



**Kimona v Muthee & 3 others (Environment and Land Appeal  
E011 of 2022) [2024] KEELC 6744 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6744 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND APPEAL E011 OF 2022**

**TW MURIGI, J**

**OCTOBER 9, 2024**

**BETWEEN**

**VINCENT MUASYA KIMONA ..... APPELLANT**

**AND**

**JOHN KIMONA MUTHEE ..... 1<sup>ST</sup> RESPONDENT**

**VERONICA NDUUME KIMONA ..... 2<sup>ND</sup> RESPONDENT**

**ANGELINA NDAWA MUTUKU ..... 3<sup>RD</sup> RESPONDENT**

**IMMACULATE MUENI MUTUKU ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. By a Memorandum of Appeal dated June 16, 2022, the Appellant appealed against the Judgment of Hon. J. N Mwaniki delivered on the 8<sup>th</sup> June 2022, in Makueni MCELC No. E021 of 2021 and set out eleven grounds of Appeal.

**Background**

2. The Respondents had sued the Appellant by way of a Plaint dated 9<sup>th</sup> February, 2021 seeking the following orders:-
  1. A declaration that the 1<sup>st</sup> Plaintiff, John Kimona Muthee is the sole proprietor of land parcel No. Ukia/Kilala/473.
  2. A declaration that the Defendant is illegally registered as the sole proprietor of land parcel No. Ukia/Kilala/473.
  3. A declaration that the Defendant holds title No. Ukia/Kilala/473 as trustees for the Plaintiffs.



4. An order of rectification of the register by cancelling the Defendant's name from the register for land parcel No. Ukia/Kilala/473 as the proprietor and be replaced with that of the 1<sup>st</sup> Plaintiff John Kimona Muthee.
  5. Any other relief deemed fit to grant by the Honourable Court.
  6. Costs and interest of the suit at court rates.
3. The Defendant filed a statement of defence on 26<sup>th</sup> February 2021 denying the Plaintiffs' claim.
  4. The Plaintiffs filed a reply to the defence on 15<sup>th</sup> March 2021 in which they reiterated the contents of the Plaint.
  5. After the trial, the Learned Trial Magistrate delivered his judgment on 8<sup>th</sup> June, 2022 in the following terms:-
    1. A declaration be and is hereby made that the Defendant is illegally registered as the sole proprietor of land No. Ukia/Kilala/473.
    2. An order be and is hereby issued to the Land Registrar, Makueni to rectify the register for land No. Ukia/Kilala/473 by cancelling the Defendant's name from the register and replacing it with that of the first Plaintiff John Kimona Muthee as the owner.
    3. Costs of the suit to the Plaintiffs.
  6. The Appellant being dissatisfied with the Learned Trial Magistrate's judgment filed this Appeal vide the Memorandum of Appeal dated 16<sup>th</sup> June 2022 on the following grounds: -
    1. The Learned Chief Magistrate erred in law and fact in failing to find that L.R No. Ukia/Kilala/473 (the suit land) was gifted to the Appellant by the 1<sup>st</sup> Respondent voluntarily.
    2. The Learned Chief Magistrate erred in law and fact in holding that the process of transfer of the suit land by the 1<sup>st</sup> Respondent to the Appellant was shrouded in secrecy contrary to the evidence adduced.
    3. The Learned Chief Magistrate erred in law and fact in finding that the Appellant had not proved the exceptions to the sanctity of his title to the suit land contrary to the evidence adduced.
    4. The Learned Chief Magistrate misdirected himself in law by basing his judgment on his personal opinion rather than the evidence adduced.
    5. The Learned Chief Magistrate erred in law and fact in not finding that there was no fraud or illegality that was proved against the Appellant.
    6. The Learned Chief Magistrate erred in law and fact in not holding that there was no theft or forgery of any documents proved against the Appellant.
    7. The Learned Chief Magistrate erred in law in writing a shallow judgment that failed to respond to the issues raised by the Appellant.
    8. The Learned Chief Magistrate erred in law in failing to formulate and analyze any issues for determination in his judgment and by disregarding the issues raised by the Appellant.
    9. The Learned Chief Magistrate erred in law in making a declaration that the Appellant was illegally registered as the proprietor of the suit land against the weight of the evidence adduced.



