



REPUBLIC OF KENYA



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**Gakungu v Gakungu (Civil Case 450 of 2009)
[2022] KEELC 15588 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15588 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL CASE 450 OF 2009
JO MBOYA, J
NOVEMBER 21, 2022**

BETWEEN

JANE W.GAKUNGU APPLICANT

AND

MICHAEL M.GAKUNGU RESPONDENT

JUDGMENT

Introduction and Background

1. Vide Originating Summons dated the 9th of September 2009, the Applicant herein has approached the Honourable court seeking for the following Reliefs;
 - i. A Declaration do issue that the sale of L.R.Kitisuru-101/C101 also known as LR. Kitisuru 101/101, to any person is, and remains void in the absence of the consent of the Applicant as Joint owner of the said Property with the NSSF Tenant Purchaser Mortgage Scheme.
 - ii. Alternatively, a Declaration do issue that the Respondent holds all proceeds arising out of the sale of L.R. Kitisuru -101/C101 as Trustee for the 2 Parties herein until the parties' respective shares thereof is determined.
 - iii. A Declaration do issue that the Applicant is entitled to one half of all the proceeds of sale of L.R. Kitisuru-101/C101 also known as LR.Kitisuru 101/101, now held by the Respondent's advocates as stakeholders in the sale, less such sums as are due to the NSSF as mortgagee over L.R.Kitisuru-101/C101 also known as LR.Kitisuru 101/101.



- iv. A Declaration do issue that the Respondent has acted unlawfully to sell the property L.R. Kitisuru -101/C101 also known as LR. Kitisuru 101/101, without the Applicant's consent or authority.

And the Applicant seeks further Orders:

- v. An Order do issue canceling the sale and Transfer of L.R. Kitisuru -101/C101 also known as LR. Kitisuru 101/101, to Bernard M. Ngaira or such other person as may claim proprietary ownership thereof without the Applicant's consent and authority to such sale.

Alternatively

- vi. An Account of all Funds released as the sale price, whether now held by him or by his agent Advocates, from the purchaser of LR. Kitisuru 101/101 also identified as Kitisuru 101/C101 be taken.
- vii. An Order do issue that the entire sale price in respect of L.R. Kitisuru -101/C101 also known as L. R. Kitisuru 101/101, less the mortgage sums retained by the NSSF in redemption of the property be forthwith deposited in Court until further orders.
- viii. An order do issue compelling the Respondent to remit to the Applicant one half of the sums declared to be the aggregate sum in respect of the purchase of L.R. Kitisuru-101/C101 also known as LR. Kitisuru 101/101, less the mortgage sums retained by the NSSF in redemption of the property, and ancillary costs.
- ix. An Injunction do issue, restraining the Respondent, by his Advocates, Walker Kontos Advocates, from releasing any sum to the Respondent or his agents save to remit the redemption sum properly due to the NSSF Board of Trustees in redemption of LR. Kitisuru 101/101 also identified as Kitisuru 101/C101, less the said Advocates' reasonable legal fees consequent upon the sale only, until further Court Orders.
- x. Costs of this suit.

2. The Originating Summons herein is premised and anchored on various grounds that have been enumerated in the body thereof and same is further supported by the Affidavit of the Plaintiff sworn on the 9th of September 2009 and to which the Plaintiff has attached various documents.
3. Upon being served with the Originating Summons, the Defendant herein filed a Replying Affidavit sworn on the 2nd of October 2009, and to which the Defendant has annexed a total of 38 documents/annextures and also a supplementary affidavit sworn on the 14th of November 2012.
4. Upon the close of pleadings, directions were given over and in respect of the originating summons, whereupon it was directed that the same be disposed of by way of viva voce evidence.
5. Subsequently, the matter was fixed and listed for hearing and each party relied on the various affidavits filed and called one witness a piece.



Evidence by the Parties:

a. Plaintiff's Case:

6. The Plaintiff's case revolves and gravitate around the supporting affidavit sworn on the 9th of September 2009 and the documents attached thereto.
7. Vide the supporting affidavit, the Plaintiff herein stated that the Defendant and herself got married in the year 1995 and thereafter same cohabited together up to and including the year 2008 when the marriage experienced difficulties.
8. Further, the Plaintiff added that owing to the marital differences, the Defendant herein left and moved out of the matrimonial home.
9. Be that as it may, the Plaintiff testified that during the subsistence of the marriage, the Defendant and herself bought and purchased a property known as L.R. Kitisuru-101/C101, which was under the National Social Security Fund Tenant Purchase Mortgage Scheme.
10. Besides, the Plaintiff added that upon the purchase of the suit property, the National Social Security Fund availed unto the Defendant and herself a tenant purchase agreement for purposes of execution and further action.
11. For coherence, the witness added that both the Defendant and herself proceeded to and executed the tenant purchase agreement and thereby signaled their readiness to take up the suit property.
12. On the other hand, the witness further testified that after the execution of the tenant purchase agreement, it was incumbent upon the Defendant and herself to pay the requisite deposit amounting to Kshs. 500,000/= Only, which amount the Plaintiff stated was duly processed and paid by the Defendant and herself.
13. Other than the foregoing, the witness also testified that other than the payment of the deposit of Kes. 500,000/= Only, National Social Security Fund also indicated that the Defendant and herself would also be paying/making monthly remittance in the sum of Kes. 62,982/= only with effect from 5th February 2004 until full payment/liquidation of the scheme.
14. It was the further evidence of the witness that at the time when the suit property was bought and purchased, there was a house therein which was 30% complete.
15. Be that as it may, the witness added that upon the purchase of the suit property, both the Defendant and herself made contributions towards the completion of the house and for clarity, that the house was finally completed and became habitable.
16. On the other hand, the witness added that same was also tasked with the responsibility of overseeing the family business inter-alia the real estate, shops in Limuru and public transport and that out of the family business, same was able to contribute to the liquidation of the monthly installment, required over and in respect of the suit property.
17. In any event, the witness has further testified that in acknowledgment and recognition of her contribution towards the acquisition and development of the suit property, the Defendant caused the suit property to be registered in their joint names.
18. Nevertheless, the witness testified that when the Defendant and herself got into marital trouble, the Defendant moved out of the matrimonial home and thereafter it became difficult to continue with the



