sup> Defendant has a right to peaceful and quiet enjoyment of the suit plot. He has a right to possession, occupation and use of the suit land. As the 2<sup>nd</sup> Defendant is the bonafide purchaser for value and legitimate owner of the suit plot, the Plaintiff's actions if not enjoined by court will prejudice the 2<sup>nd</sup> Defendant's right to ownership of property as enshrined under Article 40 of *the Constitution* of Kenya, 2010.
50. The agreement to sell and transfer rights to subject parcel of land was not obtained or made by fraud, misrepresentation or mistake and there are no special circumstances that would make it impossible to honor the terms of the contracts. Both the vendor and the purchaser in their respective testimonies admitted that they had willingly signed the sale agreement. Indeed, there is no such claim or evidence revealing otherwise. The Plaintiff cannot therefore purport to claim an interest in a land that does not fall under the category of matrimonial property.
51. The 2<sup>nd</sup> Defendant concluded his submissions by urging the court to grant the prayers sought and dismiss the Plaintiff with costs.

### **Analysis and determination**

52. Having considered the pleadings filed by all the parties herein together with the evidence tendered, this court is of the view that the following are the salient issues for determination herein;
- i. Whether Plot Number 495A was matrimonial property.
  - ii. Whether there existed a valid sale between the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant.
  - iii. Whether the Plaintiff is entitled to the reliefs sought in her plaint.
  - iv. Whether the 2<sup>nd</sup> Defendant is entitled to the reliefs sought in the counterclaim.
53. I shall now proceed to analyze the said sequentially.

### **Issue No 1 -Whether plot number 495A was a matrimonial property.**

54. The Plaintiff pleaded that on or about 1980 she bought plot no. 495A with her husband. The said plot was bought from the 3<sup>rd</sup> Defendant and they were issued with share certificate No. 160.
55. During the trial she stated that she had agreed with her husband that her husband would be registered to hold Plot No. 495A while she will be registered to hold Plot No. 495B for and on behalf of each other and their children for they were husband and wife had contributed to the purchase of the plots.



56. In the Plaintiff's submissions, she submitted that even though Plot Number 495A was acquired way before the enactment of the matrimonial property, the same ought to be treated as matrimonial property and she relied on the case of JKN -VS- JWN & Another [2022] eKLR. She also made reference to the provisions of Sections 2 and 12 of the *Matrimonial Property Act* No. 49 of 2013 and Sections 93 of the *Land Registration Act* No. 3 of 2012.

57. The *Matrimonial Property Act*, defines what a "matrimonial home" is and also what "matrimonial property" is. Section 2 of the said Act stipulates as follows:

"matrimonial home" means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;

Whereas "matrimonial property" is defined in section 6 of the Act as follows:

Meaning of matrimonial property:

For the purposes of this Act, matrimonial means---

- a. The matrimonial home or homes;
- b. Household goods and effects in the matrimonial home or homes; or
- c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
  1. Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
  2. Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their rights.
  3. A party to an agreement made under subsection (3) may apply to the court to set aside the agreement and the court may set aside the agreement if it determines that the agreement influenced by fraud coercion or is manifestly unjust.

Section 12 of the *Matrimonial Property Act* provides as follows:

Special provisions relating to matrimonial property

1. An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both the spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.
2. A spouse in monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title land or of deeds.

Section 93 (2) of the *Land Registration Act* No. 3 of 2012 provides :

"if land is held in the name of one spouse only but the other spouse (s) contributes by their labour or other means to the productivity, upkeep and improvement of the land, that spouse



(S) shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by spouse (s) shall be recognized in all cases as if they were registered.

58. In the instant case, even though the said property was acquired before the enactment of the matrimonial property the Plaintiff was able to demonstrate that she had an existing interest over the same. The Plaintiff acquired the said property together with 1<sup>st</sup> Defendant and such her consent was required prior to the disposal of the same. The court is satisfied the Plaintiff was able to demonstrate during trial her contribution and beneficial interest to the property.

