



**DMM & another v MNM (Environment and Land Appeal E029 of 2021)
[2023] KEELC 21075 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21075 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E029 OF 2021
LC KOMINGOI, J
OCTOBER 26, 2023**

BETWEEN

DMM 1ST APPELLANT

AHMED ABDULLAHI OSMAN 2ND APPELLANT

AND

MNM RESPONDENT

(Being an appeal against the decision of the Chief Magistrate's Court at Kajiado (Hon. S. Shitubi) delivered on the 23rd September 2021 in MCE&L Case No. 99 of 2019)

JUDGMENT

1. The Respondent through a Complaint dated 24th October 2019 in MCE&L Case No 99 of 2019 filed at the Kajiado Chief Magistrate's Court sued the 1st Appellant and the 2nd Appellant as the seller and purchaser respectively of Plot No Axxx/S (formerly Plot No xx/S). The suit was premised on grounds that the 1st Appellant sold off the property which was their matrimonial property without her consent. She thus prayed for declaration that the suit property was matrimonial property held by the 1st Appellant in Trust of the Respondent; that the sale and subsequent transfer of the suit property was null and void; an order compelling the Land Registrar Kajiado from registering any interest of the suit property to the 1st and 2nd Appellants among other orders.
2. In the Judgement dated 23rd September 2021, the Hon S. Shitubi (CM) having found that the suit property was matrimonial and it ought to have been sold and transferred with the Respondent's consent, granted the orders sought.



3. Aggrieved by the said Judgement, the Appellants herein appealed vide a Memorandum of Appeal dated 18th October 2021 on grounds that:
 - i. The Hon. Magistrate erred in law and fact by holding that Plot No Axxx/S (formerly Plot No xx/S) is matrimonial property.
 - ii. The Hon. Magistrate erred in law and fact by holding that the agreement for sale between the Appellants and the Transfer of the suit plot No Axxx/S were null and void.
 - iii. The Hon. Magistrate erred in law and fact by applying the provisions of the *Matrimonial Property Act*, 2013 and the *Land Registration Act*, 2012 to the suit plot.
 - iv. The Hon. Magistrate erred in law by granting the final orders that she did.
4. The appeal was canvassed by written submissions.

The Appellants' Submissions

5. Counsel for the Appellants submitted that the suit property was not matrimonial property as per Section 6 of the *Matrimonial Property Act* arguing that they lived on it from 2002 to 2012 when the 1st Appellant separated with the Respondent and has been living alone on the suit property since then. As such, the suit property ceased to be matrimonial property in 2012 and the *Matrimonial Property Act* which came to effect in 2014 could not be applied retrospectively citing the Supreme Court case of *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* [2023] KESC 4 (KLR) (Judgment). Counsel further submitted that matrimonial property had been defined under Section 6(1)(c) as property jointly owned and acquired which was not the case with the suit property adding that the Respondent had also not proved her contribution to the suit property. Reference was once again made to the above Supreme Court decision which addressed the issue of division of matrimonial property. Therefore, the suit property was not matrimonial property and Section 14 of the *Matrimonial Property Act* was inapplicable in this case. In that regard, the Hon. Magistrate erred in finding that the suit property was matrimonial property and spousal consent was required before disposing it as encompassed in Section 7 and 12 of the *Matrimonial Property Act* and Section 93 of the *Land Registration Act*.
6. Counsel went on to submit that the suit property was held under the repealed Trust Lands Act which was replaced by *Community Land Act* and these laws did not require consent.
7. He urged this court to find that the judgement and decree ought to be set aside and costs for the Appeal as well as the Subordinate court costs be awarded to the Appellants.

The Respondent's submissions

8. Counsel for the Respondent submitted that it was on record that the suit property was acquired and developed during the subsistence of the 1st Appellant and Respondent's marriage and they occupied it together with their children. Counsel indicated that the Respondent had also adduced uncontroverted evidence of her contribution towards its acquisition and development as well as the original allotment letter of the suit property. He cited the following cases; *ENK v MNN* [2021] KECA 219 (KLR) (Judgment) and *Samuel Titi Kimani v Michael Ndirangu Ngugi & another* [2022] eKLR and urged the court to uphold the lower court's decision that the suit property was matrimonial property.