10. The Learned Chief Magistrate misdirected himself by treating the evidence of the Appellant with triviality and by wholly disregarding the said evidence.
11. The Learned Chief Magistrate misdirected himself in relying on extraneous matters and his judgment and orders are against the pleadings, submissions and the law.
7. The Appellant prays for: -
  - a. That this Appeal be allowed and the judgment of the trial court be set aside.
  - b. That the costs of this Appeal and in the court below be borne by the Respondent.
8. Parties agreed to canvass the appeal by way of written submissions.

### **The Appellants Submissions**

9. The Appellant filed his submissions dated 9<sup>th</sup> May, 2024. On his behalf, Counsel condensed the grounds of Appeal into three grounds. On ground No. 1 and 2 of the Appeal, Counsel submitted that the Learned Trial Magistrate failed to expound the circumstances that led to the finding that the transfer of the suit land to the Appellant was fraudulent and shrouded in secrecy.
10. Counsel submitted that the Learned Trial Magistrate did not interrogate the aspect of the suit property being a gift inter vivos despite the Appellant's witnesses having confirmed that the 1<sup>st</sup> Respondent gifted the suit property to the Appellant. Counsel further submitted that the Learned Trial Magistrate relied on the evidence of the Land Registrar. Counsel submitted that the Trial Magistrate took issue with the transfer form and held that it could not ascertain the mode of transmission.
11. Counsel argued that the transfer forms were executed by both the Appellant and the 1<sup>st</sup> Respondent and that the stamp duty was duly paid. Counsel further submitted that the 1<sup>st</sup> Respondent obtained consent from the Land Control Board to transfer the suit property to the Appellant. In addition, Counsel added that the local chief confirmed to the Land Registrar that the 1<sup>st</sup> Respondent had gifted the suit property to the Appellant.
12. Counsel contended that the particulars of fraud enlisted in the plaint were not proved or addressed by the court.
13. With regards to ground No. 3,5 and 6 of the Appeal, Counsel submitted that the Appellant's title is protected under Section 26 of the [Land Registration Act](#) and as such, the turnaround by the 1<sup>st</sup> Respondent should not be construed as an exception under the said provision.
14. With regards to ground No. 4,7,8,9 and 10 of the Appeal, Counsel submitted that the Learned Trial Magistrate failed to address himself on the issues raised by the Appellant in his submissions. Counsel argued that the judgment does not conform with the mandatory requirements of Order 21 Rule 4 and 5 of the Civil Procedure Rules. Counsel took issue with the trial court's finding at page 149 line 19 of the Record of Appeal where the Learned Magistrate stated as follows in part:

“I don't think the first Plaintiff would transfer or even gift the Defendant the land in the circumstances of the case.”
15. Counsel questioned the circumstances that the Learned Trial Magistrate was referring to and argued that the Respondents' did not prove their case to the required standard. Counsel contended that the judgment contains assumptions and unsupported personal opinions of the Learned Trial Magistrate.



16. Concluding his submissions, Counsel urged the court to allow the Appeal as prayed. To buttress his submissions, Counsel relied on the case of *In re Estate of Godana Songoro Guyo (Deceased)* [2020] eKLR.
17. As at the time of writing this judgment, the Respondents had not filed their submissions as directed.

### **Analysis And Determination**

18. This being a first Appeal, this Court has a duty to evaluate, assess and analyse the evidence on record and make its own decision. The principles which guide a first Appellate Court were discussed in the case of *Selle & Another v Associated Motor Boat Company and Others* [1968] 1 EA 123 where the Court of Appeal set out the duty of Appellate Courts as follows;

“An appeal to this court from a trial court by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate itself and drive its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanour of a witness is inconsistent with the evidence in the case generally.”