payment of the monthly mortgage instalments. For clarity, the witness added that thereafter there was a lapse in the payment of the instalments and the outstanding arrears became substantial.

19. Other than the foregoing, the witness added that by March 2009, no remittances had been made and that as a result of the failure to make the monthly instalments, same formed an opinion that the Defendant was not keen to salvage the property.
20. Besides, the witness testified that on or about 8th July 2008, the Defendant's advocates wrote to her and informed her that the property had accumulated arrears and that the sum of Kes. 16,000,000/= Only, was required to redeem the property. Consequently, the Plaintiff averred that same was therefore being asked to come up with the said amount for purposes of salvaging the suit property.
21. However, the witness testified that same did not receive the letter in question and the letter was only brought to her attention when she went to her advocate's offices on the 4th of August 2008.
22. Be that as it may, the witness testified that the Defendant herein proceeded to and caused the suit property to be sold and/or be disposed of to a Third party, namely, Mr. Bernard M. Ngaira, albeit without her participation and/or involvement.
23. At any rate, the witness added that same only discovered that the suit property had been sold to and in favor of a Third party when same came across the purported new owner who was now claiming to be the owner of the suit property.
24. Further, the witness added that upon discovering that the suit property had been sold or better still was in the process of being sold, same wrote a protest letter to National Social Security Fund contending that she has not been involved in the sale.
25. Nevertheless, the witness continued and stated that the sale over and in respect of the suit property proceeded and eventually, the suit property was transferred to and registered in the name of Mr. Bernard M. Ngaira.
26. It was the further evidence of the witness that even though the suit property had been sold without her involvement and participation, same was no doubt a joint owner and was hence entitled to 50% share of the proceeds.
27. Notwithstanding the foregoing, the witness added that the Defendant herein did not deem it fit to share the proceeds of the sale of the suit property with her. In this regard, the witness added that the manner in which the Defendant dealt with the sale and disposal of the suit property was illegal and constituted a breach of trust.
28. Premised on the foregoing, the witness stated that after realizing the manner in which the suit property was sold and disposed of, same instructed her advocate to file the instant suit, with a view to procuring and obtaining justice from the court.
29. In the circumstances, the witness invited the court to take cognizance of the reliefs alluded to at the foot of the Originating Summons and to grant same.
30. Other than the foregoing, the witness adopted the contents of the supporting affidavit sworn on the 9th of September 2009. In this regard, the witness invited the court to admit the contents of the supporting affidavit and adopt same as her further evidence in chief.
31. Further, the witness also referred to the various annexures attached to the supporting affidavit and sought to have same produced and admitted as documentary exhibits. In this regard, the various



annextures attached to the supporting affidavit were produced and marked as exhibits P1 to P8, respectively.

32. On cross-examination, the witness stated that same was conversant with and knowledgeable of the contents of the Replying Affidavit sworn on the 2nd of October 2009. Further, the witness added that upon being served with the said Replying Affidavit, same proceeded to and filed a supplementary affidavit sworn on the 2nd of November 2009.
33. On the other hand, the witness testified that no Title had been issued to the Defendant and herself over the suit property by the time same filed the subject suit.
34. Be that as it may, the witness added that what was available was a joint tenant purchase agreement showing that the suit property was bought by the Defendant and herself. For clarity, the witness added that at the time of filing of the suit, the suit property was still registered in the name of the National Social Security Fund.
35. Other than the foregoing, the witness stated that the property herein had not been fully paid for by the time same filed and commenced the instant suit.
36. In any event, the witness added that though she has stated in her affidavit that same made contribution and payments towards the purchase of the suit property and the completion of the house thereon, same has however not stated the total amount that she paid on account of contribution in respect of the suit property.
37. Whilst still under cross examination, the witness stated that the joint tenant purchase agreement indicated and contained a term that both the Defendant and herself were to pay the sum of Kes. 62,982/= Only, on a monthly basis, until full completion/liquidation of the scheme.
38. Further, the witness stated that same was conversant with the terms and conditions of the joint tenant purchase agreement and in particular, that the monthly payment was to be made on a designated date until payment in full.
39. On the other hand, the witness also stated that same was aware that in the event of default to pay/liquidate the monthly installment, then the suit property would be liable to repossession and re-sale by the National Social Security Fund.
40. At any rate, the witness further testified that other than running the family business, she was also working at Mwalimu Sacco Cooperative Ltd. In this regard, the witness stated that her monthly salary/income from her employment was Kes. 40,000/= only per month.
41. Nevertheless, when referred to paragraph 14 of the Replying Affidavit sworn on the 2nd of October 2009, and copies of the pay-slip attached thereto, the witness retracted her previous answer and conceded that her monthly income/salary was Kes. 2,000/= Only.
42. Further, the witness also testified that the Replying Affidavit sworn on the 2nd of October 2009 has also captured and reflected her true earnings and income. In particular, the witness admitted that same has not controverted the contents of the issues raised at the foot of the Replying Affidavit and essentially pertaining to her income.
43. On the other hand, the witness indicated that same received a copy of a letter from the Defendant's advocate alerting her and informing same of the requirement to pay Kes. 16,000,000/= Only, to salvage the suit property.
44. However, the witness clarified that she received the letter from the offices of her advocates.



