



REPUBLIC OF KENYA



**KENYA LAW**  
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**M’ibari v Kinanu (Environment and Land Appeal E058 of 2022)  
[2023] KEELC 22080 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22080 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E058 OF 2022**

**CK YANO, J**

**DECEMBER 7, 2023**

**BETWEEN**

**NANCY KATHURE M’IBARI ..... APPELLANT**

**AND**

**ANASTACIA KINANU ..... RESPONDENT**

*(Being an appeal from the Judgment of S.K Ngetich - Principal Magistrate  
Court at Nkubu delivered on 21st September, 2022 in ELC Suit No. 11 of 2019)*

**JUDGMENT**

**Introduction**

1. By a plaint dated 27<sup>th</sup> February 2019 the respondent herein sued the appellant as wife and legal representative of the estate of the Wilfred K. Muguna seeking a declaration that the respondent is the lawful owner of the portion of land measuring 0.40 ha being part of LR. No. ABOGETA/U-KITHANGARI/2435 and an order for subdivision of the land into 2 portions and the respondent be registered as the proprietor of her portion measuring 0.40 ha, general damages for trespass to land and a permanent injunction against the appellant as well as costs and interest at court rates.
2. The respondent pleaded that on or about the 22<sup>nd</sup> of June 2012 the appellant’s said late husband Wilfred K.Muguna sold to the respondent a parcel of land measuring one (1) acre ( 0.40 Ha) and the respondent took over possession of the land as agreed in the agreement. The respondent averred that upon the subdivision of the original parcel of land LR No. Abogeta/U-Kithangari/30, a resultant subdivision L.R No. Abogeta/U-Kithangari/2435 was registered in the joint names of the respondent and the appellant with divided shares the respondent owns 0.40 ha and the appellant 0.80 ha.
3. It was the respondent’s case that she has developed extensively her portion of 0.40 ha by putting up a fence, piped water and various kinds of food crops to wit maize, beans, carrots and cabbage and nappier grass.



4. The respondent averred that she had not interfered with the appellant's portion of land measuring 0.80 ha but the appellant had started interfering with the respondent's portion, thereby denying the respondent rights over her said portion of land and had suffered loss and damage whose particulars are inability to cultivate the land, loss of income from the cabbages, maize, carrots, beans and nappier grass and loss of rights over private property.
5. The appellant filed her statement of defence and counter claim dated 9<sup>th</sup> August 2019 denying the allegations in the plaint. By way of defense, the appellant stated that any agreement between the respondent and the appellant is fraudulent for lack of mandatory spousal consent. That the appellant ought to have granted permission in any transaction and further that the deceased had no legal capacity to enter such a contract.
6. In her counterclaim, the appellant pleaded that her deceased husband held L.R No. Abogeta/U-Kithangari/2435 in trust for himself and the appellant who was married to him and made some contribution for the developments thereon.
7. It was the appellant's case that the respondent was registered as the owner of 0.40 ha of L.R No. ABOGETA/U-KITHANGARI/2435 without her consent and by fraudulent and or dishonest means. The appellant enumerated particulars of fraud as entering into an agreement with the deceased and failing to independently ascertain that spousal consent was obtained, failing to carry out proper due diligence on interests of the appellant in the suit land, presenting falsified documents to a government entity in the form of Divisional Land Control Board consent to pave way for the transfer of the said land so as to defeat the appellant's interest in the land and registering her names as proprietor of the land while very well knowing the transfer was obtained by untruthful means.
8. The appellant pleaded that the suit land was matrimonial property and that all transactions done without her consent were a nullity.
9. The appellant prayed for judgment against the respondent for an order to rectify the land register in respect of L.R No. Abogeta/U-Kithangari/2435 and remove the name of the respondent as the proprietor and it be replaced by the name of William K. Muguna plus costs of the suit and interest at court rates.
10. After hearing the parties, the trial court on 21<sup>st</sup> September, 2022 found in favour of the respondent and dismissed the appellant's counterclaim.
11. The appellant was aggrieved by the said judgment and filed the present appeal citing the following grounds-;
  - 1) That the learned trial magistrate erred in law and fact in not appreciating sufficiently or at all the evidence adduced by the defendant therein (the appellant herein).
  - 2) That the learned trial magistrate erred in law and fact in not appreciating sufficiently or at all the submissions of the counsel for the appellant herein and the issues for determination.
  - 3) That the learned trial magistrate erred in law in failing to appreciate the oral testimonies tendered in court by the appellant and their witnesses herein as well as the respondent herein.
  - 4) That the learned trial magistrate erred in failing to address and make a proper finding on the issues raised by the appellant in the pleadings and submissions.
  - 5) That the learned trial magistrate misrepresented the facts and evidence and misinterpreted the law on the subject matter.



