



**VAL & another v JL & another; Kiptogom (Plaintiff to the Counterclaim);
Lemarleni (Defendant to the Counterclaim) (Environment & Land Case
E001 of 2023) [2025] KEMC 11 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEMC 11 (KLR)

**REPUBLIC OF KENYA
IN THE MARALAL LAW COURTS
ENVIRONMENT & LAND CASE E001 OF 2023
AT SITATI, SPM
FEBRUARY 6, 2025**

BETWEEN

VAL 1ST PLAINTIFF

MARTIN RANDIN KIPTOGOM 2ND PLAINTIFF

AND

JL 1ST DEFENDANT

MARTIN RANDIN KIPTOGOM 2ND DEFENDANT

AND

MARTIN RANDIN KIPTOGOM PLAINTIFF TO THE COUNTERCLAIM

AND

VERONICAH ASILIA LEMARLENI . DEFENDANT TO THE COUNTERCLAIM

JUDGMENT

Pleadings

1. By a plaint dated 15th February, 2023 verified by an affidavit of similar date, the plaintiff prayed for the following reliefs:
 1. A declaration that the sale agreement dated 21st November, 2022 disposing of the suit property being PLOT 5XR Suguta Marmar Trading Centre was unlawful and therefore null and void.
 2. A permanent injunction restraining the Defendants whether by themselves, their agents, servants and/or employees or anyone under them from entering, remaining in, trespassing, collecting rent or otherwise howsoever dealing with the property known as Commercial Plot



no. 5XR Suguta Marmar Trading Centre, in any manner whatsoever interfering with the plaintiff's quest enjoyment, possession and/or ownership of the said property.

3. Such other or further relief that this Honourable court may deem fit and just to grant.
4. Costs and interest of the suit.
2. Accompanying the plaint were: Written witness statement of the plaintiff dated 14th February, 2023. List and bundle of documents containing the following exhibits to be produced in evidence: Allotment letter A bundle of birth certificates for the children of the marriage of the plaintiff and 1st defendant A bundle of birth notifications for the children of the marriage of the plaintiff and 1st defendant Land sale agreement dated 21st November, 2022 Bank account transfer receipt dated 22nd November, 2022.
3. There was an interlocutory application under a certificate of urgency for various injunctive reliefs that was expedited at the temporary stage.
4. The 1st Defendant filed a Statement of Defence dated 11th April, 2023 in which he prayed for the dismissal of the plaint. In summary, he pleaded that he was the sole registered owner and had sold the plot to the 2nd defendant and had received the purchase price. Accompanying the defence, the 1st defendant lodged the following: 1st defendant's written witness statement (undated) List and bundle of documents containing Plot allotment letter Land sale agreement Bank receipt
5. The 2nd Defendant lodged a Statement of Defence and Counterclaim dated 3rd May, 2023. In the Statement of Defence, the 2nd Defendant prayed for the dismissal of the Plaint with an alternative prayer for the prayer that:
 - a. In the alternative, the 1st Defendant be compelled to refund to the plaintiff in the counterclaim the entire amount of the purchase price plus KES 500, 000/- the 2nd Defendant used to improve the property plus the entire interest payable capable of repaying the loan advanced to him by Equity Bank for purposes of purchasing the property.

In the Counterclaim the 2nd Defendant/Counterclaimant prayed for :-
 - b. The counterclaim be upheld.
 - c. A declaration to issue that the sale and/or conveyance of the property known as Plot no. 52R Suguta Marmar to the 2nd defendant (plaintiff in the counterclaim) was proper.
 - d. An order of specific performance directing JL (the 1st defendant in the main suit) to finalize the sale and transfer of the subject plot of land by procuring and availing the requisite completion documents to the plaintiff in the counterclaim, failure of which the relevant department of the Samburu County Government to issue ownership documents to the property known as Plot No. 52R Suguta Marmar in the name of Martin Randin Kiptogom.
 - e. The defendant in the counterclaim be ordered to pay for the costs of the suit plus interest until payment in full.
6. Accompanying the Defence and Counterclaim were:
 1. List and bundle of exhibits containing:
 - a. Copy of Sale agreement between the 1st defendant and another (AMU).
 - b. Copy of Sale agreement dated 21/11/2022.