45. Further, the witness stated that upon receipt of the letter in question, she offered a better solution than the sale of the suit property. Nevertheless, the witness admitted that the better solution/offer, was not part of the documents that same has filed before the court.
46. Other than the foregoing, the witness stated that same was aware that there were pending bills pertaining to and in respect of the suit property. In this regard, the witness conceded that the pending bill due to National Social Security Fund amounted to Kes. 3,895,539/= only.
47. Other than the foregoing, the witness stated that there were no other bills due and payable in respect of the suit property. For clarity, the witness added that by the time the suit property was sold, same was fully completed.
48. Whilst still under cross-examination, the witness stated that though same has seen the contents of paragraph 12 and 13 of the Replying Affidavit concerning the debts incurred on the completion of the building, she had not disputed or controverted the said paragraphs.
49. Nevertheless, the witness added that same has responded to the issues raised therein and has acknowledged that the Defendant paid some of the bills from his own source.
50. Further, the witness also referred to the various documents attached to the Supporting Affidavit and confirmed that the documents at pages 42 to 46 of the bundle containing the Originating Summons relates to loan application forms. However, the witness added that the monies that were acquired at the foot of the loan application form were used and utilized towards the liquidation of the NSSF Mortgage.
51. Nevertheless, whilst under further cross-examination, the witness conceded that her affidavit does not allude to or specify how much money, if at all, was paid towards liquidation of the NSSF Mortgage.
52. Other than the foregoing, the witness also stated that it is true that the Defendant herein set up several businesses for her.
53. On the other hand, the witness also conceded that from the contents of the Replying Affidavit, the Defendant herein had endeavored to and explained how the monies that were received/realized from the sale of the suit property was expended. In this regard, the witness conceded to having seen the contents of paragraphs 26.2 and 26.5.
54. For clarity, the witness also admitted that the Defendant has also attached various receipts showing the expenditure incurred.
55. Other than the foregoing, the witness conceded that despite seeing the explanation that was applied and availed by the Defendant herein, same did not file any Affidavit to respond or react to the deposition by the Defendant.
56. On the other hand, the witness alluded to a copy of the Banker's cheque in the sum of Kes. 500,000/= Only. For clarity, the witness has admitted that the said Banker's cheque was procured from the Defendant's personal account at Equity Bank Ltd.
57. At any rate, the witness added that it is the said Banker's cheque which same presented to National Social Security Fund towards the deposit of the tenant purchase agreement. Nevertheless, the witness added that the receipt in respect of the said Banker's cheque was however issued in her name and not in the name of the Defendant.
58. Whilst still under cross-examination, the witness stated that the last payment towards the purchase of the property was not deducted from the Defendant's account.



59. Be that as it may, the witness added that all the rest of the payments towards the purchase of the suit property, came from and were deducted from the Defendant's personal account.
60. Further, the witness also stated that the suit property was sold and disposed of by the Defendant. However, the witness added that same did not know for how much the property was sold for.
61. On re-examination, the witness reiterated that she got married to the Defendant and thereafter she changed her name and adopted the Defendant's surname.
62. On the other hand, the witness added that the suit property was sold and disposed of by the Defendant, without her involvement and participation.
63. Nevertheless, the witness reiterated that the suit property was jointly acquired and purchased through the tenant purchase agreement.
64. Finally, the witness stated that the Defendant was a general manager at Karagiana Tea Factory. However, the witness stated that she was not conversant with or knowledgeable of the Defendant's salary.
65. With the foregoing testimony, the Plaintiff's case was closed.

b. Defendant's Case

66. The Defendant's case is premised and anchored on the basis of a Replying Affidavit sworn on the 2nd of October 2009, which the Defendant alluded to and sought to rely on its entirety.
67. Pursuant to the request by the Defendant, the contents of the Replying Affidavit sworn on the 2nd of October 2009 were admitted and deemed as the Defendant's evidence in chief.
68. Further, the Defendant also alluded to the annexures attached to the said Replying Affidavit and sought to have the said annexures adopted as documentary exhibits. For coherence, the various annexures were thereafter admitted and produced as exhibits D1 to D46, respectively.
69. Other than the foregoing, the Defendant also referred to the supplementary affidavit sworn on the 14th of November 2012 and sought to have the said supplementary affidavit as his further evidence in chief.
70. In this regard, the said supplementary affidavit was duly admitted and adopted as the Defendant's further evidence in chief.
71. Other than the foregoing, the Defendant also alluded to the various annexures attached to the supplementary affidavit and invited the court to admit the said annexures. For clarity, the said annexures were admitted as exhibits 47 to 52, respectively.
72. On the other hand, the witness herein testified that he knew the Plaintiff and that the Plaintiff and himself were not legally married.
73. Nevertheless, the witness added that the Plaintiff and himself had a relationship and that same cohabited together for a period between to 4 to 5 years.
74. Be that as it may, the witness also testified that the Plaintiff and himself made separate applications to National Social Security Fund to be allocated houses/properties and that his application was successful.
75. Following the success of his application, the witness added that same arranged to and paid a deposit of the sum of Kes. 500,000/= Only. For clarity, the witness added that the sum of Kes. 500,000/= Only, was procured from his personal account at Equity Bank Ltd.