- 6) That the learned trial magistrate erred in applying his conscience rather than the law in evaluating the evidence as presented before the court hence the findings are totally unsupported in law.
  - 7) That the learned trial magistrate erred in considering extraneous issues which vitiated his judgment thus arriving at an erroneous finding.
12. The appellant prayed that the judgment of the lower court delivered on 21<sup>st</sup> September, 2022 and the subsequent decree be set aside and the appeal to be allowed with costs and any such further and other orders as the court may deem just in the circumstances of the case.
  13. When the appeal came up for hearing the court directed and the parties agreed to canvass the appeal by way of written submissions. The appellant filed her submissions dated 2<sup>nd</sup> October, 2023 through the firm of Ngentu & Company advocates while the respondent filed hers dated 3<sup>rd</sup> October, 2023 through the firm of Kiogora Ariithi & Associates Advocates.

### **Appellant's Submissions**

14. The appellant gave a brief background of the matter and summarized the seven grounds into three to wit misapplication of the evidence, failing to address all issues and consideration of extraneous issues.
15. The appellant submitted on the duties of the first appellate court as was amplified by the Court of Appeal in *Gitobu Imanyara & 2 others Vs Attorney General (2016) eKLR* which is to 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.
16. On the application of evidence and extraneous factors, learned counsel for the appellant summarized the evidence tendered by the parties before the trial court and submitted that after analyzing the evidence, the learned trial magistrate found that despite the suit property being matrimonial, the appellant acquiesced to the respondent's ownership and possession of the suit land on account of the fact that she took too long to raise qualms that she presented before the court. Learned counsel questioned whether the trial magistrate's holding is founded on the law and submitted that it was not contested before the trial court that spousal and land control board consent were not obtained by the respondent who did not present any evidence that she obtained any of those consents. That in the trial magistrate's view, that was cured by acquiescence on the part of the appellant.
17. Regarding spousal consent, counsel for the appellant relied on the case of *MWK VS SKK & 5 Others [2018] eKLR*.
18. Concerning Land Control Board consent, the appellant's counsel relied on the Court of Appeal decision in *Aliaza Vs Saul Civil Appeal 134 of 2017 (2022) KECA 583 eKLR* which held that under Section 6(1) of the [Land Control Act](#), refusal by the Land Control Board to issue consent invalidates land transactions.
19. The appellant's counsel submitted that without spousal and Land Control Board consents, a transaction cannot be adjudged valid on account of acquiescence. That this is tantamount to sanitizing an illegality. The appellant's counsel relied on the case of *Mustafa Hamesa Dase & 7 others V County Government of Tana River & another (2022) eKLR*, wherein the court detailed the implication of illegality on contracts and cited extracts from Halsbury's Law of England (4<sup>th</sup> Edition). Vol 16 (1A) page 29, and submitted that the trial magistrate fell in error in the manner in which he analyzed the evidence before him and arrived at findings that had no footing in law. That it follows that the trial magistrate was guided by extraneous matters. Learned counsel for the appellant added that the



respondent did not conduct her due diligence well and get to know that the appellant had children who needed to consent to the transaction as that is their ancestral land.

20. Regarding the failure to determine all the issues, it is submitted that the appellant placed before court issues regarding spousal consent and placed before the trial magistrate authority that embodies explication of its implication on transactions that concern matrimonial property. That in his analysis, the trial magistrate avoided the issue and neither made a finding as to whether they were obtained nor the implication thereto. It is submitted that that was contrary to Order 21 Rule 4 of the Civil Procedure Rules, 2010.
21. It is submitted that the appeal is merited and should be allowed.

