



REPUBLIC OF KENYA



KENYA LAW
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**Alucho & another v Shisumu (Environment and Land Appeal
E022 of 2023) [2025] KEELC 4367 (KLR) (21 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4367 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E022 OF 2023**

**A NYUKURI, J
MAY 21, 2025**

BETWEEN

NOAH SHISUMU ALUCHO 1ST APPELLANT

LIVINGSTONE AMBALE RUFUS 2ND APPELLANT

AND

DORIS NOAH SHISUMU RESPONDENT

JUDGMENT

1. This Appeal filed by Noah Shisumu Alucho and Livingstone Ambale Rufus challenges the judgement of Honourable Z.J Nyakundi, (SPM) delivered on 4th September, 2023 in Kakamega MCLE No. E29 of 2020. In the impugned judgment, the learned trial magistrate found that the respondent herein was the wife of the 1st appellant; that her consent was paramount before the sale of parcel of land known as Butsotso/Shikoti/17670 (suit property) and that the transfer of the suit property to the 2nd appellant was irregular and unlawful for want of spousal consent.

Background

2. By a plaint dated 12th October, 2020, Doris Noah Shisumu Alucho sued Noah Shisumu Alucho and Livingstone Ambale Rufus seeking the following orders;
 - a. Cancellation of the transfer of land parcel number Butsotso/Shikoli/17670 from the 1st defendant to the 2nd defendant.
 - b. Declaration that the land sale agreement between the 1st and 2nd defendants is null and void since it failed to comply with provisions of the [Land Act](#) and [Land Registration Act](#) No. 3 of 2012.
 - c. Costs of this suit.



- d. Any other order that the Honourable court may deem fit to grant.
3. The plaintiff averred that she was the 1st defendant's wife and that they had been blessed with children. She stated that together with the 1st defendant, they purchased the parcel of land known as Butsotso/Shikoti/17670 which had previously been part of the parcel known as Butsotso/Shikoti/1310 from one Joram Shiselo. That the plaintiff and 1st defendant established their matrimonial home on the suit property having been assisted by the plaintiff's children to put up a house on the suit property.
 4. She also stated that in 2014, there were matrimonial differences between the plaintiff and the 1st defendant which forced the plaintiff out of the matrimonial home, leaving her children there. That the 1st defendant transferred the suit property to the 2nd defendant and the latter chased away the plaintiff's children from the alleged matrimonial property. The plaintiff denied giving her spousal consent for the transfer of the suit property which she insisted, constituted matrimonial property.
 5. In a defence dated 4th February, 2021, the defendants admitted that the plaintiff was the 1st defendant's wife and that they had been blessed with children. The 1st defendant however denied allegations that the suit property was jointly purchased with the plaintiff or that the same was matrimonial property requiring the plaintiff's consent for disposal. The 1st defendant maintained that the plaintiff deserted her matrimonial home in Shimanyiro and stated that the sale of the suit property to the 2nd defendant was lawful.
 6. The matter proceeded for hearing by way of oral testimony. Witnesses adopted their witness statements as their evidence in chief before being subjected to cross-examination. The plaintiff presented one witness while the defence presented two witnesses.

Plaintiff's evidence

7. The plaintiff testified that being the 1st defendant's wife, they jointly acquired the suit property by purchase but that the same was sold to the 2nd defendant without her consent which was required as she was the 1st defendant's spouse. In cross-examination she stated that the land belongs to her, the 1st defendant and their children and that the 2nd defendant is the 1st defendant's brother. She stated that she had been on the suit property since 1971 when she got married to the 1st defendant and that the 2nd defendant got on the land in August, 2020. She further stated that she contributed in building the house on the suit property. That marked the close of the plaintiff's case.