76. On the other hand, the witness testified that ultimately same was not able to pay the monthly installments and because of his failure to do so, same liaised with the National Social Security Fund to allow him dispose of the suit property.
77. For the avoidance of doubt, the witness testified that the suit property was ultimately sold and disposed of by the National Social Security Fund.
78. On the other hand, the witness added that after the sale of the suit property, the National Social Security Fund recovered what was due and outstanding on account of accumulated arrears and thereafter released the balance of the monies unto him.
79. Be that as it may, the witness added that the balance of the sale proceeds, which were released unto him were applied towards settling various debts that were incurred as a result of the completion of the suit property.
80. At any rate, the witness added that the manner in which the monies were utilized and expended has been explained vide the Replying Affidavit sworn on the 2nd of October 2009 and the supplementary affidavit sworn on the 14th of November 2012.
81. On cross examination, the witness admitted that the suit property was held in the joint names of the Plaintiff and himself.
82. On the other hand, the witness admitted that the suit property was eventually sold to Mr. Bernard M. Ngaira and that the sale agreement was between himself and the said Bernard M. Ngaira.
83. Whilst still under cross-examination, the witness stated that the Plaintiff herein was not involved in the sale of the suit property.
84. At any rate, the witness added that the sale proceeds were released to him through his advocates on record.
85. Further, the witness stated that the suit property was sold in the sum of Kes. 18,000,000/= Only and that out of the Kes. 18,000,000/= Only, the sum of Kes. 3,800,000/= Only, was paid to National Social Security Fund.
86. In respect of the balance of the said monies, the witness stated that same were utilized towards settling debts that were incurred towards and on account of the completion of the development standing on the suit property.
87. In any event, the witness added that the details of the debts which same had incurred have been elaborated and enumerated at the foot of the Replying Affidavit sworn on the 2nd of October 2009 and the supplementary affidavit sworn on the 14th of November 2012.
88. Other than the foregoing, the witness stated that the monies that the Plaintiff borrowed at the foot of the various loan application forms were never channeled to the purchase of the suit property. For clarity, the witness added that same was not aware of what the Plaintiff did with the monies that was due at the foot of the loan application forms.
89. Other than the foregoing, the witness added that the Plaintiff and himself were also engaged in various businesses including Matatu business.
90. However, the witness added that the monies that were gotten from the Matatu business went back into the Matatus and nothing was utilized towards the payment in respect of the suit property.



91. Finally, the witness stated that the Plaintiff herein was not involved in the sharing/distribution of the money realized from the sale of the suit property.
92. On re-examination, the witness stated that the Plaintiff herein did not file any response to his supplementary affidavit. For clarity, the witness added that the manner in which the sale proceeds was utilized and expended is well explained at the foot of the Replying Affidavit sworn on the 2nd of October 2009 and the supplementary affidavit sworn on the 14th of November 2012.
93. With the foregoing evidence, the Defendant's case was closed.

Submissions by the Parties

a. Plaintiff's Submissions

94. The Plaintiff filed written submissions dated the 12th of August 2022 and same has isolated and highlighted four issues for consideration.
95. First and foremost, the Plaintiff submitted that the suit property was jointly acquired by the Defendant and the Plaintiff. For clarity, counsel for the Plaintiff pointed out that the tenant purchase agreement was indeed entered into and executed by both the Defendant and the Plaintiff.
96. To the extent that the tenant purchase agreement was entered into and executed by both the Defendant and Plaintiff, counsel pointed out that both the parties were entitled to enjoy equal rights over and in respect of the suit property.
97. In any event, counsel added that the tenant purchase agreement contained terms and conditions which were applicable to both the Plaintiff and the Defendant and essentially, terms which were binding on both.
98. To vindicate the extent of the Plaintiff's rights to the suit property, counsel added that the joint tenant purchase agreement constituted a binding agreement which could not be altered or varied unilaterally by the Defendant.
99. In support of the foregoing submissions, counsel has quoted and cited the decision in the case of *National Bank of Kenya Ltd v Pipe Plastic Samkolite Kenya Ltd & Another* (2002) eKLR and *Pius Kimaiyo Langat v Co-operative Bank Ltd* (2017) eKLR.
100. Secondly, counsel for the Plaintiff has submitted that the Plaintiff herein made various contributions towards the purchase and acquisition of the suit property.
101. In this regard, counsel for the Plaintiff invited the court to take cognizance of exhibit P7, comprising of various loan application forms, which were made by the Plaintiff and whose proceeds were channeled towards the acquisition of the suit property.
102. Further, counsel for the Plaintiff has submitted that the various monies which were borrowed by the Plaintiff were also utilized towards developing the building that was standing on the suit property.
103. Other than the foregoing, counsel for the Plaintiff added that the Plaintiff was also responsible in respect of the management of the family business and out of which the income derived therefrom was channeled towards the completion of the house standing on the suit property.
104. Thirdly, counsel for the Plaintiff has submitted that having been a joint signatory to the tenant purchase agreement, the Plaintiff was no doubt a stakeholder in the suit property.



