



**Mwangi v Muchoki & another (Environment & Land Case 50 of 2014)
[2022] KEELC 12700 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12700 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 50 OF 2014
MD MWANGI, J
SEPTEMBER 22, 2022**

BETWEEN

MERCY NJERI MWANGI PLAINTIFF

AND

PETER MWANGI MUCHOKI 1ST DEFENDANT

EDWARD MWANGI MACHAIRA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff in this case is the wife of the 1st Defendant. Her claim is that she and the 1st Defendant jointly own the parcel of land known as Plot No. 4/XXX A in Soweto Ex-Kibarage resettlement scheme within Nairobi County (hereinafter referred to as ‘the suit property’).
2. On the said suit property, they had constructed 11 rental units, occupying some of them as a family while leasing the rest to third parties. A marital dispute however, arose between the Plaintiff and the 1st Defendant as a consequence whereof the two parties agreed to subdivide and share the rent units. The Plaintiff was to receive rent from 5 units whereas the 1st Defendant would receive from 6 units. They however continued to jointly own the suit property.
3. The Plaintiff avers that sometimes in October 2011, while she was admitted in hospital following an accident, her husband (the 1st Defendant) taking advantage of her absence, illegally, fraudulently, unlawfully and without the Plaintiff’s consent sold the entire suit property to the 2nd Defendant. The Plaintiff alleges connivance between the 1st and the 2nd Defendants herein.
4. The Plaintiff avers that the 2nd Defendant knew or ought to have known that the suit property was family land/matrimonial property and that the 1st Defendant could not therefore solely sell it to him without the consent of the Plaintiff. The Plaintiff’s case therefore is that the 2nd Defendant was not an innocent purchaser for value without notice.



5. The Plaintiff claims against the 1st Defendant (her husband) and the 2nd Defendant jointly and severally for: -
- a) Half share of the suit property.
 - b) General damages for trespass.
 - c) Lost income being Kshs 8,300/- per month from November 2021 until the date when the ownership of the half share of the suit property reverts back to the Plaintiff, with interest at bank rates.

Response by the Defendants

6. The 1st Defendant despite service did not enter appearance and or file a statement of defence against the Plaintiff's claim.
7. On his part, the 2nd Defendant filed his statement of defence dated January 28, 2019 denying the Plaintiff's claim in its totality. More particularly, the 2nd Defendant averred that the Plaintiff knew of the sale agreement between him and the 1st Defendant and indeed benefited from the proceeds of the sale. The 2nd Defendant asserted that the Plaintiff was therefore estopped from making a claim to the contrary.
8. The 2nd Defendant further averred that the Plaintiff's claim was bad in law since the Plaintiff and the 1st Defendant are still married and the claim before the court seeks a declaration and the division of the suit property as matrimonial property.
9. The 2nd Defendant insisted that he was a purchaser for value without notice and that he has since extensively developed and invested heavily on the suit property with the Plaintiff's knowledge.

Evidence Adduced.

10. The Plaintiff testified in her case and called one additional witness. The Plaintiff and her witness reiterated the averments in the plaint. The Plaintiff's testimony was that the suit property was matrimonial property which they had jointly bought with the 1st Defendant, her husband. She was therefore entitled to one half share of the said property. It was her case that she did not consent to the purported sale of the suit property by the 1st Defendant to the 2nd Defendant. In fact, her position was that she was not aware of the sale as it allegedly happened when she was admitted in hospital.
11. The Plaintiff's witness on his part stated that he is a village elder in the area where the suit property is situated. He confirmed that the suit property was the matrimonial property of the 1st Defendant and the Plaintiff, who are husband and wife respectively. He had previously mediated a matrimonial dispute between the Plaintiff and the 1st Defendant when they made the agreement on sharing of the rental units. The agreement was one of the exhibits produced by the Plaintiff in her evidence.
12. The 2nd Defendant on his part also testified in his case but did not call any other witness. He testified that though the Plaintiff did not sign the agreement for sale of the suit property, she was aware of the sale. On the day that the 2nd Defendant went to negotiate with the 1st Defendant for the purchase of the suit property and before entering into the sale agreement, the Plaintiff was at home. He remembered the 1st Defendant asking for the plot ownership documents and the Plaintiff personally handed them over to him. He therefore was of the view that she had consented to the sale.



Issues for determination

13. Having carefully perused the pleadings herein, the evidence adduced and the submissions of the parties, the court is of the view that the Plaintiff's case revolves around the issue of jurisdiction of the court to divide matrimonial property. The issue that the court then must decide is whether it has the jurisdiction to issue the kind of orders sought by the Plaintiff in respect of the suit property in view of the fact that she and the 1st Defendant are still married.