Defendants' evidence

8. DW1 was Noah Shisumu Alucho the 1st defendant. His testimony was that the plaintiff was his estranged wife and that she left home on her own volition in 2013. He stated that he purchased the suit property in 1988 from one Sarah as the same had been registered in the name of Malagu Tsuma Kumbo Sarah's deceased husband. That he sold the land on 19th December, 2013 to the 2nd defendant and that he bought another parcel in shiasasali where he relocated. He maintained that he had a matrimonial home with the plaintiff at Shimanyiro where his ancestral land is and where he has built a house for one of their sons. He insisted that the suit property is not a matrimonial property.
9. On cross-examination, he stated that he built a house on the suit property and that he has no family. He denied the fact that the plaintiff was his wife and stated that he has no children with the plaintiff. He stated that the plaintiff lives with her husband and children.



10. DW2 was Rufus Livingstone the 2nd defendant. His testimony was that he knows the 1st defendant very well and that the latter sold him the suit property. That the suit property was subject of succession proceedings and that he lawfully obtained registration.
11. On cross-examination, he stated that there was a house on the land when he purchased it. That marked the close of the defence case.
12. Upon considering pleadings, evidence and submissions, the trial court found that the plaintiff was the 1st defendant's wife and that the latter could not sell the suit property without the plaintiff's consent hence the sale to the 2nd defendant was irregular and unlawful. On that basis, the learned trial magistrate allowed the plaintiff's claim.
13. Aggrieved with the findings of the trial court, the appellants herein appealed against the same vide a Memorandum of Appeal dated 19th September, 2023 citing the following three grounds;
 - a. That the honourable trial magistrate erred in law and fact in ordering cancellation of the transfer of land parcel Butso/So/Shikoti/17670 from 1st appellant to the 2nd appellant when in fact documents on record show that there was no such transfer of the said land from the 1st defendant (now 1st appellant) to 2nd defendant (now 2nd appellant).
 - b. That the trial magistrate erred in law and fact and arrived at his erroneous verdict against the evidence on record and relied on extraneous matters.
 - c. That the trial magistrate erred in law and fact in annulling the land sale agreement dated 19.12.2013 between the 1st appellant and 2nd appellant when there was no proof of fraud or misrepresentation where there was no such fraud or misrepresentation pleaded nor proved and when in fact the sale was for a different land parcel.
14. Consequently, the appellant sought for orders that the appeal be allowed and the trial court's judgment be set aside with costs to the appellant.
15. The appeal was canvassed by way of written submissions and on record are appellant's submissions dated 2nd October, 2024 as well as the respondent's submissions dated 10th February, 2025.

Appellants' submissions

16. Counsel for the appellants submitted in regard to grounds one and two of the appeal that the green card produced in evidence showed that the 2nd appellant was the registered proprietor of the suit property and that at no time was the 1st appellant the registered proprietor thereof. Further that the transfer was from one Johnstone Kulundu Mukubi and that hence by ordering the cancellation of transfer by the 1st appellant when none existed, the trial court issued orders in vain as Johnstone Kulundu Mulubi was not a party to the lower court proceedings.
17. It was further argued for the appellants that the trial court relied on extraneous matters of fraud and misrepresentation in arriving at its conclusions, when in the respondent's plaint fraud and misrepresentation were not pleaded counsel cited the cases of Kuria Kiarie & 2 Others v Sammy Magero [2018] eKLR and Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR to buttress their argument.
18. Regarding the 3rd ground of appeal, counsel submitted that the trial court was wrong in nullifying the agreement between the 1st and 2nd appellants as there was no evidence of fraud or misrepresentation.



