



**SKN v MKN & another (Environment and Land Appeal
E056 of 2022) [2024] KEELC 4185 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4185 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E056 OF 2022**

**CK NZILI, J
MAY 8, 2024**

BETWEEN

SKN APPELLANT

AND

MKN 1ST RESPONDENT

CMM 2ND RESPONDENT

*(An appeal from the judgment by Hon. L.N Juma (SPM)
delivered on 8.9.2022 in Meru CM ELC No. 79 of 2020)*

JUDGMENT

1. The appellant at the lower court had been sued as the 1st defendant by the 1st respondent, his estranged wife as the plaintiff, together with the 2nd respondent for breach of trust over L.R No. Kiirua/Naari-Maitei/xxx acquired during the subsistence of their marriage which was aborted in 2013.
2. It was averred that the appellant, without consent, subdivided the suit land into five portions, namely L.R No's. Kiirua/Naari/Maitei/xxxx – xxxx and secretly disposed of L.R No's xxxx, xxxx and xxxx and was in the process of selling the rest. The 1st respondent prayed for a declaration that L.R No. xxx and xxxx were held in trust and should be transferred to her.
3. The appellant opposed the suit through a statement of defence dated 9.9.2021, terming the 1st respondent as an estranged wife whom she married under Kimeru customary law in 1980 until 2013, when she left for good. It was averred that during their marriage, he jointly bought L.R No. Kiirua/Naari/Maitei/xxxx with MR in 1980, which they later subdivided into two; hence, he solely acquired L.R No. Kiirua/Naari/Maitei/xxxx, free of any alleged trust.
4. The appellant averred that he shifted his home to Timau area following numerous threats to his life by the 1st respondent and sold off the land to different people, the 2nd respondent included and therefore



- had no obligation to the 1st respondent since the land was neither held in trust nor was it matrimonial property. He termed the suit as a non-starter.
5. The 2nd respondent opposed the suit through a statement of defence and counterclaim dated 24.2.2021, denying the contents of the plaint. She described herself as an innocent purchaser for the value of L.R No. Kiirua/Naari/Maitai/xxxx, with no knowledge of the alleged relationship between the appellant and the 1st respondent. The 2nd respondent counterclaimed for an order of specific performance of an agreement dated 10.9.2019 or in the alternative, compensation for breach thereof.
 6. The 1st respondent, by a reply to the appellant's defence dated 15.9.2021, reiterated the contents of her plaint. While acknowledging the purchase of the land together with his cousin MR, she averred she had halfway contributed to it and had faith then in her husband to hold the land in trust; otherwise, she would have insisted on the inclusion of her name in the title documents. The 1st respondent averred that at the time of acquiring the land, she was already in gainful employment, and therefore she contributed Kshs.3,200/=towards the purchase.
 7. In a reply to the 2nd defendant's defence and defence to the counterclaim dated 8.7.2021, the 1st respondent reiterated the issue of trust and breach thereof on her behalf and the children. She blamed the 2nd respondent for not conducting due diligence to establish the status of the land before embarking on the transaction. In addition, the 1st respondent averred that the only claim the 2nd respondent had, if any, was against the appellant.
 8. MKN testified as PW 1 and adopted her witness statement filed alongside the plaint on 4.9.2020 and a further statement dated 12.11.2021, as her evidence in chief. She said they married under Kimeru customary law in 1978 and separated in 2013 after the appellant assaulted her and since remarried. PW 1 said that during their marriage, they acquired land from one Njogu John together with a cousin, MO, measuring 2 acres for Kshs.64,000/=, which they shared and extensively developed. PW 1 said she was living in a rented house in the Mugae area. Further, PW 1 said they have five children. She said the appellant had sold three out of the five portions of the land remaining with L.R No's.xxxx & xxxx. PW 1 said their marriage was fraught with violence meted out to them by the appellant, for he was a drunkard, and sometimes he would absent himself from home. PW 1 said the appellant eventually started living with another woman, alleged to be his wife who they now live within Timau. PW 1 relied on official searches for L.R No's. xxxx, xxxx, xxxx & 1495 and a mutation form as P. Exh No. 1-5.
 9. In cross-examination PW 1 said the plot was acquired out of their savings from income the appellant and herself had earned out of employment business and farming activities. She said her total contribution for the land was Kshs.1,200 out of Kshs.6,400/= which they paid to the seller at an advocate's office in Meru. PW 1 said it was the appellant who demolished the house they had erected when she left the matrimonial home, which she denied was part of the appellant's ancestral or family land. She denied taking any money from the purchasers of the three portions sold by her former husband, especially from one Caroline. She said the sale agreement was witnessed by her son, RM and a neighbour by the name of Saberio. EN testified as PW 2 and adopted her witness statement dated 12.11.2021 as her evidence in chief. She confirmed that the appellant was her brother-in-law, who married her sister in 1978.
 10. Daniel Karukuthi testified as PW 3 and confirmed that she witnessed the traditional marriage between the appellant and the 1st respondent as then a village elder in 1978 who eventually bought land in the Naari area. Ephraim Mugambi testified as PW 4. As a son of the appellant and the 1st respondent, she told the court that he was born on 15.2.1978 as a firstborn, followed by FM in 1980. He denied assaulting his father or demolishing his house, even though they were not in a good relationship with