19. Similarly, in the case of *Ephantus Mwangi & Another v Duncan Mwangi* [1982-1988] 1 KAR 278 the Court of Appeal held that;

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

20. In the proceedings before the lower Court, the Appellant was the Defendant while the Respondents were the Plaintiffs.
21. PW1 John Kimona Muthee testified that he is the registered proprietor of the suit property. It was his testimony that the 2<sup>nd</sup> Plaintiff is his wife while the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are his daughters and that the Defendant is his grandson. He denied having sold or gifted the suit property to the Defendant and added that their matrimonial home was situated within the suit property.
22. He testified that he was very old, sickly and that he could not see. That after he realized that the original title for the suit property had been replaced with a scanned copy, he conducted a search on 15/01/2021 and discovered that the suit property was illegally and fraudulently transferred to the Defendant. That on 02/02/2021 he reported the matter to Makeni Police station through his daughter the 3<sup>rd</sup> Plaintiff herein. He testified that the Defendant fraudulently caused the suit property to be registered in his name and explained that if at all he had transferred the suit property to the Defendant, he would have returned the title deed which was not the case here.
23. He insisted that the Defendant was issued with the title for the suit property through fraud, forgery and misrepresentation of information. He denied obtaining consent from the Land Control Board to transfer the suit property to the Defendant. He denied having married his daughter Patricia Ndunge and asserted that she returned home after her marriage to David Mavindu failed. He argued that if at



- all he had gifted the suit property to the Defendant, he would have informed his family as he did when he gifted his land to his daughter Angelina Ndawa Mutuku.
24. On cross examination, he denied attending the Land Control Board or affixing his thumb print on any document at the Land Control Board.
  25. PW2, Angelina Ndawa Mutuku testified that she is a daughter to PW1 and PW2. She echoed the evidence of PW1.
  26. On cross examination she testified that the 1<sup>st</sup> Plaintiff was residing with her on her land and denied kidnapping him or poisoning his mind to say that he never gifted the suit property to the Defendant. She denied the allegations that her father gifted the suit property to the Defendant.
  27. On re-examination she testified that her father went to stay with her in her home on 7/10/2020 and insisted that he was in her home on 19/11/2020 when he was alleged to have transferred the suit property.
  28. PW3 Pius Musau Kakuta testified that he was a neighbour and close family friend of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Plaintiffs. He testified that the Defendant's mother Patricia Ndunge returned to her parents' home after her marriage to David Nzivo Mavindu failed to work out. It was his testimony that no customary rituals were performed to officiate the marriage between the 1<sup>st</sup> Plaintiff and the Defendant and that same is prohibited under the Kamba customary law.
  29. PW4 Stephen Katua Munyao testified that he is the National Secretary of Ekuna Mba Ivia clan. He testified that under the Kamba customary law it is prohibited for one to marry his own daughter. He stated that an unmarried single mother could pay dowry to her parents to open up dowry payments for her children. He denied that there was a marriage ceremony between the 1<sup>st</sup> Plaintiff and Patricia Ndunge.
  30. PW5 Samuel Maina the Land Registrar based at Makueni Land Registry testified that the suit property, initially registered in the name of the 1<sup>st</sup> Plaintiff, was on 8/12/2020 transferred to the Defendant. That as per the transfer form, the consideration for the suit property was a gift but was cancelled in biro to indicate Kshs 40,000/= as purchase price. He stated that according to the letter of consent the suit property was a gift. That the transfer was based on a gift and the payment of Kshs 40,000/= was for stamp duty.
  31. On cross examination he testified that the transfer process was not fraudulent and added that he would not know if the transferor was accompanied by a member of the family to the board or whether the thumb print belongs to the transferor.
  32. The Defendant testified as DW1 and called three witnesses in support of his case. It was his testimony that the 1<sup>st</sup> Plaintiff married his mother Patricia Ndunge in September 2017 under the Kamba customary law.
  33. That in the year 2018, his father called him together with his mother and told them that his mother was the custodian of all his properties and gave her the suit property. That in the year 2020, his grandfather instructed him to go to the lands office to collect all the documents necessary to effect the transfer as he wanted to transfer the suit property to him and his mother.
  34. He asserted that the 1<sup>st</sup> Plaintiff voluntarily affixed his thumb print on the transfer documents in the presence of his mother. That he attended the Land Control Board together with the 1<sup>st</sup> Plaintiff where he obtained consent to transfer the suit property to him. That after he was issued with a title deed for



