



REPUBLIC OF KENYA



**KENYA LAW**  
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**Martin v Mulwa (Environment and Land Appeal E018 of 2020)  
[2022] KEELC 13588 (KLR) (11 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13588 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E018 OF 2020  
CA OCHIENG, J  
OCTOBER 11, 2022**

**BETWEEN**

**MUTUA MARTIN ..... APPELLANT**

**AND**

**TABITHA NTHENYA MULWA ..... RESPONDENT**

*(Being an Appeal from the Judgment of Kangundo Senior Principal Magistrate's Court  
in Civil Case No. 37 of 2016 delivered on 9th December, 2020 by Hon. D. Orimba - (SPM))*

**JUDGMENT**

**Introduction**

1. By a memorandum of appeal dated the December 17, 2020 the appellant appealed against the whole judgment delivered by Hon D Orimba (SPM). The genesis of this appeal is the judgment of Hon D Orimba in Kangundo SPMCC No 37 of 2016 Tabitha Nthenya Mulwa vs Mutua Martin delivered on December 9, 2020 where the trial court proceeded to enter judgment in favour of the plaintiff (respondent).
2. The appellant being dissatisfied with the whole of the said judgment filed a memorandum of appeal dated the December 17, 2020 which contains the following grounds:
  1. That the learned trial magistrate erred in law and in fact by failing to appreciate that the sale agreement between the appellant and the plaintiff's husband was entered into on August 6, 2002 before the enactment of the Land Registration Act 2012 hence the agreement cannot be invalidated on the basis that spousal consent had not been obtained as it was not a requirement.
  2. That the learned trial magistrate erred in law and in fact by holding that the suit property was matrimonial property yet there was no proof that the property was acquired during the subsistence of the marriage between the respondent and Pius Mulwa Mbole (deceased).



3. That the learned trial magistrate erred in law and in fact that the respondent's witness testimony was marred with inconsistencies.
4. That the learned trial magistrate erred in law and in fact by ignoring the express testimony of defence witnesses and failing to appreciate and interrogate the document filed in support of the defendant's case.
5. That the learned trial magistrate erred in law and in fact by failing to appreciate that the appellant had been in peaceful, open and continuous occupation and possession of the suit property since 2002 upon entering the agreement.
6. That the learned trial magistrate erred in law and in fact by failing to appreciate that the respondent's suit against the appellant filed on March 14, 2016 was time barred by virtue of section 7 of *Limitation of Actions Act*.
7. That the learned trial magistrate erred in law and in fact by failing to appreciate that the respondent had not proved her case to the required standard.
8. That the learned trial magistrate erred in law and in fact by relying on conjecture, supposition and extraneous matters.

Reasons wherefore the appellant prays that:

1. The judgment of the subordinate court delivered on December 9, 2020 be set aside and vacated.
  2. Such other relief as this honourable court may deem fit.
  3. Costs of the appeal and interest.
3. The appeal was opposed by the respondent who filed her replying affidavit dated the February 26, 2021. She averred that the memorandum of appeal was an afterthought, ill calculated and an abuse of the court process. In support of her marriage to the deceased, she attached a copy of their marriage certificate which was issued in 1974. She also attached a copy of the certificate of official search in respect to the suit land indicating that the late Pius Mulwa Mbole was its registered owner.
  4. The appeal was canvassed by way of written submissions.

### Submissions

5. The appellant in his submissions contended that land parcel No Matungulu/Katine/645 hereinafter referred to as the 'suit land', cannot be classified as matrimonial property as the respondent in her testimony confirmed she resides in Ngonda while the said land is in Katine. Further, that the appellant had been in occupation of the suit land since 2002. He argues that the respondent did not adduce any evidence of her contribution in the acquisition of the suit land. He insists that lack of spousal consent could not invalidate the agreement dated the August 6, 2002 as the requirement for the said consent was introduced in the *Land Act*. He claims that the respondent's suit was statute barred by virtue of the Limitations of Actions Act as she filed it in 2016 yet he purchased the suit land in 2002. To support his arguments, he relied on the following decisions: *Francis Kiarie Kamau & Another v Sammy Kimemia Njuguna & Another (2021) eKLR*; *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro (2015) eKLR*; *Gladys Wanjiku Waititu vs Housing Finance Company Ltd & Another (2017) eKLR*; *Peter Kagunza Adaji v Sikukuu Martin Maiyo & Another (2017) eKLR*; *Edward Moonge Lengusuranga v James Lanaiyara & Another (2019) eKLR*; *Gathoni v Kenya Cooperative Creameries Ltd (1982) KLR 104*; *Iga vs Makerere University (1972) EA*; *Mtana Lewa vs Kabindi Ngala Mwangandi (2005) eKLR*; *Peter*



*Mbiri Michuki vs Samuel Mugo Michuki (2014) eKLR*; *Kiplangat Shelisheli Mutarakawa v Joseph Rotich Kones (2018) eKLR* and *Ndungu Dennis v Ann Wangari Ndirangu & Another (2018) eKLR*.