Respondent's submissions

19. Counsel for the respondent submitted that the respondent filed the suit before the subordinate court to stop the 1st appellant from transferring her matrimonial home to the 2nd appellant on the basis that no spousal consent for such transfer had been given by the respondent and therefore the sale agreement between the 1st and 2nd respondent was unlawful as the suit property was matrimonial home.
20. Counsel submitted that the fact that the 1st appellant permitted and directed the family of Kombo Tsuma to transfer the suit property to the 2nd appellant did not exonerate him from obtaining the respondent's spousal consent.
21. Supporting the trial court's findings, the respondent's counsel submitted that the transfer to the 2nd appellant was done without spousal consent, hence the same was null and void. Regarding the transfer of the suit property from Johnstone Kulundu Mukubi to the 2nd appellant, counsel submitted that the same was by the 1st appellant's permission. Reliance was placed on Section 28(a) of the [Land Registration Act](#) for the proposition that spousal rights over matrimonial property is overriding interest on registered land hence the 1st appellant could not lawfully enter into a sale agreement with the 2nd appellant without spousal consent of the respondent.
22. Counsel submitted that the respondent produced pictures showing that the suit property was her matrimonial home. The court was referred to Kajiado HC Civil Case no. 11 of 2018(OS) where the High court held that a matrimonial home should be protected from disposal by either of the spouses without the consent of the other spouse.

Analysis and determination

23. This court has carefully considered the appeal, parties' rival submissions and the entire record. This being a first appeal, the duty of this court is to reconsider and re-assess the record and conclusions arrived at by the trial court and decide whether the same should stand or not and give reasons either way.
24. In the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, the Court of Appeal discussed the duty of the first appellate court as follows;

“An appeal to this court from a trial 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 consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
25. From the pleadings it is clear that the dispute herein is that the respondent who is undeniably the wife of the 1st appellant and with whom they have children, did not give spousal consent allowing the 1st appellant to sell the suit property to the 2nd appellant and that therefore the sale and the transfer thereof are both unlawful because the suit property is matrimonial property.
26. The appellants in their pleadings confirmed the existence of the marriage between the respondent and the 1st appellant, did not deny the respondent's assertion that no spousal consent was given, but insisted that the suit property was not matrimonial property and that therefore there was no requirement for spousal consent before its sale. Therefore, the issues for this court's determination are whether the suit property is matrimonial property, whether the respondent contributed to the acquisition thereof and whether the sale thereof required the respondent's spousal consent.
27. Before this court embarks on determining the above issues to ascertain whether the trial magistrate made a proper finding on the evidence and the law, it must first be satisfied that it has the requisite



jurisdiction to hear and determine the issues raised in the appeal because section 78 of the Civil procedure Act clothes this court with similar powers as those of the trial court, even as it exercises its appellate jurisdiction. Thus, this court can only deal with appeals in matters that fall within its jurisdiction. Therefore, the question that ought to be addressed is whether this court being an Environment and land court has jurisdiction to determine the issue as to whether or not the suit property is matrimonial property, whether the respondent contributed in the acquisition thereof and whether the respondent's consent was necessary before sale and transfer of the same.

28. Jurisdiction is the power of the court to determine a dispute. Jurisdiction is everything, hence before a court undertakes the determination of a dispute, it must first be satisfied that it has the requisite jurisdiction to hear and determine the same. In the case of Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited [1989] KLR 1, the court stated as follows;

"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings."

29. The jurisdiction of a court flows from the Constitution or statute or both and a court cannot arrogate itself jurisdiction it does not have. In the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others (2012) e KLR the Supreme Court of Kenya stated as follows;

"A court's jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

30. The jurisdiction of this court is to hear and determine matters relating to the environment and use of and occupation, and title to land. The jurisdiction of this court is provided for in Article 162 (2) (b) of the Constitution of Kenya as read with section 13 of the Environment and Land Court Act which provide as follows;

Article 162 (2) (b) of the Constitution of Kenya provides that;

"Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

- a.
- b. The environment and the use and occupation of, and title to, land."

Section 13 of the Environment and Land Court Act provides that;

"Jurisdiction of the Court



(1)	The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of <u>the Constitution</u> and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
(2)	In exercise of its jurisdiction under Article 162(2)(b) of <u>the Constitution</u> , the Court shall have power to hear and determine disputes—
(a)	relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
(b)	relating to compulsory acquisition of land;
(c)	relating to land administration and management;
(d)	relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and



(e)	any other dispute relating to environment and land.”	
(a)	relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;	
(b)		relating to compulsory acquisition of land;
(c)	relating to land administration and management;	
(d)		relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
(e)	any other dispute relating to environment and land.”	