- him. PW 4 said there was a time when the police arrested him for unknown reasons. He said his house was demolished on 30.6.2021 so he has been living in a rental house.
11. PW 4 told the court his brother RM was the one his father would go with while collecting money from potential buyers of their plots, which his parents jointly acquired. PW 4 also confirmed various incidences of assault by his father over PW 1. Similarly, PW 4 said he was born and brought up on the suit land until his father chased them away in 2013.
 12. Alice Naitore Majira testified as PW 5. As a neighbour of PW 1, he told the court she had known the estranged couple since 1983 after they bought land and constructed a permanent house next to her land in Naari, but she has not seen them on the land since 2013. PW 5 confirmed that when she moved into her land in 1986, she found the two as a couple but would not tell if they were still married after they left in 2013.
 13. SKN testified as DW 1 and adopted his witness statement dated 9.9.2021 as his evidence in chief. He told the court that he bought L.R No. xxx together with MR in 1980 before he married the 1st respondent, the same year out of his savings since he was working at Meru Variety stores and later subdivided the land into L.R No.xxxx.
 14. DW 1 said the differences with the 1st respondent started after she brought a stepson, IMK; the two became hostile, causing him to flee for his life and live in the Timau area.
 15. Further, he said PW 1 left the matrimonial home in 2013 following intervention by Ameru elders, only to come back in 2018 and assault him, following which he made a report at Kiirua police station. He said the suit was a plan to take away his land. D.W. 1 denied that the land was held in trust for the 1st respondent or her children. He relied on a copy of the title for L.R No. xxx, O.B. extracts numbers 9.25/1/2018, 7/1/9/2018, 13/15/5/2019, 11/21/2/2019 and a chief's letter dated 15.5.2019 as D. Exh No. 1-6.
 16. DW 1, in cross-examination, admitted subdividing the land into five portions and selling some to, among others, one Caroline and the 2nd respondent ten years after the 1st respondent left him. He said he has lived with his new wife and two of the 1st respondent's children, namely RM and TM, at Timau since he demolished his former home. DW1 denied buying the land jointly with the 1st respondents. He said the title deed was issued in August 1980 after they were married. He said he had no sale agreement to show that he was the sole purchaser of the land. DW 1 said he did not officially divorce the 1st respondent. He said S was not his biological son, so he only had four children with the 1st respondent, all of whom used to live on the land before 2013. DW 1 confirmed that L.R No.xxxx was yet to be sold while L.R No.xxxx belonged to the 2nd respondent. He said he did not require the 1st respondent's consent to sell his land.
 17. JM testified as DW 2. As a brother of DW 1 he told the court the latter bought the land on his own before he married PW 1 and was blessed with four children. He confirmed that the land was not ancestral. He could not confirm if the two were officially divorced.
 18. CM testified as D.W. 3 and adopted her witness statement dated 24.2.2021 as her evidence in chief. She told the court that her son DW. 1 witnessed her sale agreement, for she did not know if the appellant had a wife, for the land was vacant. DW3 said she later learned of inhibition when she went to collect her title deed and eventually went to PW 5. DW 3 said that a neighbour, Job Nyakioke, was the one who introduced her to the land, which had no house, and after conducting the official search, she established the owner was DW 1. She said no one stopped the transaction and had been tilling the land tending miraa and avocado trees.