6. The respondent in her submissions insists the memorandum of appeal herein does not meet the threshold for setting aside and/or vacating the judgment entered by the subordinate court on December 9, 2020. She argues that she was duly married to the deceased and produced a copy of the marriage certificate to that effect. Further, that the deceased entered into a sale agreement when he was ailing and he has also been buried on the suit land. She reiterates that she is entitled to the costs of the suit. To support her arguments, she relied on the following decisions: *TMV vs FMC (2018) eKLR*; *Ugandan Case of Paul Kagwa vs Jackline Muteteri (Matrimonial Cause – 2005 /23) (2006) UGHC 17 (18 May 2006)*; *Mary Wanjiku Githatu v Esther Wanjiru Kiarie (2010) eKLR* and *R vs Rosemary Wairimu Munene, Ex parte Applicant vs Ihururu Dairy Farmers Cooperative Society Ltd.*

### **Analysis and determination**

7. Upon consideration of the memorandum of appeal, replying affidavit, record of appeal and the rivaling submissions, the following are the issues for determination: Whether the sale agreement dated the August 6, 2002 between Pius Mulwa Mbole and the appellant is valid. Whether the appeal is merited.
8. The background against which the appeal was brought was a suit filed by the respondent being Kangundo SPMCC NO 37 of 2016 - Tabitha Nthenya Mulwa vs Mutua Martin. She had sued the two defendants, one being her husband and the other being a supposed buyer of their ‘matrimonial property’ being the suit land. She claimed that the 2<sup>nd</sup> defendant (appellant) had trespassed on her property without her consent. In her amended plaint dated the May 24, 2019, she sought for the following orders:
  - a. That a declaration be made that the sale agreement between Pius Mulwa Mbole and the appellant herein over property known as Matungulu/Katine/ 645 was null and void.
  - b. An order of permanent injunction restraining the defendant by himself, his agents, servants or any other person claiming under him from trespassing into the plaintiff’s aforementioned parcel of land or in any other manner interfering with her quite possession of the same.
  - c. Costs of the suit.
  - d. Any other relief that the court deems fit and just to grant under the circumstances.
9. Both defendants filed their defences but the 1<sup>st</sup> defendant passed away before the matter was concluded. The matter was finally heard and judgment was delivered on December 9, 2020 in favour of the plaintiff (respondent), nullifying the sale to the 2<sup>nd</sup> defendant (appellant).
10. Since this is a first appeal and while associating myself with the decision of *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR*, I opine that this court’s duty is to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and will hence give due allowance for that.
11. From the many grounds of appeal, I find that the two main issues which should be considered to enable the court determine this appeal are whether spousal consent was a requirement before execution of the agreement between the deceased and the appellant in respect to the suit land. Further, if the suit land can be deemed as matrimonial property. From the evidence in the lower court, it emerged that the deceased and the appellant entered into a sale agreement on August 6, 2002. Further, that the appellant took possession of the suit land in 2004. The respondent insists the suit land was matrimonial



property and hence the deceased could not dispose of the same without her consent. From the marriage certificate it is evident the respondent was indeed the wife of the deceased. Further, from the certificate of title, the deceased was registered as the sole proprietor of the suit land in 1995, seven years before he disposed of a portion of it. The trial court in its findings held as follows:

This court draws the irresistible conclusion that the plaintiff had acquired spousal rights under the land registration Act 2012 which are overriding interests in land and therefore her late husband could not sell the land without her consent and knowledge.'

12. In determining the relevance of spousal consent before 2012, the Court of Appeal expressly affirmed its position when it stated in Fredrick Chege Ndogo v Bernard Njoroge Mbugua & another [2016] eKLR as follows:

We conclude this limb of the appeal by stating that the requirement for spousal consent is a recent development in Kenya attributable to the enactment of the Land Registration Act of 2012 and the Land Act of 2012 by parliament. It had no application whatsoever to the sale of the suit land which predated the statute.'