- the suit property, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants came and took away the 1<sup>st</sup> Plaintiff from their custody and advised him to change his mind on the transfer of the suit property.
35. He denied obtaining registration of the suit property fraudulently and insisted that the 1<sup>st</sup> Plaintiff transferred the suit property out of his free will.
36. On cross examination he testified that the reason why he should benefit more than the other grandchildren is because the 1<sup>st</sup> Plaintiff takes him as his son and that he has taken care of him since the year 2011. He asserted that due process was followed in effecting the transfer of the suit property to his name. He further testified that they did not inform the other family members about the transfer of the suit property. He confirmed that the 1<sup>st</sup> Plaintiff was suffering from mental issues for four years and was under his care and that of his mother. In cross examination, he stated that the Plaintiff would have illusions, threaten and chase people around with a panga.
37. DW2 Patricia Ndunge testified that the Defendant is her son, while the 1<sup>st</sup> Plaintiff and 2<sup>nd</sup> Plaintiff were her biological parents and that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were her sisters. It was her testimony that in the year 2017, the 1<sup>st</sup> Plaintiff called clan elders and relatives to officiate marriage rituals between her and the 1<sup>st</sup> Plaintiff under the Kamba customary law since he did not have a male child and wanted her to take care of him during his old age.
38. That after the marriage ceremony, her father instructed the Defendant to obtain land transfer documents in a bid to transfer the suit property to the Defendant in her place. She testified that the 1<sup>st</sup> Plaintiff voluntarily affixed his thumb print on the transfer documents in her presence and later appeared before the Land Control Board where he obtained consent to transfer the suit property to the Defendant. That later on the 3<sup>rd</sup> and 4<sup>th</sup> Defendants came and took away the 1<sup>st</sup> Plaintiff from their custody and advised him to change his mind about the transfer of the suit property to the Defendant.
39. DW3 Benjamin Mutuku testified that he officiated the Kamba customary marriage between Patricia Ndunge and the 1<sup>st</sup> Plaintiff. That the purpose of the marriage was to enable her son to take the generation forward as the 1<sup>st</sup> Plaintiff did not have a son.
40. DW4 Peter Maithya Kioko testified that the 1<sup>st</sup> Plaintiff invited his relatives to a marriage ceremony because he did not have male child and wanted Patricia Ndunge not to get married so that she could look after them.
41. Although the Appellants raised eleven (11) grounds of appeal in the Memorandum of Appeal, the Court is of the opinion that the Appeal may conclusively be determined on the following two (2) grounds: -
- i) Whether failure to frame the issues for determination vitiates the judgment.
  - ii) Whether the learned trial magistrate erred in law and fact in making a finding that the Appellant is illegally registered as the sole proprietor of the suit property;

### **Whether failure to frame the Issues for Determination Vitiates The Judgment**

42. The Appellant lamented that the Learned Trial Magistrate erred in law and fact by failing to frame the issues for determination. He further lamented that the learned trial magistrate failed to address himself on the issues that he had raised in his submissions.
43. Order 21 Rules 4 and 5 of the Civil Procedure Rules provides as follows:-



- 4) Judgments in defended suits shall contain a concise statement of the case, the points of determination, the decision thereon, and the reasons for the decision.
- 5) In suits in which issues have been framed, the court shall state its findings or decision with the reasons therefore upon each separate issue.
44. In the case of *Rukidi vs Iguru and Another* [1995-1998] 2 EA 318 the court held that:-
- “Framing of the issues is an important step in the determination of a case as it defines the areas of controversy and narrows down the scope of inquiry. It makes the hearing of the case more focus oriented and saves the time of the court .....”
45. In *Norman vs Overseas Motor Transport (Tanganyika) Limited* Civil Appeal No.88 of 1958 [1959] EA 131 the court held that:-
- “If though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the court and the court decides the point, as if there was an issue framed on it, the decision will not be set aside on appeal on the ground merely that no issue was framed.....”
46. Similarly in the case of *Peter Ngumi Gichoho alias Pete Ngumi Gichoho Ngugi v Ambrose Wanjohi Migwi T/A Migan Hardware Store Nyeri HCCA NO. 138 OF 2003* the court held that:-
- “The deficiency in failing to frame the issues can be corrected by the first appellate court”.
47. In the matter at hand, the learned trial magistrate did not frame the issues for determination which he was enjoined to do under Order 2 Rule 5 of the Civil Procedure Rules. However, this court finds and holds that failure to frame the issues was an irregularity which can be cured in the present appeal.