Analysis and Determination

14. Whether the court has the jurisdiction to issue the orders sought in respect of the suit property during the subsistence of the marriage between the Plaintiff and the 1st Defendant.
15. It is a settled principle of law that parties are bound by their pleadings. The court too is bound by the pleadings of the parties and cannot in its determination purport to adjudicate on an issue or grant a prayer not sought in the pleadings. The court determines a case on the issues that flow from the pleadings.
16. The Plaintiff in her case as framed in the plaint dated January 22, 2014 seeks half share of the suit property on the premise that it is matrimonial property jointly owned by herself and the 1st Defendant who is her husband. The fact that the Plaintiff and the 1st Defendant are married is not in dispute. She confirmed the same in her testimony during the hearing of the case.
17. The Plaintiff's testimony was that she and the 1st defendant jointly bought the suit property and resided therein as a family besides renting the 'extra rooms' to sustain themselves and their family. In other words, it was their matrimonial home. The 1st Defendant however, without the Plaintiff's consent and knowledge, purportedly sold the suit property to the 2nd defendant. The Plaintiff strongly avers that the purported sale of their matrimonial property without her consent was illegal, fraudulent and unlawful. The Plaintiff explains that the 1st defendant took advantage of her absence, when she was admitted in hospital after an accident, to sell the suit property.
18. Though the Plaintiff asserts that the purported sale of the suit property was unlawful, she has not sought the nullification of the sale transaction nor the cancellation of the transfer of title of the suit property (if at all) to the 2nd defendant; rather what she strangely claims is half share of the suit land being plot No. 4/245 A in Soweto Ex- Kibarage Resettlement Scheme. In essence, the Plaintiff is asking this court to subdivide the property into two and distribute the one half to her; her half share of the matrimonial property.
19. What I must determine then, first and foremost, is whether this court has the jurisdiction to do what the Plaintiff is asking of it.
20. Section 7 of the *Matrimonial Properties Act* provides that matrimonial property '.... shall be divided between spouses, if they divorce or their marriage is otherwise dissolved.'
21. From a plain reading of Section 7 of the *Matrimonial Properties Act*, I am not persuaded that the court has the authority to divide matrimonial property between spouses while their marriage is still subsisting. Indeed, the Court of Appeal in the case of *AKK v PKW* [2020] eKLR, held that the High Court may only 'make a declaration of the rights of parties' in relation to any matrimonial property between them if their marriage has not been dissolved. In interpreting section 7 of the said Act, the Court of Appeal held that the 'High Court' cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved.



22. It follows therefore that this court does not have the jurisdiction to issue the orders sought by the Plaintiff as that would be tantamount to dividing matrimonial property between the spouses when their marriage has not been dissolved. I agree with the 2nd Defendant's submission in this respect.
23. The other prayers sought by the Plaintiff i.e. general damages for trespass and lost income would only be granted if the court declared the sale of the suit property illegal, null and void. The court has not been invited to make such a finding. The 2 prayers cannot therefore be granted.
24. As I stated above, parties are bound by their pleadings.
25. In the case of the *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & 3 others* [2014] eKLR, the court reiterated the principle that parties in litigation are bound by their pleadings. The court in the case cited with approval the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3 where the court quoted an article by Sir Jacob entitled, "the present importance of pleadings" published in 1960 where the author had stated that,

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rule of pleadings, for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves or at any rate one of the might feel aggrieved for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. In an adversarial system of litigation therefore, it is the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any other business" in the same sense that points other than those specific may be raised without notice."

26. The supreme court of Nigeria on the other hand in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC91/2002 re-emphasized the principle that parties are bound by their pleadings and further stated that,

"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation."

27. In the case of *Raila Odinga & Another v IEBC & 2 others* (2017) eKLR, the Supreme Court of Kenya pronounced the essence of pleadings and stated that,

"It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the



court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

28. Accordingly, the only option is for this court to strike out the Plaintiff’s suit for want of jurisdiction.
29. I have perused the court file and note that the Plaintiff was on January 22, 2014 granted leave by Hon. Lady Justice Nyamweya (as she then was) to file the suit as a pauper under the provisions of Order 33 of the *Civil Procedure Rules*. I will therefore not condemn her to pay the costs of the suit.
30. The conclusion therefore is that this suit is struck out for want of jurisdiction but with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

M.D MWANGI

JUDGE

In the Virtual Presence of: -

Mr. Ngani for the 2nd Defendant.

Ms. Mercy Njeri (Plaintiff in person) present.

No appearance for the 1st Defendant

Court Assistant: Hilda

M.D MWANGI

JUDGE