### **Respondent's Submissions**

22. In their submissions, learned counsel for the respondent submitted that the appeal has no merits and urged the court to dismiss the same with costs. With regard to grounds 1, 2 and 3 of the appeal, counsel for the respondent submitted that the respondent had demonstrated before the lower court that the suit land L.R NO. Abogeta/U-Kithangari/2435 is registered in the names of the respondent and the appellant. That the respondent's share is 0.40 ha while the appellant's share is 0.8 ha and further the respondent was in occupation of her said share and had produced the agreement for sale of land as exhibit number 1.
23. It is the respondent's submission that the appellant admitted that the respondent took possession of the land in the year 2012 and is still cultivating the land. That the trial court sufficiently considered the evidence which was adduced by both parties. Learned counsel for the respondent stated that as submitted by the respondent before the lower court, the appellant did not raise any issue of the respondent's share before the death of her husband, hence the trial court correctly arrived at the correct finding on the issue by finding that the appellant acquiesced to the respondent's ownership.
24. The respondent further submitted that the appellant filed a succession cause in respect of her husband's estate in the year 2017 while fully aware of the issue and her names were registered as the owner of 0.80 Ha share and she did not complain. The respondent's counsel submitted that there is no evidence to support the grounds of the appeal and urged the court to dismiss the same.
25. The respondent submitted that in her statement filed in court on 14<sup>th</sup> August 2019, the appellant contradicted her prayer in the counterclaim and pointed out that in the counterclaim, the appellant prayed for the removal of the respondent's name as proprietor and be replaced with the name of Wilfred K. Muguna while in the statement wanted the respondent's name removed and substituted with the appellant's names. It is submitted that this contradiction was fundamental and fatal to the appellant's case and the respondent urged the court to dismiss ground 4 of the appeal.
26. With regard to grounds 5, 6 and 7 of the appeal, the respondent submitted that the appellant did not establish the benchmarks required to prove fraud as required by the law. The respondent relied on the case of Vijay Morjaria Vs Nasnghmadhusingh Darbar & Hulashiba Nansibngh Darbar CA 106 of 2000. It is the respondent's submissions that the appeal has no merits and prayed that the same be dismissed with costs to the respondent.

### **Analysis and Determination**

27. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities relied on by the advocates for the parties to buttress their rival positions. This being a first appeal, it is trite law that this court has the duty and obligation to reconsider the evidence,



evaluate it and draw its own conclusions, bearing in mind that this court has neither seen nor heard the witnesses and therefore will make due allowance in this respect. There are only three issues I find call for my consideration; Whether the trial magistrate failed to appreciate sufficiently or at all the evidence adduced by the appellant herein, whether the trial magistrate failed to address and make a proper finding on the issues raised by the appellant in the pleadings and submissions, and whether the learned trial magistrate considered extraneous issues which vitiated his judgment thus arriving at an erroneous finding.

**whether trial magistrate failed to appreciate sufficiently or at all the evidence adduced by the appellant**

28. It was the appellant's evidence at the hearing before the trial court that she saw the respondent entering the land in 2012 and cultivated on the same land and further continued staying on the land up to 2015. That she entered on the land again in 2019. It was the appellant's evidence that Wilfred K. Muguna (deceased) was her husband and that they were married in 1995 and further that she found other family members staying on the suit land.
29. It was also the appellant's evidence that the land was owned by her father in law and that she was not aware if there had been distribution. The appellant was shown D exhibit No. 1 which was an agreement dated 22<sup>nd</sup> June 2012 between her husband, Wilfred K. Muguna and the respondent and she testified that she was not aware of the agreement. The appellant further testified that she did not know who was the current registered owner of the land but when she was shown exhibit 3 which was a title deed no. Abogeta/Upper Kithangari/2425, she confirmed the registered owners were Nancy Kathure 0.80 ha and Anastacia Kinanu 0.4 ha.
30. The appellant further testified that she did not know who did that registration but stated that her husband was a drunkard and he could have done that. The appellant further testified that she never went to the Land Control Board or land registry to object to the transfer. The appellant prayed that the respondent's names be cancelled and the title reverts to her husband and later stated that she wanted the title to revert to her name.
31. The court has carefully perused the record. The trial court correctly narrated the evidence of the appellant who testified as D.w 1 wherein she adopted her statement filed on 14<sup>th</sup> August 2019 and stated that she was the wife of Wilfred K. Muguna (deceased). That it was when she was filing succession case that she discovered that the respondent was registered owner of 0.40 ha of the suit land which had all along been their matrimonial home. The trial court correctly stated that whereas the appellant alleged that she was not involved at all during the sale of the land, she admitted that the respondent entered the land in 2012. From the record, it is clear to me that the trial magistrate considered all the evidence adduced by the parties, including that of the appellant.

**Whether the trial magistrate failed to address and make a proper finding on the issues raised by the appellant in the pleadings and submissions.**

32. In my view, there are two issues that were raised by the appellant at the trial court. The first is lack of spousal consent in the agreement for sale of the suit land between her husband and the respondent and the second issue is on fraud.
33. The appellant pleaded that the agreement between the respondent and her husband was fraudulent for lack of mandatory spousal consent and that the appellant ought to have consented to the transaction.