9. On whether the sale and subsequent transfer of the suit property was null and void, counsel submitted that having determined that the suit property was matrimonial property, it was imperative for the Respondent's consent to be sought before any sale and/or transfer. Therefore, due process was not followed and registration of interest in the 2nd Appellant's name should be nullified. Counsel pointed out that the 2nd Appellant was not a bonafide purchaser because there was no proof that he had undertaken due diligence beyond confirming that the suit property was registered in the 1st Appellant's name and also noted that the suit property was sold in secrecy because the original allotment letter was in the Respondent's custody and that the 1st Plaintiff procured another allotment letter illegally. To support this argument, reference was made to the following cases where it was held that even before the inception of the *Matrimonial Property Act* and *Land registration Act*, matrimonial property was an overriding interest *Mugo Muiru Investments Ltd v EWB & 2 others* [2017] eKLR; *Kadzo Mkutano v Mkutano Mwamboje Kadosho & 2 others* [2016] eKLR; *Wilstone Ndindi Mwawugunga v Kenya Women Microfinance Bank PLC* [2022] eKLR; *Esther Ndegi Njiru & another v Leonard Gatei* (2014) eKLR and *Godfrey N. Nyaga v Margaret W. Theuri & 3 other* [2015] eKLR.
10. Counsel prayed that the Appeal be dismissed.

Analysis and Determination

11. I have considered the Record of Appeal, the rival submissions and the authorities cited. The issues for determination are:
- i. Whether the suit property Plot No Axxx/ S(formerly Plot No xx/ S) is matrimonial property.
 - ii. Whether the agreement for sale and the Transfer of the suit plot No Axxx/S was null and void.
 - iii. Whether the provisions of the *Matrimonial Property Act*, 2013 and the *Land Registration Act*, 2012 were applicable to the suit property.
 - iv. Who should bear costs of the Appeal?
12. This being a first appeal, the Court is called upon to re-examine the evidence adduced in the lower court and independently arrive at its own conclusions as was re-affirmed by the Court of Appeal in *ENK v MNNN* (Civil Appeal 559 of 2019) [2021] KECA 219 (KLR) where it was stated;
- “... *Selle & another v Associated Motor Boat Company Limited & others* [1968] EA 123 where the following passage appears:
- “...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”.
13. The Appellants' case is that the Learned Trial Magistrate erred in law and in fact by finding that the suit property was matrimonial property. Counsel outlined the definition of matrimonial property per Section 6 of the *Matrimonial Property Act* and went on to submit that the suit property did not satisfy the laid out ingredients because the parties had separated long before the *Matrimonial Property Act*



came to effect and the property was not jointly owned. Counsel supported this argument by relying on the Supreme Court case of *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* (Petition 11 of 2020) [2023] KESC 4 (KLR).

14. Did the lower court therefore err in finding that the suit property was matrimonial property? Section 6 of the *Matrimonial Property Act* provides that:

“6.

- (1) For the purposes of this Act, matrimonial property 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.”

15. Section 2 has defined Matrimonial home as “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”

16. Whereas this court takes cognisance of the recent development in the distribution of Matrimonial property as per the above cited case of *JOO v MBO*, it is important to note that in that case, the Supreme Court comprehensively addressed the question of distribution of property acquired during a marriage. However, in this suit the question for determination was not distribution of matrimonial property but whether the suit property was matrimonial property in the first place.

