



**JCR v JKR & another (Environment and Land Appeal 10 of 2021)
[2022] KEELC 15245 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15245 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 10 OF 2021
EO OBAGA, J
NOVEMBER 24, 2022**

BETWEEN

JCR APPELLANT

AND

JKR 1ST RESPONDENT

JC 2ND RESPONDENT

(An appeal from the Judgment of Hon N Wairimu Senior Principal Magistrate dated 12th February, 2021 in Eldoret Chief Magistrate E & L Case No 32 of 2019)

JUDGMENT

1. This appeal arises from the Judgement of Hon N Wairimu delivered on February 12, 2021 in Eldoret Chief Magistrate E&L case No 32 of 2019. The Appellant, JCR is wife of the 1st Respondent, JKR the two having married on January 1, 1992. On April 18, 2005, JKR purchased 2.0 acres out of LR No [particulars withheld] making a total of three (3) acres.
2. There arose matrimonial differences between JCR and JKR which made JKR to move out of the matrimonial home and went to cohabit with NJM. JCR moved to Eldoret Chief Magistrate's court where she filed Eldoret children case No 168 of 2014 seeking maintainance of the children.
3. On April 24, 2015, a consent was recorded in Eldoret Chief Magistrate's court Children case No 168 of 2014 in which JCR and JKR *inter-alia* agreed that the family farm was to be used purely for payment of school fees for all the minors in the case.
4. On July 11, 2016, JKR sold 1.5 acres out of LR No (Particulars withheld) to the 2nd Respondent. Again on April 5, 2017, JKR sold 0.2 of an acre out of LR No (Particulars withheld) to the 2nd Respondent making a total of 1.7 acres.



5. On March 8, 2019, JKR field Eldoret Chief Magistrate Court E & L No 32 of 2019 in which it sought to restrain JKR and the 2nd Respondent from offering for sale, transferring or in any manner interfering with 3 acres comprised in LR No (Particulars withheld) in addition to a declaration that the intended sale touching on 3 acres comprised in LR No (Particulars withheld) is unlawful, illegal, null and void.
6. On December 18, 2019, JKR and the 2nd Respondent filed a joint defence and raised a counter-claim in which they sought to have JCR's suit dismissed and for declaration that the 3 acres comprised in LR No (Particulars withheld) did not constitute matrimonial property as well as a permanent injunction to restrain JCR and her servants or agents from interfering with 3 acres comprised in LR No (Particulars withheld).
7. In the meantime, JKR field a divorce cause against JCR in Eldoret Chief Magistrate's court Divorce cause No 22 of 2019. This is still pending.
8. After the hearing of the suits the trial magistrate held that she had no jurisdiction to make declaratory orders as to whether the 3 acres comprised in LR No (Particulars withheld) was a matrimonial property as that was a preserve of the High Court. The trial Magistrate proceeded to dismiss JCR's suit and proceeded to make a finding that the 2nd Respondent had acquired a good title in respect of LR No (Particulars withheld)
9. It is the impugned judgment which made JCR to file this appeal in which she has raised the following grounds of appeal: -
 1. The trial court erred in fact and in law in failing to invalidate the agreements for sale by finding that consent of the 1st Respondents spouse was obtained in contravention of the evidence adduced during trial.
 2. The Honourable Magistrate erred in fact and in law in validating the agreements for sale in finding that the spousal consent was obtained from a third party to the marriage between the Appellant and the 1st Respondent in contravention of the *Land Registration Act*.
 3. The Honourable magistrate erred in fact and in law in dismissing the Appellant's claim in finding that the 2nd Respondent was a *bona fide* purchaser for value when no consent of the appellant was obtained prior to the agreements for sale as required under the *Land Registration Act*.
 4. The Honourable magistrate erred in fact and n law in failing to make a finding of fraud when the appellant had established the burden of proof to the required standard.
 5. The Honourable magistrate considered extraneous issues and therefore arrived at a wrong conclusion in dismissing the appellant's claim.
 6. The Honourable magistrate erred in both fact and in law by failing to correctly evaluate the evidence and thereby arrived at a wrong conclusion by validating the agreements for sale.
 7. The trial court failed to take into consideration the Appellant's submissions and thereby arrived at a completely erroneous conclusion in dismissing the appellant's claim.
 8. The trial court failed to properly analyze the evidence on record, the provisions of section 28 of the *Land Registration Act* regarding spousal rights, the submissions and thereby arrived at a completely erroneous conclusion.
 9. In all circumstances of the case, the findings of the learned magistrate are insupportable in law.



10. The parties to this appeal were directed to file written submissions. The Appellant filed her submissions on May 19, 2022. The Respondents filed their submissions on September 27, 2022. I have gone through the record of appeal as well as the submissions of the parties herein. The duty of this court as a first appellate court was stated by the Court of Appeal in *China Zhongxing construction company limited –Vs- Anne Akuru Sophia* (2020) eKLR wherein the court cited the court of appeal for East Africa in *Peters OVs- Sunday Post Limited* (1958) EA 424 where Sir Kenneth O’Conner stated as follows:-

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt -vs- Thomas* (1), [1947] AC 484.”