**Whether the learned trial magistrate erred in law and fact in making a finding that the appellant is illegally registered as the sole proprietor of the suit property**

48. The Appellant faulted the Learned Trial Magistrate for failing to hold that the Respondents did not prove fraud against him and for failing to address himself on the particulars of fraud listed in the Plaint.
49. It is trite law that fraud must be specifically pleaded and proved.
50. In the case of *Vijay Morjaria v Nansing Madhusingh Darbar & Others* [2000] eKLR (Civil Appeal No 106 of 2000) Tunoi JA as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
51. Similarly, in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR the Court of Appeal held that:-
- “...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious



charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”

52. Although the standard of proof is not beyond reasonable doubt it is higher than proof on a balance of probabilities.
53. In Civil cases, the standard of proof is on a balance of probabilities. Section 107 (1) and (2) of the Evidence Act provides as follows:-
- 107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.
- (2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
54. It is clear from the above provisions that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe.
55. The Appellant faulted the court for failing to hold that the 1<sup>st</sup> Respondent gifted the suit property to him but instead held that the transfer process was shrouded in secrecy. He argued that the Respondents did not prove the allegations of fraud nor were the same addressed by the court.
56. At paragraph 15 of the Plaintiff, the Respondents pleaded fraud and set out the particulars of fraud and illegality on the part of the Appellant as follows: -
- a) By illegally transferring the land Parcel No. Ukia/Kilala/473 to himself without any legal authority from the 1<sup>st</sup> Plaintiff.
  - b) By presenting a forged transfer instrument or transfer not attested or no transfer at all at the lands registry.
  - c) By transferring a family land belonging to the 1<sup>st</sup> Plaintiff without seeking consent of the Plaintiffs.
  - d) By purporting to transfer the land Parcel No. Ukia/Kilala/473 without legally procuring consent to transfer from the land control board.
  - e) By secretly stealing the 1<sup>st</sup> Plaintiff's original title deed to land Parcel No. Ukia/Kilala/473.
  - f) By transferring the land Parcel No. Ukia/Kilala/473 to himself without any consideration to the Plaintiffs.
  - g) By conveying the land Parcel No. Ukia/Kilala/473 secretly into his sole name knowing very well that it is a family land.
  - h) Res ipsa loquitur.
57. The Appellant faulted the Learned Trial Magistrate for failing to find that the 1<sup>st</sup> Respondent voluntarily gifted and subsequently transferred to him the suit property. The Appellant contended he was instructed by the 1<sup>st</sup> Respondent to obtain the necessary documents to facilitate the transfer of the suit property and that he affixed his thumb print in the presence of his mother. In this regard, the Appellant produced an undated application for consent (DEX2) and a letter of consent from the Land Control Board dated 19/11/2020 (DEX3).