105. To this extent, counsel has added that the consent of the Plaintiff was therefore mandatory, in the event that the suit property was being sold and/or be disposed of.
106. Fourthly, counsel for the Plaintiff has invited the court to take cognizance of the provisions of Section 91(2) of the [Land Registration Act](#) and in particular to find and hold that a property that is registered in the joint names of two or more persons cannot be dealt with without the consent of all the parties involved.
107. In this regard, counsel for the Plaintiff has submitted that there was no way that the Defendant would deal with and dispose of the suit property without the involvement and participation of the Plaintiff.
108. Consequently, counsel for the Plaintiff has contended that the manner in which the Defendant dealt with the suit property violated and infringed upon the rights of the Plaintiff.
109. To vindicate the foregoing submissions, counsel for the Plaintiff invited the Honourable court to take cognizance of the holding in the case of *NNK v G NK*, Thika ELC Case No. 781 of 2017.
110. Finally, counsel for the Plaintiff submitted that there is no dispute that the Defendant herein was paid the balance of the purchase price arising from the sale of the suit property.
111. In this regard, counsel has submitted that the only expenditure that ought to have been discounted from the proceeds of the sale was the sum of Kes. 3,400,000/= Only, being the amount that was owing due and payable to National Social Security Fund.
112. For coherence, counsel for the Plaintiff has added that the net balance remaining from the sale proceeds amounted to a sum of Kes. 14,600,000/= only. In this regard, counsel has submitted that the said balance ought to have been shared equally between the Plaintiff and the Defendant.
113. Premised on the foregoing, counsel for the Plaintiff has therefore submitted that the Defendant herein ought to be compelled to surrender and pay to the Plaintiff the sum of Kes. 7,300,000/= only together with interests with effect from 9th September 2009.

b. Defendant's Submissions

114. The Defendant filed written submissions dated the 17th of October 2022 and same has similarly raised, highlighted and amplified four issues for consideration.
115. First and foremost, the Defendant has submitted that the suit property was solely bought and purchased by the Defendant. For clarity, the Defendant has contended that the initial deposit of the sum of Kes. 500,000/= Only, was drawn from his personal account with Equity Bank Ltd.
116. Similarly, counsel for the Defendant has submitted that even the monthly contributions which were made to and on account of the suit property were paid by the Defendant himself.
117. To this extent, counsel for the Defendant invited the court to take cognizance of the evidence of the Plaintiff where same admitted and acknowledged that all the monthly contributions which were paid towards the mortgage installments, were deducted from the Defendant's personal account.
118. Similarly, counsel for the Defendant also invited the court to take cognizance of the admission by the Plaintiff that the Banker's cheque for Kes. 500,000/= only which was paid towards the joint purchase agreement was procured from the Defendant's personal account at Equity Bank.



119. Premised on the foregoing, counsel for the Defendant contended that the mere inclusion of the name of the Plaintiff in the joint tenant purchase agreement did not confer upon the Plaintiff any proprietary rights in respect of the suit property.
120. At any rate, counsel for the Defendant has added that the name of the Plaintiff was merely included in the joint tenant purchase agreement on humanitarian basis and consideration.
121. In support of the foregoing submissions, counsel for the Defendant has quoted and relied upon the holding in the case of *Pettite v Pettite* (1969) 2 ALL ER at page 385.
122. Secondly, counsel for the Defendant submitted that the suit property was acquired solely by himself and that the Plaintiff did not make any contributions whatsoever towards the purchase, acquisition and development of the suit property.
123. In particular, counsel contended that in fact the Plaintiff admitted that all the monies that were utilized towards the purchase and acquisition of the property were deducted from the Defendant's personal accounts.
124. On the other hand, the Defendant's counsel added that even though the Plaintiff had indicated that same applied for and took out loan facilities, the Plaintiff admitted in her evidence that there was no evidence that any of those loan facilities were utilized towards the purchase, acquisition and development of the suit property.
125. In any event, counsel added that the Plaintiff herself conceded that she had not indicated or quantified how much contribution, if any, that same paid towards the acquisition of the suit property.
126. In the absence of such evidence, counsel for the Defendant submitted that the Plaintiff is thus not entitled to any share, let alone the 50% share claimed by the Plaintiff.
127. In support of the contention, that the mere fact that the Plaintiff's name is reflected as a joint owner, does not entitle that Plaintiff to an automatic entitlement to the suit property, counsel cited and quoted the decision in the case of *Burns v Burns* (1984) 1 ALL ER 244, E N K v M N N N Civil Appeal No. 559 of 2019 (2021) KECA 2019 (KLR) and *Mbugua v Mbugua* (2000) eKLR.
128. Thirdly, counsel for the Defendant has submitted that the inclusion of the name of the Plaintiff in the joint tenant purchase agreement, was taken and made on humanitarian consideration and for compassion.
129. Further, counsel has added that despite the inclusion of the name of the Plaintiff in the joint tenant purchase agreement, the Plaintiff did not make any contribution towards the purchase of the suit property.
130. Premised on the foregoing, counsel for the Defendant has submitted that to the extent that the Plaintiff did not make any contribution, her consent was neither necessary nor mandatory prior to and before the disposal of the suit property.
131. In any event, counsel has added that the provisions of Section 91(2) of the *Land Registration Act*, 2012 (2016), do not apply to and in respect of the disposal of the suit property, which was dealt with and disposed of prior to the enactment of the *Land Registration Act*, 2012.
132. Finally, counsel for the Defendant has submitted that during and in the course of completing the house which was standing on the suit property, same accrued various debts and expenses from named and known persons.