- c. Copy of Plot allocation letter dated 25/02/2019.
 - d. Copy of Offer Letter/letter of Acceptance from Equity Bank.
 - e. Copy of account transfer of KES 2million.
 - f. Copy of letter dated 30/12/2022 from Letare B. & Co. Advocates.
2. Encumbrance placed on the plot by the plaintiff.
 3. List and bundle of exhibits containing the written witnesses' statement of the 2nd defendant, Simon Tianti Leratia and Benson Kamau.
7. The firm of Kiriaku & Company Advocates represented the Plaintiff while the firm of Kihoro Kimani & Associates represented the 2nd Defendant/Plaintiff in the Counterclaim.

2. The Plaintiff's Case

8. On 8th June, 2023 and 22nd June, 2023 the plaintiff VAL testified by adopting her written witness statement. By it she told the court that she got married to the 1st plaintiff in 2004 and bore him 5 children. She added that she cohabited with him in the subject plot and assisted in the development of the same with rental units. She added that she did not consent to the sale to the 2nd defendant. She produced the above-listed exhibits.
9. In cross-examination by Mr. Kihoro Advocate, the following came to light: Plot 5XR was registered in the name of the 1st defendant only; the 1st Defendant is the husband of the plaintiff; by the time that the plaintiff got married to the 1st defendant he was already married with his first wife who had borne him children; the plaintiff and her husband (1st defendant J) jointly constructed the plot in the year 2004; after construction, she ran a business in the plot although she brought no business documents to prove the same; She denied participating in the sale of the plot to one "AMU" and denied knowledge of the transaction as it took place; PW1 had lived in Suguta Marmar for 18 years; M and S were well known to PW1 as the children of her husband (1st defendant) by his first wife; PW1 only learnt much later that the said M and S had witnessed the sale of the plot to one AMU; PW1 was not aware that the 2nd defendant took out a bank loan to finance the plot purchase but was aware that the 2nd defendant paid Kshs 2million to the 1st defendant as purchase price; The 1st defendant husband to the plaintiff did not inform her of the sale of the plot to the 2nd defendant; Prior to the transactions, the plaintiff was collecting rent from the rental units standing on the plot; Her husband the 1st defendant after the sale the 2nd defendant did not stop PW1 from further collecting rent; The 2nd defendant only started collecting the rent from the tenants while the plaintiff had gone to Laikipia to attend to their livestock; The 1st defendant sold the plot without informing the plaintiff or that of her children;
10. In re-examination by Mr. Kiriaku Advocate, the plaintiff told the court that when she got married to the 1st defendant in 2004, she was not aware that he had a first wife but learnt of it much later. She gave birth to 5 children while living on the said plot. She added that when she got married to the 1st defendant, only 2 houses were on the plot but subsequently she and the 1st defendant jointly added more houses for rent. PW1 added that the land was formally allotted to her husband in 2015 whilst she was already married to the 1st defendant. She affirmed that she was not involved in the sale of the plot to the 2nd defendant and never consented to its sale. She raised a complaint when the 2nd defendant started collecting rent. In her further evidence, she affirmed that she was not given even a cent out of the Kshs 2million sale proceed of plot sale. She denied instructing the writing of a letter to the transacting lawyers.
11. At the end of her testimony, the plaintiff closed her case.