11. The court of appeal in *China Zhongxing Construction Company (supra)* further stated as follows;

“The appropriate standard of review established in these cases can be stated in three complementary principles:

- a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantages of seeing and hearing the witnesses testify before her; and
- c. It is not open to the first appellate Court to review the finding of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

12. In re-evaluating and re-considering the evidence before the trial court, I find that the following issues stand out for determination in this appeal: -

- a. Whether the trial magistrate had jurisdiction to deal with the suits before her.
- b. Whether there was spousal consent in respect of sale of 1.7 acres comprised in LR No (Particulars withheld).
- c. Whether the 2nd Appellant obtained good title in respect of the 1.7 acres comprised LR No (Particulars withheld).

Whether the Trial Magistrate had Jurisdiction to Deal with the Two Suits Before Her;

13. The Appellant had filed a suit against the Respondent. The Respondents filed a counter-claim. In law, a counter claim is a separate suit. It is therefore clear that there were two suits before the trial magistrate for determination. From the judgement of the trial magistrate and particularly the issues which she framed for determination, it is apparent that she did not address herself on the counter-claim.

14. The Appellant’s claim before the trial magistrate was very specific. The reliefs which the Appellant sought were as follows:-



- a. A declaration that the intended sale on basis of the sale agreement dated 11th of July, 2016 or any other date touching on the 3 acres in that parcel of land known as ((Particulars withheld) is unlawful, illegal, null and void.
 - b. An order of permanent injunction restraining the defendants jointly and severally from offering for sale, transferring, wasting, alienating or otherwise in any manner interfering with 3 acres in that parcel of land known as (Particulars withheld).
 - c. Costs of the suit.
 - d. Any other relief the honorable court shall deem fit to grant.
15. The Respondent's counter-claim too had specific reliefs which were as follows:-
- a. The Plaintiff's suit be dismissed with costs.
 - b. A declaration do issue to the effect that three (3) acres comprised in LR No (Particulars withheld) does not constitute matrimonial property.
 - c. A permanent injunction do issue against the Plaintiff restraining her by herself, her servants, assignees and/or any person acting under her instruction from interfering with the Defendant's legal ownership of three acres forming the suit parcel of land comprised in that parcel of land known as LR No (Particulars withheld).
 - d. The Plaintiff be condemned to pay the costs of the suit with interest.
 - e. Any other relief this honourable court may deem just and expedient to grant in the best interest of justice.
16. From the prayers in the Appellant's plaint and going through the evidence which was adduced, it is clear that the bone of contention is whether there was spousal consent which was obtained from the Appellant prior to the sale of 1.7 acres by the 1st Respondent to the 2nd Respondent. The trial court was never asked to declare rights of the Appellant and the 1st Respondent in terms of what proportion each had on LR No (Particulars withheld) in as far as the three acres out of which 1.7 acres had been sold were concerned.
17. Prior to the amendment of section 93 of the *Land Registration Act, 2012* sub section (4) of the said section provided that any spouse disposing of an interest in land without consent of the other, that disposition was void. The entire section 93 of the *Land Registration Act 2022* was deleted and it was replaced by a new section which provided as follows:-
- “Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of marriage, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act”.
18. Matrimonial property is defined in section 2 of the Act as follows:-
- “means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses and their family home and include any other attached property”.
19. There is no contention that the three acres comprised in LR No (Particulars withheld) were purchased during the subsistent of the marriage between JCR and JKR. As at the time of delivery of the impugned judgment, the marriage between JCR and JKR had not been dissolved.



20. Under the *Magistrate's Court Act 2015*, section 26 of the *Environment and Land Court Act* was amended and subsection (3) was inserted immediately after section (2). The inserted subsection (3) provides as follows: -
- “The Chief Justice may by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and Land matters of any area of the country.”
21. Section 2 of the *Land Laws (amendment) Act, 2016*, No 28 of 2016 which commenced on September 21, 2016 defines “court” to mean the Environment and Land Court established by the *Environment and Land Court Act, 2011*, and other courts having jurisdiction on matter relating to land.
22. Under section 12 of the *Matrimonial Property Act*, the need for spousal consent which was under the deleted section 93 which was done under the *Land Laws (amendment) 7, 2016* is provided for. The definition of what constitutes matrimonial property is clearly stipulated. It was therefore wrong for the trial magistrate to hold that she had no jurisdiction to entertain the Appellant’s suit.
23. I have already said herein above that the trial magistrate did not address herself on the counter-claim. Had she addressed herself to the same, she had jurisdiction to do so. The definition of what constitutes matrimonial property is clearly set out in the *Matrimonial Property Act*. The trial magistrate would have had no difficulty in dismissing the Respondent’s claim for a declaration that the 3 acres comprised in LR No (Particulars withheld) did not constitute matrimonial property as well as the injunction which they were seeking.
24. Under the *Matrimonial Property Act*, there is no definition of court. This was left until after the matrimonial property rules had been promulgated. As at the time of delivery of the impugned judgment, the rules had not been promulgated. The rules were promulgated in 2022 and were published through legal notice No 137 of July 22, 2022. These rules gave jurisdiction for applications under *Matrimonial Property Act* where the value of the subject involved does not exceed Kshs 20,000,000/= to the Chief Magistrates court and for applications where the property exceeds Kshs 20,000,000/= to the High Court.