133. On the other hand, counsel for the Defendant further added that upon the sale and disposal of the suit property, the sale proceeds were applied and utilized towards the liquidation of the identified debts. In this regard, counsel has invited the court to take cognizance of the contents of the Replying Affidavit sworn on the 2nd of October 2009 and the supplementary affidavit sworn on the 14th of November 2012.
134. Nevertheless, counsel has also added that the clear and elaborate details which were contained at the foot of the Replying Affidavit and the Supplementary Affidavit, were never controverted by the Plaintiff herein.
135. In the premises, counsel has submitted that in the absence of any further/supplementary affidavit by the Plaintiff, it is deemed that the contents of the Replying Affidavit sworn on the 2nd of October 2009 and particularly the aspect pertaining to the details of the expenditure and the debts, stood admitted by the Plaintiff herein.
136. Premised on the foregoing, counsel has therefore invited the court to find and hold that the Plaintiff's suit has not been proven or established. In this regard, counsel has implored the court to dismiss the suit with costs.

Issues For Determination

137. Having reviewed the Originating Summons dated 9th September 2009, the Supporting Affidavit thereto and the Replying Affidavit filed by the Defendant and having similarly reviewed the oral evidence tendered by the Parties; and having considered the written submissions filed on behalf of the Parties herein, the following issues are pertinent and worthy of determination:
 - i. Whether the Plaintiff was a Joint owner with the Defendant in respect of the suit property and if so, whether the Plaintiff was consulted prior to the sale/disposal of the suit property?
 - ii. Whether the Plaintiff made any known contribution towards the purchase, acquisition and ultimate development of the suit property and if so, whether the Plaintiff is entitled to a share of the sale proceeds of the suit property?
 - iii. Whether the Honourable court is seized of the requisite jurisdiction to invalidate/revoke the sale of the suit property to and in favor of Mr. Bernard M Ngaira?

Analysis And Determination

Issue Number 1

Whether the Plaintiff was a Joint owner with the Defendant in respect of the suit property and if so, whether the Plaintiff was consulted prior to the sale/disposal of the suit property.

138. The Plaintiff herein testified and contended that same got married to the Defendant in the year 1995 and thereafter both the Defendant and herself cohabited together up to and including the year 2008.
139. On the other hand, the Defendant contended that the Plaintiff and himself were never married, however, the Defendant added that same had a loose relationship with the Plaintiff which culminated into the birth of two children.



140. From the testimony of the Plaintiff and the Defendant, it is evident that there is no unanimity as to whether the Plaintiff and the Defendant were lawfully married or otherwise.
141. Nevertheless, it is appropriate to state and observe that this Honourable court is not seized of the requisite capacity, competence and jurisdiction to pronounce on the issue of whether or not there was a valid marriage between the Plaintiff and the Defendant or otherwise.
142. In the premises, the dispute as to whether or not there was a marriage and whether same has been dissolved, will have to await further proceedings before the correct forum, subject to appropriate advice to the disputants.
143. Be that as it may, the issue that falls for determination by this court is whether the suit property was jointly purchased, acquired and developed by the Plaintiff and the Defendant and if so, whether the Plaintiff's consent was therefore necessary before any dealings and transaction over the suit property.
144. In this respect, it is common ground that the tenant purchase agreement was crafted in the joint names of both the Plaintiff and the Defendant and thereafter same was duly executed by both.
145. On the face of it, the execution of the tenant purchase agreement by both the plaintiff and the Defendant, would connote that indeed the suit property was jointly purchased and acquired.
146. However, before making a precipitate decision as to whether or not the suit property was jointly acquired and purchased by the Plaintiff and the Defendant, it is appropriate to discern whether both parties made contribution towards the purchase and acquisition of the property.
147. In this regard, it is imperative to take cognizance of the contents of paragraph 11 of the Supporting Affidavit sworn by the Plaintiff.
148. For coherence, the contents of paragraph 11 are reproduced as hereunder;

“That it was in recognition of my contribution to the property’s acquisition and development that the Respondent and I were registered as joint owners of the property, L.R No. Kitusuru-101/C101”.
149. From the foregoing paragraph of the Supporting Affidavit, the Plaintiff seems to suggest that same made contributions towards the purchase and acquisition of the suit property and that her registration as a joint owner, was in recognition and acknowledgment of her contributions.
150. Having made the foregoing averments, one would have expected the Plaintiff to go a notch higher and to particularize the contributions made and the quantum thereof.
151. Be that as it may, the Plaintiff herein failed to particularize and to provide details of the payments and contributions, if any, made by herself.
152. To the contrary, the Plaintiff herein conceded during cross-examination that same neither quantified nor supplied details of the contributions made by her in respect of the purchase of the suit property.
153. For coherence, it must be stated and underscored that the burden of proving the contributions, if any made by the Plaintiff, fell on her shoulders and hence it was incumbent upon the Plaintiff to supply the requisite details relating to the contributions made. For clarity, the evidence of such contributions, was critical, essential and paramount.



154. To this end, it is appropriate to recall and reiterate the holding of the Supreme Court of Kenya in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR, where the court stated and observed as hereunder;

(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

155. In the absence of any evidence of contribution, it is difficult to find and hold that indeed the Plaintiff herein accrued legitimate rights and interests as a joint owner of the suit property.

156. Notwithstanding the foregoing, the Defendant herein tendered evidence that the inclusion of the name of the Plaintiff in the tenancy purchase agreement, was borne out of humanitarian consideration and not otherwise.

157. On the other hand, the Defendant further added that indeed the inclusion of the name of the Plaintiff was to protect her from harassment and intimidation by the Defendant’s 1st wife, namely Rodah Njeri, with whom the Defendant had separated but the marriage was still subsisting.