19. DW 3 said there was a house on the land when she bought it. She said she was not aware a spousal consent was necessary during the transactions; otherwise, the seller came with a son during the transaction and land control board meeting. Even though the seller had a wife, DW 3 said she did not witness the sale agreement. DW 3 said she believed what the seller told her: that he lived in Timau area and never enquired about his marital status. DW 3 said she tried to reach out to the 1st respondents in vain after discovering the inhibition orders and the caution. Other than conducting an official search DW 3 said she confirmed who the owner was from both the neighbours and one MR. She said she discovered the inhibition in September 2020 while trying to transfer the land.
20. After considering the evidence tendered by the parties, the trial court allowed the suit and ordered the appellant to compensate the 2nd respondent, triggering this appeal.
21. The appellant faults the trial court:
 - i. For finding there was a trust in favour of the 1st respondent, which decision was not only a basis but erroneous.
 - ii. For failing to consider and appreciate his defence and evidence.
 - iii. For allowing a claim that was not supported by any evidence and facts.
 - iv. For making an erroneous judgment given the issues and the evidence before it.
 - v. For making a flawed analysis which no independent tribunal properly exercising its mind on the facts would have arrived at.
22. With leave of court, parties were directed to file written submissions to the appeal by 23.4.2024. The respondent relied on written submissions dated 22.2.2024 stating that the appellant's statement of defence at the lower court was a mere denial. Further, the 1st respondent isolated three issues for the court's determination. Regarding trust, it was submitted that it was not in dispute that the appellant was a husband to her who, together with the issues of marriage, used to cohabit on the suit land and was yet to divorce formerly.
23. Therefore, it was submitted that going by Sections 2, 9, 12 and 14 (a) of the *Matrimonial Property Act*, there existed a rebuttable presumption that property acquired during a marriage in the name of one spouse is held in trust for the other spouse. Reliance was placed on *F.S v E.Z* (2016) eKLR and *J.O.O v MBO Fida (K) & another* Petition 11 of 2020 (2023) KESC 4 (KLR), *Kadzo Mkutano v Mukutano Mwamboje Kadosho & others* (2016) eKLR.
24. The 1st respondent submitted under Sections 28 & 93 (2) of the Registration Act that she had an overriding interest and spousal consent was a condition precedent before matrimonial property could be disposed off. Consequently, the 1st respondent submitted that the appellant acted maliciously and stealthily to defraud her interest in the suit property.
25. On whether the counterclaim by the 2nd respondent had merits, the 1st respondent submitted that there was no evidence that she was party to the said agreement or whether her spousal consent was sought. To this end, the 2nd respondent ought to have done due diligence and can only demand a refund from the appellant; otherwise, the counterclaim lacks merit as against the 1st respondent. The court was urged to dismiss the appeal with costs for lack of merits.
26. The role of the appellate court of the first instance is to consider the record of a lower court with an independent mind and perspective, come up with its findings on both facts and the law, mindful that the trial court had the opportunity to see and hear the witnesses first-hand. See *Abok James Odera t/a*



A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR and *Gitobu Imanyara & others v A.G.* & (2013) eKLR.

27. The court has carefully gone through the pleadings, evidence tendered, grounds of appeal, written submissions and the law. The issues coming out for my determination in this appeal are:
- a. Whether the 1st respondent proved her rights on interests over L.R No. xxxx and its resultant subdivisions L.R No's xxxx, xxxx, xxxx,xxxx and xxxx.
 - b. If there was a need for spousal consent in subdividing the initial land, the sale and transfer of the resultant subdivisions to the appellant and third parties.
 - c. If the 1st respondent is entitled to L.R No. Kiirua/Naari-Maitei/1493 and 1494.
 - d. Whether the 2nd respondent was an innocent purchaser for value without notice.
28. It is a trite law that parties are bound by their pleading, and issues flow from them. In this appeal, the primary pleadings are the plaint dated 3.9.2020, the appellant's statement of defence dated 9.9.2021, the 2nd respondent defence and counterclaim dated 24.2.2021, which unfortunately had no titular heading, verifying affidavit and has no evidence of payment of filing fees.
29. Further, the 1st respondent filed a reply to the defence by the appellant and a reply to the defence and defence to the counterclaim by the 2nd respondent dated 15.9.2021 and 8.7.2021, respectively. The court has not come across a statement of defence and defence to the counterclaim filed by the appellant herein to the 2nd respondent.
30. The 1st respondent claims at the lower court, as indicated above, that the suit property was acquired during the subsistence of their marriage and that each of them contributed to the acquisition and development of the said property. Further, the 1st respondent, who is yet to divorce the appellant formally led evidence that she contributed towards the acquisition and that the appellant did not seek her consent or approval of the subdivision and transfer. She, therefore, urged the trial and to confirm those proprietary rights arising out of a trust as a right.
31. Constructive trust is a right enforceable sole in equity to the beneficial enjoyment of property to which another person holds the legal title. In *MNK v POM Initiative for strategic litigation in Africa (ISLA) (amicus curiae)* petition 9 of 2021 (2023) KESC 2 (KLR) Family (27th January 2023) (Judgment) the court held thus:

“Whenever two parties by their joint efforts acquired property to be used of their joint benefit, courts may impose or impute a constructive or resulting trust. The legal owner was bound to hold the property in trust for them both. That trust did not need any writing. It would be enforced by an order for sale, but in a proper case, the sale could be postponed indefinitely. It applied to husband and wife, to engaged couples and to man and mistress, and maybe to other relationships too. Their contribution financially and otherwise to the acquisition of the land, the building of the house, the purchase of furniture, and the making of their home, were based on the basis of the purpose of that joint relationship.