Whether There Was Spousal Consent in Respect of Sale of 1.7 Acres Comprised in LR No (particulars Withheld);

25. While dealing with the issue of jurisdiction, I touched on the need for spousal consent under section 12 of the *Matrimonial Property Act*. The *matrimonial Property Act* came into force on January 16, 2014. JKR first sold 1.5 acres to the 2nd Appellant on July 11, 2016. He also sold another 0.2 acres on July 5, 2017. JKR was therefore under obligation to seek the consent of JCR as provided for under section 12 of the *Matrimonial Property Act*.
26. During the hearing before the trial court, JKR adopted his written statement as part of his evidence in chief. In this witness statement, JKR was categorical that spousal consent is not mandatory where a property is purchased by one spouse and the other spouse does not give any prove of contribution. In his recorded evidence on page 15 of the proceedings at line 2, JKR stated that JCR had refused to give consent.
27. The 2nd Appellant during cross examination stated that he never saw KCR at the time of buying the 1.7 acres. He stated that JKR came along with NJM. there was no evidence of any spousal consent given. Despite there being no evidence of spousal consent, the trial magistrate seems to have misconstrued the



presence of JCR in arbitral proceedings before the area chief and the Deputy county commissioner as constituting consent on her part. The trial magistrate stated as follows:-

“on the issue of whether or not the contract of sale through agreements dated July 11, 2016 and April 5, 2017 were valid without the requisite consent from the Plaintiff, I would be inclined to agree with the defendants that the plaintiff has failed to prove that there was fraud or misrepresentation in the process by which the 2nd defendant acquired an interest in land parcel No LR No (Particulars withheld) considering the fact that the defendant is indeed a bonafide purchaser for value without notice having testified that the consent of the 1st Defendant spouse was obtained after meetings at the DCC and the Chief’s office.”

28. The arbitration proceedings before the chief took place on November 8, 2008 while those before Assistant county commissioner took place on February 13, 2019. As at the time these proceedings were taking place, JKR had already sold the 1.7 acres to the 2nd Appellant. The said arbitral proceedings did not constitute grant of consent and in any case they would not have operated retroactively even if they were to be legal. The trial magistrate gravely misdirected herself in holding that these arbitral proceedings constituted spousal consent. There was infact no spousal consent given and the Respondent had conceded as much in their evidence.

Whether the 2nd Appellant Obtained Good Title in Respect of the 1.7 Acres Comprised in LR No (Particulars withheld);

29. While dealing with the issue of spousal consent, I find that there was no spousal consent given by JCR. This being the case, the sale between JKR and the 2nd Appellant was null and void. There is no good title which could flow from a process which was a nullity *ab initio*. The 2nd Appellant did not plead for a declaration that he had obtained good title. Despite the 2nd Appellant having not pleaded in his counter-claim that he had obtained good title, the trial magistrate went ahead to grant a relief which had not been pleaded. The trial magistrate stated as follows: -

“In the circumstances I would make (sic) dismiss the Plaintiff’s suit and make a finding that the 2nd Defendant acquired a good title in parcel No (Particulars withheld).

30. It is clear from the above analysis that the Appellant’s appeal has merits. I proceed to set aside the judgment of the trial magistrate dismissing the Appellant’s suit and in place thereof enter judgment in favour of the Appellant in the following terms;
- a. A declaration is hereby made that the sale between JKR and the 2nd Appellant on the basis of sale agreements dated July 11, 2016 and July 5, 2017 touching on 3 acres comprised in LR No (Particulars withheld) is unlawful, illegal, null and void.
 - b. An order of permanent injunction is hereby given restraining the Respondents jointly and severally from offering for sale, transferring, wasting or alienating 3 acres comprised in LR No (Particulars withheld).
31. On the other hand, the Respondent’s counter-claim is dismissed with costs to the Appellant.
32. The Respondents shall pay the costs of the Appellants suit before the lower court and pay costs of this appeal.
33. It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET ON THIS 24TH DAY OF NOVEMBER, 2022.



E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Kimeli for Mr. Tororei for Appellant.

Court Assistant –Albert

E. O. OBAGA

JUDGE

24TH NOVEMBER, 2022