158. To my mind, the inclusion of the name of the Plaintiff in the tenant purchase agreement creates a rebuttable presumption of equal rights, but which presumption can be rebutted upon adduction or production of evidence to the contrary.

159. To vindicate the foregoing observation, it is imperative to take cognizance of the holding of the Court of Appeal in the case of *Kivuitu v Kivuitu* (1991) 2KAR 241 where the court stated and observed as hereunder:

“The fact that the property is registered in the joint names means that each party owns an undivided equal share thereon...

Because of the conveyance of the property to be held by them as joint tenants, there was a presumption at the time, that the intention of the parties was to hold the matrimonial home as joint tenants, provided that if one of them died, the other would take the entire ownership.”



160. Additionally, the mere fact that a parties' name has been included as a joint owner/proprietor of a property, does not ipso-facto mean that the said party has equal interests over the impugned property.
161. In this regard, I am duly guided by the holding of the Court of Appeal in the case of ENK v MNNN Civil Appeal 559 of 2019[2021] KECA 219 [KLR], where the court stated and observed as hereunder:

“Evidence showed that the appellant paid for the properties in full with no monetary contribution by the respondent at all. Although the properties were registered in their joint names, the appellant was able to show that he did that purely for the affection he had for his wife at the material time. When divorce came the appellant proved to the required standard that he had personally purchased and paid for the properties. The respondent did not make any monetary contribution. The appellant was able to rebut the presumption that the properties which were jointly registered were equally owned. In any case marriage per se is not a ground for sharing properties acquired during marriage in an equal basis.

The law in a well-trodden path has established that parties must show evidence of their respective contribution to the properties and secondly to the family well-being. It is clear beyond doubt that there was no issue to the marriage for the respondent to assert that she was taking care of children and other family issues. Admittedly both parties were top professionals who pursued their personal and professional interest separately.”

162. Premised on the holdings in the decision that have been quoted in the preceding paragraph, I come to the conclusion that the mere inclusion of the name of the Plaintiff in the tenant purchase agreement did not denote that the Plaintiff acquired any legitimate rights to the suit property and therefore was entitled to be consulted in the alienation and disposal of the suit property.
163. At any rate, it must be recalled that at the time when the suit property was being alienated and disposed of, same had not been formally transferred and registered in the joint names of the Plaintiff and the Defendant.
164. Besides, it is not lost on the court that the suit property belonged to and remained registered in the name of the National Social Security fund, who by dint of the terms of tenant purchase agreement, was at liberty to repossess the suit property and to sell same in the event of default.
165. Further, it is common ground that by the time the suit property was sold and disposed of, both the Plaintiff and the Defendant had accrued and accumulated arrears, which admittedly were not paid.
166. In a nutshell, I come to the conclusion that the Plaintiff has not placed before the court sufficient and credible material upon which to find and hold that the Plaintiff was indeed a joint owner, strictu sensu and by extension was entitled to be consulted prior to and before the alienation of the suit property (which admittedly was registered in the NSSF).

Issue Number 2

Whether the Plaintiff made any known contribution towards the purchase, acquisition and ultimate development of the suit property and if so whether the Plaintiff is entitled to a share of the sale proceeds of the suit property.

167. The Plaintiff herein testified that same made various contribution towards the purchase, acquisition and development of the property.
168. In fact, the Plaintiff contended that at the time of the purchase and acquisition and development of the suit property, same was employed and was therefore working with Mwalimu Sacco Cooperative Ltd.



169. In this regard, the Plaintiff contended that same acquired various loans which were thereafter channeled towards payment of the monthly contribution towards the mortgage scheme as well as the completion of the house standing on the suit property.
170. Additionally, the Plaintiff also added that same was also managing the family businesses, inter-alia the real estate, the Tea Shop at Limuru and the Matatu Business. For clarity, the witness testified that borne out of the management of the family business, she also contributed to the acquisition and development of the suit property.
171. Similarly, the Plaintiff added that same was also entitled to salary/monthly income and that borne out of the monthly income, same also made further contribution towards the acquisition and development of the suit property.
172. Notwithstanding the foregoing, the Plaintiff herself admitted and acknowledged that same had not quantified and indicated how much contribution she made towards the purchase, acquisition and development of the suit property.
173. Contrarily, the Plaintiff herein is also on record as having stated that the Banker's cheque for Kes. 500,000/= which was utilized as the deposit towards the tenant purchase agreement was procured from the Defendant's personal account at Equity Bank Ltd.
174. On the other hand, the same Plaintiff also testified and indicate that all the monthly contributions towards the mortgage scheme were deducted from the Defendant's personal accounts.
175. For the avoidance of doubt, it is appropriate to reproduce the pertinent aspects of the Plaintiff's response during cross-examination.
176. For completeness, same are reproduced as hereunder:
- “I am aware that the Banker's cheque for the sum of Kes. 500,000/= was drawn from the Defendant's personal account at Equity Bank Ltd. I can confirm this is the Banker's Cheque I presented to NSSF. I confirm that however the receipt was issued in my name. The last payment towards the purchase of the property was not deducted from the Defendant's account. However, I do confirm that all the rest of the payment came from and were deducted from the Defendant's personal account.”
177. From the evidence tendered, there is no gainsaying that the entire contributions, starting with the deposit at the inception of the transaction, were paid and borne solely by the Defendant.
178. On the other hand, the Defendant tendered evidence that upon the sale and disposal of the suit property, the accumulated arrears on account of instalment amounting to Kes. 3,895,539/= only was paid and released to the National Social Security Fund.
179. Further, the Defendant stated that the balance of the said purchase price was released unto him and that same was expended in line with the deposition alluded to at paragraphs 26.2 and 26.5 of the Replying Affidavit sworn on the 2nd of October 2009.
180. Suffice it to point out that despite being served with the Replying Affidavit sworn on the 2nd of October 2009 and which contained elaborate details pertaining to and concerning the expenses which were settled by the proceeds of the sale, the Plaintiff herein did not deem it fit and expedient to controvert the said details.