Further that the deceased had no legal capacity to enter such a contract. The trial court addressed the issues of spousal consent and stated-;

“Although the defendant claims that she was not aware of the sale of land agreement, I find from the long period of occupation and use of the 0.40 ha of the suit land by the plaintiff without the defendant raising a complaint, leads to a presumption that the defendant had acquiesced to the plaintiff’s ownership.”

34. The issue as I understand in this case is whether or not the absence of spousal consent invalidated the transaction between the respondent and the appellant’s deceased husband. There is abound a string of cases that have been decided by our courts with respect to beneficial and equitable interest of a spouse in landed property. Even before the enactment of the Land Registration Act and Matrimonial Properties Act, courts held that property held in the name of one spouse was held in trust for the other spouse. This was the holding in the case of Mugo Muriu Investment Limited Vs E.W.B & 2 others (2017) eKLR, where the court held as follows at paragraph 50 -51:

“The appellant did not regard the issue of trust imposed on the charger, S.B and its effect on the sale and transfer by HCFK as significant. As stated above, even though the matrimonial property was registered in the name of S.B alone he held the title and legal estate in trust for both himself and Elizabeth jointly. This proposition is buttressed by the decision in Gissing Vs Gissing (1970) 2 All E.R 780. (1971) AC 886. See also Falconer Vs Falconer (1970 3 All E.R 449 (1970) 1WLR 1333; and Hazell Vs Hazel (1972) 1 All ER 923; 1 WLR 301. Lord Diplock in Gissing Vs Gissing (supra) at Pg 906 in (1971) AC 886 held that-;

“In nearly all these cases, the inexorable inference is that the husband is to hold the legal estate in the house in trust for them both, for both to live in for the foreseeable future. The couple does not have in mind a sale, nor division of proceeds of sale, except in the far distance.”

35. Further in the Mugo Muriu case (supra) the court went on to state thus-;

“Elizabeth’s interest in the matrimonial home was an overriding, equitable and unregistered interest. Such interest entitled her to remain in the property. It was an interest in the property. It follows that a purchaser of the matrimonial property even without notice that Elizabeth was in possession would take the property subject to Elizabeth’s interest. The evidence in this appeal shows that the appellant either did not do due diligence or was unconcerned with the occupation of the property by Elizabeth and her interest in it. The appellant took the property subject to Elizabeth’s overriding interest in it and Elizabeth being a part owner could not be removed from the property. Even before the Land Registration Act came into force on 2<sup>nd</sup> May 2012, the equitable beneficial interest of 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 interest. Under common law overriding interests are interest to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property. In this appeal, the appellant acquired the title registered in the name of S.B subject to the interest of Elizabeth. In effect, the appellant neither obtained legal title of the property as notionally it was overridden by Elizabeth’s overriding interest nor was the appellant entitled to possession. The transfer to the appellant was subject to Elizabeth’s unregistered overriding incumbrance.”



36. Section 28 (1) of the *Land Registration Act* provides that spousal rights over matrimonial property are overriding interests which subsist without their being noted in the register. The said section states as follows-;

28. Unless the contrary is expressed in the register, all registered land shall be subject of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

- (a) Spousal rights over matrimonial property,
- (b) Trusts including customary trusts,
- (c) Rights of way, rights of water and profits subsisting at the time of first registration,
- (d) Natural rights of light, air, water and support,
- (e) Rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law,
- (f) Leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies,
- (g) Charges for unpaid rates and other funds which, without reference to registration under this act, are expressly declared by any written law to be a charge upon land,
- (h) Rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription,
- (i) Electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law and
- (j) any other rights provided under any written law.

37. Section 2 of the said Act as amended defines matrimonial property to mean any interest in land or lease that is acquired by a spouse or spouses during the subsistence of a marriage. Further, Section 93 states as follows-;

- (1) Subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or, all the spouses –
  - (a) There shall be a presumption that the spouses shall hold the land as joint tenants unless –
    - (i) A provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in his or her own name only, or that the spouses are taking the land as joint tenants, or
    - (ii) the presumption is rebutted in the manner stated in this subsection, and
  - (b) The registrar shall register the spouses as joint tenants.
- (2) If land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose



name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered.