31. Does the dispute herein relate to use of and occupation, and title to land? I do not think so. On one hand, the respondent claimed that the suit property was matrimonial property which she contributed in the acquisition thereof, and whose sale and or transfer required her spousal consent arguing that the sale thereof by the 1st appellant to the 2nd appellant was unlawful for want of spousal consent. On the other hand, the 1st respondent confirmed the existence of the marriage between him and the respondent but maintained that the suit property is not matrimonial property, hence as indicated earlier in this judgment, the issues in dispute are whether the suit property is matrimonial property; whether spousal consent was necessary before sale and transfer thereof and whether the sale between the 1st and 2nd appellants was unlawful for want of spousal consent.

32. Section 2 of the *Matrimonial Property Act* define matrimonial home as follows;

“Matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;”

33. Section 6 of the same Act defines Matrimonial property as follows;



Meaning of matrimonial property

1. For the 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
34. Regarding ownership of matrimonial property, Section 7 of the said Act vests ownership thereof in the spouses in accordance to each spouse's contribution and provides as follows;

7. Ownership of matrimonial property

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

35. On the requirement for spousal consent, section 12 (1) of the Act provides for the requirement of spousal consent before alienation of matrimonial property as follows;

Special provisions relating to matrimonial property

1. An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.
36. Regarding jurisdiction and procedure, section 17 of the Act provides for actions for declaration of rights to matrimonial property as follows;

Action for declaration of rights to property

- (1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
 1. An application under subsection (1)—
 - a. Shall be made in accordance with such procedure as may be prescribed;
 - b. May be made as part of a petition in a matrimonial cause; and
 - c. May be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.
37. Rule 6 of the Matrimonial Property Rules ([Legal Notice 137 of 2022](#)) provides for the courts with jurisdiction to determine a matrimonial disputes as follows;
6. Court to which application may be made
 1. An application to enforce a claim relating to matrimonial property may be made in any proceedings under the Act—
 - a. To the High Court in any case where the value of the matrimonial property which is the subject matter of the claim exceeds the pecuniary jurisdiction of a magistrate's court; or



- b. To a magistrate's court having civil jurisdiction to adjudicate matters within the court's pecuniary jurisdiction.
2. Where the spouses profess the Muslim faith, the court to which an application is made may, on the request of the parties, be guided by Muslim law.
38. Concerning institution of claim on matrimonial property, Rule 7 (4) (e) of the said rules provides for institution of a claim for cancellation of transfer or other disposition of matrimonial property.
39. Therefore, where the question of ownership of matrimonial property is raised, the trial court must consider each spouse's contribution, and where a spouse seeks relief for cancellation of title in a disposition by their spouse during the subsistence of the marriage, they ought to file their claim in the Magistrates court, where the value of the subject matter falls within the pecuniary jurisdiction of the Magistrates court and where it exceeds such pecuniary jurisdiction, such matrimonial dispute ought to be filed in the High court.
40. In view of the above provisions and more particularly by dint of the provisions of Rules 6 and 7 of the Matrimonial Property Rules 2022, the claim herein being a contest regarding matrimonial rights and the legality of the sale and transfer of the suit property by the 1st appellant to the 2nd appellant for want of spousal consent, I find and hold that the same is a claim within the jurisdiction of the Magistrates court and the High court. In view of the delineation of this court's jurisdiction provided in Article 162 (2) (b) of *the Constitution* of Kenya as read with section 13 of the *Environment and Land Court Act*, I find and hold that this court has no jurisdiction to hear and determine this appeal, which I hereby strike out. As the parties herein are related by marriage, I make no order as to costs.
41. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 21ST DAY OF MAY, 2025.

A. NYUKURI

JUDGE

In the presence of;

Mr. Getanda for the appellant

Mr. Orute holding brief for Mr. Manyoni for the respondent

Court Assistant: M. Nguyai