181. In fact, when the Plaintiff was cross examined on the contents of the said expenditure, same stated as hereunder:

“I can see the contents of paragraph 26.2 and 26.5 thereof. I can also see that the Defendant has annexed various receipts as pertains to the respective expenditures. I can see that the Defendant has also filed the documents relating to my interdiction. I did not file any affidavit to respond to the issues raised in the Defendant’s affidavit dated/sworn on the 2nd of October 2009.”

182. To my mind, having not responded to the elaborate details that were supplied by the Defendant, it is deemed that the Plaintiff herein admitted and acknowledged that the named expenditures were indeed incurred and settled in the manner stated.

183. In this regard, I am reminded of the holding of the court in the case of *Mohammed & Another vs. Haidara* [1972] E.A 166 at page 167 paragraph F-H, Spry V.P considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows:

“The respondent made no attempt to reply to these allegations and they therefore remain unrebutted...Here, the respondent’s affidavit gives no material facts and the only real evidence of facts is that contained in the appellant’s affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied...”

184. From the foregoing observation, two issues do arise. Firstly, the Plaintiff has not tendered any evidence to authenticate her claim to have contributed to and in respect of the purchase and acquisition of the suit property.

185. In this regard, the mere registration and reflection of her name in the tenant purchase agreement does not denote contribution.

186. To vindicate the foregoing observation, it is imperative to take cognizance of the decision in the case of *Burns v Burns* [1984] 1 ALL ER 244 where Fox, LJ stated as hereunder;

“If there is a substantial contribution by the woman of the family expenses, and the house was purchased on a mortgage, her contribution is, indirectly referable to the acquisition of the house since in one way or other, it enables the family to pay the mortgage installments.

Thus a payment could be said to be preferable to the acquisition of the house if, for example, the payer either:

- a. Pays part of the purchase price; or
- b. Contributes regularly to the mortgage installments; or
- c. Pays off part of the mortgage; or
- d. Makes substantial financial contributions to the family expenses so as to enable the mortgage installments to be paid.”

187. Secondly, the Plaintiff has not disputed the debts and expenses that were settled using the proceeds of the sale price. In this regard, it must be taken that the debts, whose details were underlined in the Replying Affidavit are deemed as admitted.



Issue Number 3

Whether the Honourable court is seized of the requisite Jurisdiction to invalidate/revoke the sale of the suit property to and in favor of Mr. Bernard M Ngaira.

188. Other than the claim that the Plaintiff was neither involved nor consulted prior to and before the alienation of the suit property, the Plaintiff had also sought for an order nullifying the transaction of the suit property.
189. In this regard, it was the Plaintiff's position that to the extent that the sale of the suit property was taken and undertaken without her involvement and participation, then same ought to be canceled, revoked and invalidated.
190. Nevertheless, the Plaintiff herein was aware that at the time of the filing and commencement of the subject suit, the suit property had been lawfully transferred to and registered in the name of Mr. Bernard M Ngaira.
191. Be that as it may, the Plaintiff did not find it fit and appropriate to implead the said Bernard M Ngaira as a party to the instant suit.
192. In the premises, it is not open to the Plaintiff to seek any relief against the said Bernard M Ngaira, who was neither joined nor impleaded as a party in the instant suit.
193. Suffice it to observe that a court of law cannot make any adverse orders against a party who has neither been impleaded nor afforded an opportunity to be heard. For clarity, to do so would be tantamount to condemning a party unheard contrary to the Rule of Natural Justice.
194. At any rate, the provisions of Article 50(1) of *the Constitution* 2010 underscores the right of every citizen to a Fair Hearing.
195. For convenience, the provisions of Article 50(1) of *the Constitution*, 2010, provides as hereunder;
 50. Fair hearing
 - (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
196. Premised on the foregoing, it is my finding and holding that the reliefs sought pertaining to and concerning invalidation of the sale of the suit property, albeit in the absence of the known purchaser, are misconceived, bad in law and legally untenable.

Final Disposition:

197. Having evaluated and analyzed the various issues for determination, I now come to the conclusion that the Plaintiff herein has neither proved nor established her claim to the requisite standard. See the provisions of sections 107, 108 and 109 of the *Evidence Act*, Chapter, 80, Laws of Kenya.
198. Suffice it to point out that the burden of proof laid on the shoulders of the Plaintiff and not otherwise. For clarity, the Plaintiff was obliged to discharge the evidential burden of proof, before the Defendant could be called upon to rebut the evidence tendered.
199. Unfortunately, the Plaintiff failed to meet and satisfy the requisite threshold. Consequently, the Plaintiff's case has not been proven on a balance of probabilities.



200. Consequently and in the premises, the Plaintiff's suit is devoid of merits and same be and is hereby dismissed.

201. Nevertheless, Each party shall bear own costs of the proceedings, borne out of the peculiar circumstances of the case and coupled with the continued relationship between the Parties.

202. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2022.

HON. JUSTICE OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr. Kamwaro for the Plaintiff.

Mr. C N Kibara for the Defendant.