**Issue No. 2 -Whether there existed a valid sale agreement.**

59. It was the 2<sup>nd</sup> Defendant's case that he entered into a sale agreement dated 1<sup>st</sup> October 2012. The 2<sup>nd</sup> Defendant also submitted that the said agreement was valid having met all the terms and conditions of Section 3 (3) of the [Law of Contract Act](#).
60. From the evidence on record, the Plaintiff and the 1<sup>st</sup> Defendant purchased the suit property together in 1980 and agreed that the same would be registered in the names of the 1<sup>st</sup> Defendant on her behalf and their children. That was also the same position in respect to plot No. 495B. This was basically done to protect her interest in the property. The evidence on record shows that the sale of the suit property was done without the consent of the Plaintiff and by the mere fact that the 1<sup>st</sup> Defendant admitted in evidence that he wanted to use the proceeds in paying for school fees of their children that in itself justified the position taken by the Plaintiff that the suit property was to be registered in the names of the 1<sup>st</sup> Defendant for and her behalf and also for the benefit of their children. Had the 2<sup>nd</sup> Defendant bothered to carry out proper due diligence, he would have learnt that the Plaintiff had a beneficial interest to the suit property. I am of the view that all telltale signs that the 1<sup>st</sup> Defendant was hiding something were there but the 2<sup>nd</sup> Defendant chose to ignore the same. A party who fails to carry out proper due diligence or who is negligent in doing so while purchasing a property has only himself to blame when it turns out that the person who sold the property to him had not disclosed all material facts. He cannot be heard to claim that he purchased the property innocently and in good faith. In this case, there was plenty of evidence showing that the Plaintiff had an interest in the property. In addressing this issue, this court having found earlier that the Plaintiff never consented to the sale of the said property it cannot arrive at the position that the same was valid. The 2<sup>nd</sup> Defendant never did any due diligence in establishing the position and interest of the Plaintiff in respect to the said property.

**Issue No. 3- Whether the Plaintiff is entitled to the reliefs sought.**

61. The Plaintiff sought for several reliefs in her plaint. She sought for permanent injunction and order directing the 2<sup>nd</sup> Defendant to vacate the suit property and also costs of the suit. I wish to state that an order of permanent injunction is meant and/or intended to prohibit, restrain and bar the happening of an event. For good measure, such an order operates to forestall invasion of, inter-alia, land by a party, who has no legitimate rights and Interests to the land in question. In respect of the instant case, evidence abound that the 2<sup>nd</sup> Defendant was already on the suit land hence the prayers for permanent injunction and for eviction that have been mounted by the Plaintiff.
62. In the instant case this court is satisfied that the Plaintiff has been able to prove her case to the required standard and this court will proceed to grant her the prayers sought.



#### **Issue No.4 - Whether the 2nd Defendant is entitled to the reliefs sought in his counterclaim**

63. In the counterclaim dated 17<sup>th</sup> May 2019 the 2<sup>nd</sup> Defendant sought the following orders; a declaration that the transaction relating to the sale of plot No. 495 was proper and above board and therefore that the 2<sup>nd</sup> Defendant is rightful and legitimate owner of the plot No, 495A now plot number Ruiru/Kiu Block 12/ 485. The 2<sup>nd</sup> Defendant also sought for an order of perpetual injunction against the Plaintiff and special damages of Kshs 10,000. The 2<sup>nd</sup> Defendant also sought an alternative remedy of reimbursement of the purchase price of the land at current market value together with the cost of suit.
64. During trial the 2<sup>nd</sup> Defendant produced evidence to the effect that he paid purchase price of Ksh 1,300,000/- towards the purchase of the suit property. This evidence was not challenged nor controverted by any party and having considered the same this court shall proceed to grant the 2<sup>nd</sup> Defendant the alternative relief for refund of the purchase price at the current market rate.

#### **Issue No. 5 - What orders should issue as to costs.**

65. On the issue of costs, it is trite law that costs shall follow the events, but it is also noteworthy that this court retains the discretionary rights on award of costs. However, looking at the circumstances of this case and considering the relationship between the Plaintiff and the 1<sup>st</sup> Defendant I will direct each party to bear own cost of suit.

#### **Final orders**

66. In the end, the suit by the Plaintiff and counterclaim by the 2<sup>nd</sup> Defendant are disposed as follows;
- a. A permanent injunction is hereby granted restraining the Defendants by themselves, their servants and or agents from disposing by way of sale or in any other manner transferring and/ or interfering with plot number Ruiru/Kiu Block 12/485 and also known as Plot No. 495A.
  - b. The 2<sup>nd</sup> Defendant is hereby ordered to vacate the property Plot No. 495A Ruiru/Kiu Block 12/485 within 30 days from today.
  - c. The 1<sup>st</sup> Defendant is hereby ordered to reimburse the 2<sup>nd</sup> Defendant the full amount of the purchase price of the land at the current market value.
  - d. Each party to bear own cost of the suit and counterclaim.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> AUGUST 2023.**

**E.K WABWOTO**

**JUDGE**

In the presence of: -

Ms. Mwangi for the Plaintiff.

Ms. Mwasharu fo Kabithi for the 2<sup>nd</sup> Defendant.

N/A for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.