- (3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house-
  - (a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge, or
  - (b) The assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.
- (4) If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with section 3(a) or 3(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.

38. Section 6 of the *Matrimonial Property Act* states as follows;

Meaning of matrimonial property-

- (1) For the purpose of this Act, Matrimonial Property means-
  - (a) Matrimonial home or homes;
  - (b) Household goods and effects in the matrimonial home or homes,  
© any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
- (2) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
- (4) a party to an agreement made under subsection (3) may apply to the High Court to set aside the agreement and the court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

39. In this case, the appellant pleaded that she is the widow and legal representative of the estate of Wilfred K. Muguna (Deceased) and that at all material times, her late husband held LR. No. Abogeta/U-Kithangari/2435 in trust for himself and the appellant. In her counterclaim, the appellant further pleaded that with her contribution, the said land was extensively developed. The appellant's case was that the respondent acquired the said land without her consent and by fraudulent and/or dishonest means. The appellant listed the particulars of fraud which include lack of spousal consent from the appellant.

40. On her part, the respondent submitted that the appellant did not raise any issue before the demise of the appellant's late husband. The trial court found that the appellant acquiesced to the respondent's ownership.

41. A spousal right over matrimonial property is recognized by the *Land Registration Act*, 2012. The said Act was assented to on 27<sup>th</sup> April 2012 and the date of commencement was 2<sup>nd</sup> May 2012. From the evidence on record, the respondent stated that on 22<sup>nd</sup> June 2012 she entered into an



agreement with the late Wilfred K. Muguna who was the owner of a share of Parcel No. Abogeta/U-Kithangari/30 whereafter the deceased became registered as proprietor of parcel of land LR. Abogeta/U-Kithangari/2435, a subdivision of the original parcel of land, and the land was registered in the names of the deceased and the respondent. It is clear that by the time the respondent and the deceased entered into the agreement on 22<sup>nd</sup> June 2012, the *Land Registration Act* was already in force having been assented to on 27<sup>th</sup> April 2012 and the date of commencement being 2<sup>nd</sup> May, 2012. In my view, spousal consent was necessary before the disposition of the suit land to the respondent. In this case, it is not disputed that the late Wilfred K. Muguna was husband to the appellant herein. In my view, the deceased held the land which was said to be ancestral land, in trust not only for the appellant as his wife, but also for their children. In this case, the appellant had clearly demonstrated that the suit land was not only ancestral land, but was also their matrimonial property. In my considered view, and going by the provisions of law referred to hereinabove, no valid sale and transfer could be done by the deceased to the respondent without spousal consent. Therefore, the transfer to the respondent was invalid for having been done in contravention of express provisions of the law. In my view, the deceased could not purport to sell and transfer the suit land to the respondent without the spousal consent from the appellant who was his lawful wife. Without spousal consent, the transaction between the respondent and the deceased in my view cannot be adjudged valid on account of acquiescence and the learned trial magistrate fell into error by holding so because that would be tantamount to sanitizing an illegality.

42. It is not in dispute that the rights of a registered proprietor of land are absolute and indefeasible. However, they are also subject to the rights and encumbrances noted on the register as well as overriding interests set out in Section 25 and 28 of the *Land Registration Act*. Spousal rights over matrimonial property and trusts including customary rights are subject to protection under the said Act. The registration of the suit land in the name of the respondent in my view did not extinguish the appellants rights and neither did it relieve the deceased of his duties or obligations under Section 28 as a trustee.

43. Section 26 of the *Land Registration Act* provides that-;

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except –

- (a) on ground of fraud or misrepresentation to which the person is proved to be a party, or
- (b) where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.”

44. In this case, I am satisfied that the appellant had proved that the respondent’s title was acquired illegally, unprocedurally or through a corrupt scheme. I find the evidence on record was sufficient to prove that the appellant had proved her counter claim against the respondent since no spousal consent was given and ought to have been allowed while the respondent had failed to prove her case and ought to have been dismissed by the trial court.

45. In the result, I find that this appeal has merit and the same is allowed. The judgment and decree of the lower court is set aside and I substitute it with orders dismissing the respondent’s suit and allowing the appellant’s counterclaim as prayed.



46. Costs of this appeal and of the lower court are awarded to the appellant against the respondent.

47. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 7<sup>TH</sup> DAY OF DECEMBER, 2023.**

**In the presence of**

Court assistant – V. Kiragu/Lena M

Ms Mugo for respondent

No appearance for appellant

**C.K YANO**

**JUDGE**