17. It is not in contention that the parties were married and the suit property was acquired during the subsistence of the said marriage as espoused under Section 6 and as was held by the Learned Trial Magistrate. The impugned judgement reads in part:

“...In his testimony the 1st Defendant told the court that indeed the Plaintiff was his wife, but they separated. He denied that the suit property herein was matrimonial property and maintained that he purchased from Mr. Khambiye in 2002. That he sold a matatu and built the first house in 1990, which he sold in 2002... All agreements and documents got lost and he reported to the local authority who issued him a replacement of the allotment letter for plot No xx/S x/Estate which he sold to the 2nd Defendant... He transferred it to the 2nd Defendant on 2nd December 2019.

....

It is clear that the suit property herein was acquired in the year 2002 during the subsistence of the marriage between the Plaintiff and the Defendant. It was the family home for many years 2002-2012. It is where the children were born and raised. There is no better description of a matrimonial home...”

18. The 1st Appellant however argues that by the time the suit property was sold, the marriage had ceased to exist because he had separated from the Respondent. With this argument, the 1st Appellant is calling upon this Court to determine the issue of distribution of property based on the alleged separation. Unfortunately, dissolution of marriage and distribution of property is a question that ought to be



determined in a different forum. And this court notes that the Learned Trial Magistrate duly stated as much:

“... How the Plaintiff and the children moved out may not be important for purposes of this case.

....

The Court cannot grant the request that the interest be conferred to the Plaintiff. Doing so would be offending Section 7 of the *Matrimonial Property Act* given that this marriage has not been dissolved. Separation is not the same thing as divorce...”

19. On this basis, this court finds no error or fault in the lower court’s finding that the suit property was matrimonial property. In upholding that finding, this Court makes reference to the Court of Appeal case of *AKK v PKW* [2020] eKLR where it stated:

“... This court in *Mbogo & another v Shah* [1968] EA 93, stated that it would only interfere with the exercise of discretion by a lower court where it is satisfied that the decision of the lower court is clearly wrong “... because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion...”

20. The Appellants went on to state that the suit property was not subject to provisions of the *Matrimonial Property Act* and the *Land Registration Act* because it was governed by the *Community Land Act* vested in the National Land Commission (NLC) hence there was no requirement for spousal consent.

21. This court states emphatically that this argument is erroneous because Section 31 (2) of the *Community Land Act* categorically provides that:

For the purposes of this Act, contracts and transfers over community land shall be carried out in a manner similar to transactions over private land as provided in the *Land Act*, 2012 and registered as provided in the *Land Registration Act*, 2012.

22. Further, the Supreme Court in the Advisory Opinion Reference 2 of 2014 *In the Matter of the National Land Commission* [2015] eKLR was emphatic that the NLC has no power to register title documents in the following words:

“(291) It is proper to observe, thus, that the *Land Act* substantively addresses the ‘management’ function of the NLC. This is because it establishes mechanisms with a bearing on interests in public land. This is consistent with the intention of a variety of public documents, and of the *Constitution* that of establishing an independent institution that will, in consultation and co-operation with the National and County Governments, supervise dealings in public land.

(292) Now as regards the *NLC Act*, it was established to, inter alia, provide for the management and administration of public land; The roles of the NLC, according to the *NLC Act*, are in tandem with its roles in the *Land Act*. These include: allocation of land; disposing of public land; leasing and effecting change of user. These roles are the preparatory steps towards registering a title.



Neither of the two statutes gives the NLC the function of registration of title, in express terms.

23. In light of the relevant legal provisions and precedents, it is clear that the Appellants' argument asserting the inapplicability of the *Matrimonial Property Act* and the *Land Registration Act* lacks a valid legal basis and should be dismissed. The Lower court holding that "... Having found that the suit property was matrimonial property, it follows that any dealing in it, including sale and transfer ought to have been with the consent of the Plaintiff..." is hereby upheld
24. In conclusion I find that the Appeal is devoid of merit and is hereby dismissed.
25. Taking into consideration the relationship of the parties in this suit, there will no orders as to costs. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF OCTOBER 2023.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Githuka for the Appellants.

Ms. Okumu for Mr. Mosongo for the Respondent.

Court Assistant – Mutisya.