3. The Defendants'/Counterclaimant's Cases

i. 1st Defendant's Defence

12. On 22nd June, 2023 and 20th July, 2023 DW1 adopted his defence affirming that he sold the plot to the 2nd defendant for Kshs 2 million and was paid in full.
13. In cross-examination by Mr. Kiriaku Advocate, the following came to light:the 2nd defendant married the plaintiff in the year 2004;the plaintiff was not informed of the sale and she never received any proceeds since the purchase price was deposited directly into his bank account by the 2nd defendant;he lived with the plaintiff in the plot and sired 5 children with her while living with her in the plot;the plot was originally allotted to his name only;
14. In re-examination, the witness told the court that the plot was allotted to him 1997 but admitted that he had no document to prove the 1997 as the year of the allotment. He insisted that he started living in the plot in 1997 but admitted that he had no evidence of paying rates to the County after the allotment was made.
15. In further questioning, he told the court that his initial sale to AMU was in secret since his wife (the plaintiff) was unaware and not involved. He affirmed that only M was aware of the sale to the 2nd defendant but the rest of the children resisted the transaction although he forced it through. He conceded that he refunded AMU before secretly selling the plot to the 2nd defendant for Kshs 2million and that his wife only learnt of the sale upon her return from Laikipia. He added that he was unaware about his wife's claim over the houses and pointed out that he did not go back to a lawyer to draft a term on the houses.

ii. The 2nd Defendant's Defence and Counterclaim

16. DW2 Martin Randin Kiptogom adopted his written witness statement as his testimony affirming that he recorded the sale agreement and paid the full price. He took possession albeit briefly and received rent only the plaintiff to change the story yet she had participated in the negotiations.
17. In cross-examination, the following came to light:he paid Kshs 2 million directly to the 1st defendantthe 1st defendant's sons by his now deceased first wife witnessed the transaction as did the plaintiff but the plaintiff did not sign anywhere;he did not witness the earlier transaction between the 1st defendant and the said AMU;he knew that the plaintiff lived on the plot with her children;he had lived in Suguta Marmar for over 28 years and knew that the disputed plot was developed with rental houses;he collected rent for 2months totalling Kshs 75,000 only before the plaintiff showed up and stopped him from collecting the rent;DW2 came to know the plaintiff in the year 2005;he termed the letter dated 30/12/2023 as written by someone who was unknown to him;
18. In re-examination by Mr. Kihoro DW2 told the court that he met the family on 15th November, 2022 and by 21st November, 2022 he had paid the purchase price after taking out a bank loan. He said that when he met the family, the plaintiff never raised any objections in the presence of the transacting lawyers.
19. DW3 Benson Nderitu Kamau adopted his witness statement as his testimony confirming that he witnessed the sale agreement recorded by Lempere Advocate. Present were the 1st defendant, the 2nd defendant, the plaintiff and children of the 1st defendant. He disclosed that the plaintiff, however, did not sign the agreement.



20. In cross-examination, he stated that the plaintiff was present in the negotiations but did not sign anywhere. He added that the plaintiff was aggrieved that the plot had been sold cheaply to AMU hence the cancellation and refund of the money.
21. DW4 Simon Tianta Leratia adopted his witness statement as his testimony confirming that he witnessed the sale agreement.
22. In cross-examination, he admitted that the 2 sons of the 1st defendant by his now deceased first wife were present during the recording of the sale agreement. The plaintiff was present but she did not sign anywhere.
23. In re-examination, he affirmed that the plaintiff was involved in the negotiations but signed no documents.
24. DW5 Mackland Lemeteki the County Physical Planner produced 3 development plans for 1982, 1995 and 2001 together with a 2012 Advisory Plan as exhibits. In summary, he told the court that in all these exhibits there existed no plot number 52R but only 51Q existed.
25. In questioning by Mr. Kihoro he confirmed that Plot 5XR was not existing in the maps and plans. He advised that unless a ground survey was done it could not be possible to verify the existence of the Plot 5XR since it was not reflected in the documents that he had produced in evidence. He admitted that as per the Land Rates payment letter Plot 5XR existed nonetheless.
26. When questioned by Mr. Kiriaku he disowned the Land Rates letter since he was not the author of the same.
27. At that stage the defence/counterclaimants closed their cases and lodged written submissions.

4. Submissions by the Parties

28. The plaintiff lodged no written submissions as did the 1st defendant.
29. The 2nd defendant lodged submissions dated 5th January, 2025. In summary, he argued that there was no document to prove the existence of the marriage between the plaintiff and the 1st defendant. It was argued that consequently, there was no matrimonial property capable of being protected by law and no spousal consent was required at any stage of the transaction since the allotment letter was registered in the sole name of the 1st defendant.
30. This Honourable Court was then called upon to determine the dispute. Before making that determination, the court noted that there were undisputed and disputed issues.