Disputes between cohabitants or former cohabitants over ownership, occupation or use of the property had to be solved by applying ordinary legal rules applicable to strangers. Legislation that enabled courts to allocate or re-allocate beneficial interests in the assets following divorce did not apply to cohabiting couples. Kenya did not have laws to protect parties to cohabitation in case of a dispute relating to property acquired during the subsistence of such cohabitation. However, the issue of cohabiting couple's property had



increasingly become a social problem due to the high number of people resorting to cohabitation and in the process of acquiring properties, upon separation, there being no legislation governing the division of property while resolving such disputes difficult, a laissez fair approach could result in injustice for parties to a relationship who might be more vulnerable or who contributed less in financial terms than their partners. The interventionist approach risked creating uncertainty and attaching a monetary value to the party's actions within that type of relationship was often highly complex as was in the instance case. The common intention of the parties at the time of purchase was sufficient to give rise to a constructive trust, which could be inferred from conduct other than making financial contributions to cohabitants. Even though constructive trust was premised on Section 38 of the *Land Act* 2012 the same had not been applied in solving disputes relating to cohabitants. The common intention of the parties at the time of purchase of the suit property gave rise to a constructive trust between the appellant and the respondent. The appellant and the respondent had been cohabiting since 1986. In 1991 the suit property was bought by the two parties and registered in the name of the appellant. The respondent was present during the drafting and signing of the sale agreement and was a witness. The parties lived in one of the rooms from 1993 and plowed the proceeds of rent to construct more rental units..... There was a common intention for the appellant and the respondent to have a beneficial interest in the suit property”.

32. In this appeal, the issues of marriage cohabitation, joint living and development of the suit property between the appellant and the 1st respondent are not in dispute. Witnesses called by both sides confirm that the parties were jointly living together. The subdivision of the initial jointly purchased 2 acres occurred in August 1980 or thereabout, when the parties were under cohabitation. Developments between 1975 and 2013 were undertaken together.
33. Marriage between the parties was under Kimeru customary law. A brother to the appellant confirmed the marriage but was uncertain whether the two parties had formally divorced. The appellant confirmed that he continues living with the two of his issues of marriage in Timau area. The cause of the separation is abuse. Each of the two parties alleges that the other was the cause of the violence.
34. That notwithstanding, the appellant confirmed that the 1st respondent moved out of the matrimonial home. On the other hand, the 1st respondent told the trial court it was the appellant who chased her away from the matrimonial home and embarked on disposing of it without her spousal consent, which amounts to unjust enrichment over the property she has a beneficial interest in, including her children.
35. In assessing beneficial interest due to the party, the court looks not only at the primary financial contributions to the acquisition but also at other forms of contributions, such as the actions of the parties in maintaining and improving such properties. Both parties herein averred and testified that they contributed to the acquisition and development of the suit lands between 1980 and 2013.
36. Section 119 of the *Evidence Act* provides that a court may presume the existence of any fact that it thinks likely to have happened on the ordinary course of natural events and human conduct; customary marriage herein is not disputed. Long cohabitation between a man and a wife gives rise to a presumption of marriage in favour of a party asserting it. Evidence to the contrary to rebut the presumption, though separated, has not been tendered by the appellant. His brother was unaware of any formal divorce. The appellant did not mention any ceremony that he undertook to invalidate the customary marriage nor did his elder brother mention in his testimony.
37. In *Mary Wanjiku Githathu v Esther Wanjiku Kiarie* (2010) eKLR, the court held that the existence or otherwise of a marriage was a question of fact. In *CWN v D.K* (2021) eKLR the court observed that