13. In a different matter touching on a charge of a matrimonial property, the same Court of Appeal addressed this point in the case of Stella Mokeira Matara vs Thaddeus Mose Mangenya & Another, Court of Appeal at Kisumu, Civil Appeal No 63 of 2014 (2016) eKLR. In the said suit, at the Environment and Land Court, the plaintiff, who was wife of the 1<sup>st</sup> defendant, filed a suit seeking to stop a sale by a chargee. The plaintiff contended that the property in issue was matrimonial property and she had not given her consent to the creation of a charge. The Court (Okong'o J) at the Environment and Land Court held the view that spousal consent was not a requirement before the Land Act, 2012, and was not persuaded to grant an injunction. The Court of Appeal upheld the decision of Okong'o J and dismissed the appeal.
14. While Justice Munyao Sila also had occasion to address the same issue, on whether spousal consent was a requirement before the Land Act, 2012, in the case of Elizabeth Wanjiru Waweru vs John Waweru Chege & 3 Others (2016) eKLR, where he declined to grant an injunction on the argument that consent of the spouse was not given to a charge created in the year 2011. He held that there was no requirement in the law for spousal consent then.
15. In the instant appeal, the appellant argues that the sale agreement between himself and the respondent's late husband was entered into in 2002, before spousal consent was made a mandatory requirement. The said sale agreement was not challenged nor denied, but the respondent simply stated that she was not involved or aware of the same. Defence witnesses:- DW2, DW3 and DW4 stated in open court that they did witness the sale of the suit land between the appellant and the deceased and that the respondent was aware of the same. The deceased who was the 1<sup>st</sup> defendant in the lower court, in his statement of defence confirmed to have sold a portion of the suit land to the appellant for Kshs 90,000. The agreement having been voluntarily entered into by adults with consideration having been paid, is a valid agreement within the meaning of a contract unless the same is proved to have been voided by fraud, misrepresentation or otherwise. Since prior to the enactment of the Land Act, 2012, there was no legal provision making spousal consent a mandatory requirement before transactions touching on matrimonial property could be entered into, this court finds that the appellant's agreement with the deceased was valid and that the trial court ought to have deemed the appellant as a bona fide purchaser for value. Based on the facts as presented while associating myself with the decisions cited above, I find that the appeal succeeds on this ground.



16. As to whether the trial court sufficiently applied itself to the evidence tendered by the rivalling parties, I have considered the proceedings and judgment by the honourable court. The plaintiff's case was premised on her capacity as the wife to the deceased hence the need for spousal consent. All her documents namely the marriage certificate, the search certificate, the death certificate and the grant ad litem were to support her case as the legal beneficiary of her husband's estate. The appellant's case on the other hand was premised on the grounds that he lawfully purchased the suit land and took quiet possession thereof. He did produce a copy of the sale agreement which was corroborated by DW2, DW3 and DW4. On cross-examination, he stated that he had commenced the transfer process but the same could not be completed due to the court case and the vendor passed on. DW2 confirmed to have done the payment of the last instalment in 2004. He also confirmed that the respondent was aware of the sale and that they had been together when the deceased bought cows from the proceeds therefrom. Further, on the issue of the appellant's possession of the suit land, the respondent in cross-examination did confirm that she became aware of his being on the suit land in 2015 and that the husband passed on in 2018. She stated that the husband was buried on the suit land but PW2, the respondent's son, stated that the deceased was buried at Ngonda. DW3, the respondent's son, also confirmed that the family had never lived on the suit land but resided in Ngonda.
17. From the evidence tendered in the lower court, it is clear that there was indeed a valid purchase of the suit land. Further, that the appellant peacefully occupied it since 2004. In the circumstance, this court finds that the trial court ought to have sufficiently considered the fact that it is not disputed that the sale agreement was validly entered into, that the respondent including her family have never lived on the suit land. Further, that the respondent's evidence had some inconsistencies especially on the burial site of her late husband which fact was controverted by evidence of PW2. Consequently, I find that the appeal also succeeds on this ground.
18. In the foregoing, I find the appeal merited and will proceed to set aside the judgment of Hon DO Orimba SPM dated the December 9, 2020 and substitute it with the following orders:
- a. The respondent being the legal representative of the estate of Pius Mulwa Mbole be and is hereby directed to transfer the portion of land parcel number Matungulu/Katine/645 which the appellant purchased within ninety (90) days from the date hereof failure of which the deputy registrar, Environment and Land Court do execute the transfer forms.
  - b. The costs of the appeal is awarded to the appellant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 11<sup>TH</sup> DAY OF OCTOBER, 2022.**

**CHRISTINE OCHIENG**

**JUDGE**