5. Undisputed Issues

- i. While Plot 5XR was not reflected in the part development plans, it actually existed on the ground and the 1st defendant was the rate payer to the County.
- ii. The 1st defendant was the registered allottee of the subject plot.
- iii. The plaintiff was the wife of the 1st defendant.
- iv. The plaintiff and her children lived on the subject plot since 2004/2005.
- v. The plot had buildings which housed rental units with rent-paying tenants.
- vi. Nowhere did the plaintiff sign on the transaction documents.



- vii. The 1st defendant had initially sold the plot to one AMU for Kshs 1 million but the parties mutually rescinded the contract with the purchase price being refunded by the 1st defendant.
- viii. The 1st defendant then sold the same plot to the 2nd defendant for Kshs 2 million which was paid in full.
- ix. The sale transaction was made via a written sale agreement between the 1st defendant and the 2nd defendant.
- x. The 2nd defendant paid the full purchase price using a bank loan.
- xi. The purchase price was directly paid into the 1st defendant's bank account and the plaintiff received nothing out of the transaction.
- xii. The plaintiff had been collecting rent since 2005 but lost the collection briefly for 2 months when the 2nd defendant made the collections.

6. Determination

- 31. Only 2 issues arise for determination: the legal status of the sale agreement and whether the subject plot was matrimonial property.

i. What was the legal status of the sale agreement between the 1st defendant and the 2nd defendant?

- 32. by dint of section 3(3) of the [Law of Contract Act](#), all dealings in land must be in writing witnessed by at least 2 witnesses:
 - 3. Certain contracts to be in writing

No suit shall be brought upon a contract for the disposition of an interest in land unless—

 - (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
- 33. Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”
- 34. In the present case, the contract dated 21/11/2022 substantially complied with the drafting formalities under section 3(3) of the [Law of Contract Act](#).
- 35. From the written terms of the contract, the subject plot that was being sold was Plot 5XR Suguta Marmar Trading Centre. This was the “land” on sale. On the one hand, the 2nd defendant pleads that when he bought this land, he automatically acquired the rental houses standing on it but on the other hand the plaintiff pleads that the houses were not included.
- 36. Being a contract in land, the court was called upon to determine what was the applicable law(s). The governing laws in order of priority would be the [Constitution](#), Statute and Common Law doctrines.



37. Under Article 260 of the Constitution land is defined as:

"land" includes—

- (a) the surface of the earth and the subsurface rock;
- (b) any body of water on or under the surface;
- (c) marine waters in the territorial sea and exclusive economic zone;
- (d) natural resources completely contained on or under the surface; and
- (e) the air space above the surface;

38. The Constitution is silent on whether developments and improvements constitute "land". The answer for this is silence is to be found in statutory provisions.

39. Section 2 of the Land Act 2012 defines land by reference to section 260 of the Constitution but goes ahead to define what is a development:

"land" has the meaning assigned to it in Article 260 of the Constitution;

lawful improvements" means improvements which increase or improve the value of land which have been quantified by a qualified valuer in accordance with all applicable law and includes—

- (a) any permanent infrastructural developments including dams, reservoirs, water treatment plants;
- (b) any buildings;
- (c) any growing commercial trees or shrubs;
- (d) any water points, fences and other pastoral infrastructure that may be on the land.

40. Therefore, by statutory definition "land" means the surface/ground itself and all that is beneath the surface plus the air above it but buildings/structures on the land are distinctly defined by statute as "improvements" not as land. This distinction in the definition of the land and developments constituted a modification of the English Common Law doctrine of Cujus.