- the status of a relationship turns much on evidence as much as it is a presumption of law. Evidence to rebut the presumptions has to be strong, distinct, satisfactory and conclusive.
38. In *Juletabi African Adventure Ltd & another v Christopher Michael Lockley* (2017) eKLR, the court held a constructive trust is an equitable remedy imposed by the court against one who has acquired the property by wrongdoing and arises where the intention of the parties cannot be ascertained. Further, the court said a constructive trust will arise automatically where a person who is already a trustee takes advantage of his position for his benefit to guard against unjust enrichment.
 39. In this appeal, while the appellant acknowledges the 1st respondent was his estranged wife, he did not state whether the alleged interests were genuine, remote, or invalid and contrary to those of the issues of marriage. The appellant acknowledges that he left the matrimonial home to find another home where he lives with another woman and two of his issues of marriage with the 1st respondent.
 40. When the appellant was asked where the other two issues of marriage lived or his estranged wife stayed, he was unclear. The appellant nevertheless testified that he had involved two of the sons in disposing of the matrimonial home, which he says was not his part of ancestral or family land from his father's side.
 41. In *MNK v POM* (*supra*), the court cited *Elayne Marian Teresa Oxley v Allan George Hiscock* (2004) EWCA 546, where the court cited *Gissing v Gissing* (1971) AC 886, that in considering constructive trust, the court looks at the nature of the substantive right, proof of common intention, inferred common intention and the quantification of the right.
 42. In this appeal there is evidence that the two parties initially lived in a rental house and bought the suit property as a home to live as a husband and wife, together with their children. Each of them claims, and I have no reason to doubt the collective contribution towards its acquisition and development between 1980 and 2013. Each made direct and indirect contributions during the said period. Therefore, my finding is that there was a common intention to purchase, develop, occupy and live on the suit property as a family. Consequently, I find the registration of the suit property in the name of the appellants was within the common intention of the 1st respondent and their children to have beneficial interests in the suit property.
 43. As to the status after separation in 2013, the appellant blames the 1st respondent for the separation while the latter heaps the sole blame on the appellant, who became violent and started to cohabit with another woman and chased them away. Further, the 1st respondent pleaded and testified that the separation did not extinguish her beneficial interests since they had yet to divorce formally. PW 1 was emphatic in cross-examination that she was entitled to be buried on the suit land since she has not remarried and lives in rental houses, and so are her children, who are entitled to a home.
 44. In *J.O.O v MBO Fida* (*supra*), the Supreme Court of Kenya held that Article 45 (3) of the *Constitution* provides that parties are entitled to equal rights at the time of marriage, during the marriage, and at the dissolution of the marriage. The court said the right to equality was one of the fundamental rights and freedoms that are protected, inherent and indefeasible. The court said equity was an essential principle regarding matrimonial property and that in a marriage, the general assumption was that both spouses shared everything and, on the face of it, contributed towards the home or family in one way or the other to whichever extent, however big or small. Further, the court held that in the event of a marriage breakdown, a court has to make a fair and equitable matrimonial property under Article 45 (3) of the *Constitution*.
 45. In *Kadzo Mkutano v Mukutano Mwamboje* (*supra*), the court held that Section 28 of the *Land Registration Act* recognizes spousal rights over matrimonial property and was required before a spouse can sell matrimonial property absence of which the sale becomes null and void.



46. In this appeal, the 2nd respondent describes herself as an innocent purchaser for value without notice. In *Torino Enterprises Limited v Attorney General* (2023) KESC KESC 79 KLR, *Dima Limited v County Government of Mombasa & 5 others* (2023) KESC 30 KLR and *Fanikiwa Limited v Dirikwa Squatters Group & 95 others* (2021) KECA 307 (KLR), the court held that due diligence includes doing more than a mere official search, including visiting the suitland to establish who was in occupation. The 2nd respondent relied on a neighbour, the appellant and his son. There is no evidence that she did more prodding to ascertain the marital status of the appellant. Spousal consent is admitted that it was not sought or procured before the sale agreement, subdivision and transfer were effected. It was not enough to involve the son of the 1st respondent in the transaction.
47. The appellant knew that he had two wives, yet none was involved in the transaction. He also knew the beneficial interest of the 1st respondent in the matrimonial property. Similarly, the 2nd respondent cannot feign ignorance of the law. There is no evidence consideration that the 2nd respondent followed all the legal processes towards the acquisition of the suit land free of any fraud. The 2nd respondent's counterclaim was not verified as required under Orders 4 & 7 of the *Civil Procedure Rules*. The land control board consent dated 20.2.2020 has no consideration indicated as alleged by the 2nd defendant. In the absence of spousal consent, making the sale agreement between the appellant and the 2nd respondent null and void, I find that the 2nd respondent could not have been entitled to an equitable relief of specific performance.
48. The upshot is that I find the appeal lacking merits. The trial court was in error to disallow prayer number (2) of the plaint dated 3.9.2020. This being a family matter, the 1st respondent is awarded half the costs of this appeal.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 8TH DAY OF MAY, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu

No appearance