58. The 1<sup>st</sup> Respondent denied having gifted the suit property to the Appellant and insisted that the Appellant transferred the suit property to himself without his authority and without procuring consent from the Land Control Board. He denied that he attended the Land Control Board or affixing his thumb print on the transfer documents
59. PW2 testified that the 1<sup>st</sup> Respondent was in her home as at the time when the transfer of the suit property was allegedly done. It was the Respondents case that the 1<sup>st</sup> Respondent was very old, sickly and had poor vision.
60. At this juncture this court is called upon to determine whether the 1<sup>st</sup> Respondent had capacity to gift or transfer the suit property to the Appellant. Gift inter vivos are made between living persons. Black's Law Dictionary defines a gift as the voluntary transfer of property to another without compensation. It stipulates the essentials to make a gift as follows:- The donor must have capacity to make the gift; he must have an intention to make it; his intention must be to make it; his intention must be to make it now and not in the future; he must deliver, either actually or constructively...'
61. From the above definition it is clear that the person who makes the gift must have capacity to gift the property and the gift must be perfected.
62. The 1<sup>st</sup> Respondent testified that he was very old, sickly and had poor vision. PW2 testified that her father had been ailing since the year 2017. To corroborate their evidence, the Respondents relied on the medical treatment cards and the medical report dated 31/10/2020 by Dr. Kokonya, Consultant Psychiatrist. The medical report by Dr. Kokonya shows that the 1<sup>st</sup> Respondent was suffering from, Dementia stage 5 (moderately severe cognitive decline) & anxiety. In his report, Dr Kokonya opined as follows:-
- “ This patient was found on assessment to lack the requisite capacities to make valid decisions due to deterioration in his vision, physical and mental health”.
63. The Defendant admitted in cross examination that the 1<sup>st</sup> Respondent had developed mental issues for four years and was under his care and that of his mother. He stated that the 1<sup>st</sup> Respondent would have illusions and would chase people around with a panga. He produced a letter dated 6<sup>th</sup> March 2018 by the Chief Kilala location. In the said letter, the Chief stated as follows in part:-“The above named John Kimona Muthee developed mental complications four years ago and was under the care of his grandson Mr. Vincent Muasya Kimona who takes care of both his grandparents and his mother.”
64. From the foregoing it is evident that the 1<sup>st</sup> Respondent was suffering from a mental condition.
65. The medical report of Dr. Kokonya was not challenged in any way. This therefore means that the 1<sup>st</sup> Respondent had no capacity to gift or transfer the suit property as he was mentally impaired and or lacking in capacity. Going by the report of Dr. Kokonya, it is crystal clear that the 1<sup>st</sup> Respondent did not have the requisite mental capacity to transfer the suit property.
66. The 1<sup>st</sup> Respondent testified that their matrimonial home is situated on the suit property and that he has no other land. His evidence was corroborated by PW2.
67. At paragraph 7 of the Plaint, the Respondents pleaded as follows:-
- “The Plaintiffs state that the only matrimonial home for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs is on land parcel No. Ukia/Kilalal/ 473”.



68. At paragraph 5 of the statement of Defence, the Defendant admitted that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' matrimonial home was situated within the suit property. The 2<sup>nd</sup> Respondent asserted that they were not aware that the 1<sup>st</sup> Respondent had gifted the suit property to the Defendant. The Appellant admitted that the other family members were not aware of the transfer of the suit property since 1<sup>st</sup> Respondent signed the transfer documents in the presence of his mother.
69. It is not in dispute that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents matrimonial home is on the suit property. Matrimonial property is defined in Section 6 of the *Matrimonial Property Act* as follows:-
- “For purposes of this Act, matrimonial property means-
- (a) the matrimonial home or homes;
  - (b) household goods and effects in the matrimonial home or homes; or
  - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage
70. The suit property is therefore matrimonial property within the meaning of Section 6 of the *Matrimonial Property Act*. Having found that the suit property is matrimonial property this court is called upon to determine whether spousal consent was a requirement to effect the transfer of the suit property to the Appellant.
71. The requirement for spousal consent was introduced by the *Land Registration Act* which came into force on 02/05/2012. Section 28 of the *Land Registration Act* recognizes spousal rights over matrimonial property as an overriding interest. No evidence was adduced to show that the 1<sup>st</sup> Respondent obtained spousal consent in order to gift the suit property to the Appellant. The purported gift having been made during the subsistence of the marriage was made without the spousal consent which made the gift invalid.
72. As rightly submitted Counsel for the Appellant, the sanctity of title to land is protected under Section 26 of the *Land Registration Act* 2012. It is trite law that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property and can only be impeached under circumstances spelt out in Section 26 (1) of the *Land Registration Act*, which provides as follows;
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-
- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
73. Having found that the 1<sup>st</sup> Respondent did not have the mental capacity to transfer the suit property, and having found that spousal consent had not been obtained, this court finds and holds that the suit property was irregularly transferred to the Appellant.



74. In end, I find that the Appeal is devoid of merit and the same is hereby dismissed. As the parties herein are closely related, I direct that each party bears its own costs.

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**HON. T. MURIGI**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 9TH DAY OF OCTOBER, 2024.**

In The Presence Of:

Kinyanjui present for the Appellant.

Kithuka present for the Respondents.

Court assistant Steve.