41. The surface, beneath the surface, structures on the surface plus the air above the surface constituted "land" under the Common Law of England doctrine of Cujus - Cujus est solum, eius est usque ad coelum et ad inferos (cujus doctrine) which translates to "whoever owns the soil, it is theirs all the way up to Heaven and down to Hell"

42. The applicability of the Common Law doctrine was recently highlighted in the case of In RE Estate of Njokoya Ole Magelo (Deceased) Succession Cause No. 75 of 2014 (2024)(Judgement (9th July, 2024)

The substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date, apply to Kenya with such modifications, adaptations, exceptions and alterations as are necessary (s.3 of the Judicature Act). This is commonly known as 'the reception clause' (underlining mine)



43. The modification of the Common Law doctrine of Cujus has also occurred in and is discernible under Mohammedan Law prevailing at the Kenyan coast where a house or land may be sold as separate from each other notwithstanding the fact that the house sits on that land. The Court of Appeal discussed this concept in the authority of *Musa Salim Chai & Another –versus Zakayo Kaiya Kaibunga* (2020) eKLR (Musinga, Murgor JJ.A)

32. It is noteworthy that in the coastal region one can own a house and not necessarily the plot on which the house stands. In *Mariam Fadhili vs Samson Maricho Otweyo & 3 others* [2016] eKLR this Court held:-

Our land law regime is mainly dictated by statute and common law; both of which define land as not only the ground but the structures thereon. This is based on the Latin maxims ‘cujus est solem ejus et usque ad coelum et ad inferos’ which translates into ‘whoever’s is the soil, it is theirs all the way to heaven and all the way to hell’ and ‘quic quid planatur solo solo cedit’ (whatever is attached to the soil becomes part of it).

From the two maxims, land has by and large been defined to mean the ground and all fixtures thereon. However, courts have taken judicial notice of the Mohammedan concept of ownership of ‘a house without land’ that is prevalent at the coast. This concept works on the premise that proprietorship of land and of the structures thereon can be mutually exclusive. A person may own one without necessarily owning the other. This proposition found support under the provisions of the Land Titles Act cap 282 (repealed) which governed land registration at the coast. Under the Act, interests in land required registration, with Section 55(b) recognizing houses and coconut trees as such interests or holdings whose proprietorship could be independent of the land. (See *Muhiddin Mohamed v. Jackson Muthama & 168 others* [2014] eKLR. Upon registration, a certificate of registration would issue, which would act as proof of legitimacy of the proprietor’s interest.”

44. From the Constitutional and statutory modification of the definition of land being somewhat separate and distinct from the developments thereon, it fell upon the contracting parties on 22/11/2022 to clearly discuss and agree on the rental houses sitting on the subject parcel. This was so that as provided in section 2 of the *Land Act* 2012 (cap. 280) a valuation of the rental units be undertaken for inclusion in the sale agreement. By failing to discuss and negotiate this term relating to the rental houses, the contracting parties lacked consensus ad idem and this rendered the contract void. The plaintiff correctly pleaded that the contract was unenforceable for lack of meeting of minds. The Court of Appeal in *Barclays Bank Of Kenya Limited –versus- Patriotic Guards Limited* (2015)eKLR (JKaranja, GK Oenga & P M Wilu JJ.A. (as she then was))) affirmed the critical importance of a meeting of minds:

The first issue which we need to address is whether there was a binding contract between the parties herein. According to the learned Judge, the letter of offer coupled with the acceptance and release of the money to the respondent constituted a binding contract. In our view, those were only two of the essential ingredients of a contract. One other essential of a valid contract is a meeting of minds by the parties (consensus-ad idem).”



45. In Njoroge –versus – Maina (Environment and Land Case 239 of 2017) (2023) KEELC 20293 (KLR) (28 September, 2023) it was pointed out that only where there is a meeting of minds does the contract become binding.

50. Contrary to the Plaintiff’s Counsel’s claim, once parties are at consensus ad idem, a contract becomes binding. Any conduct of a party that disrupts the completion of a contract constitutes breach of contract.”

46. As can be seen on the face of the contract, the detailed description of the plot is missing. While the court may not re-write the contract for the parties, the court cannot fail to take notice of the ambiguities in the contract. It was neither stated to be a vacant undeveloped plot nor a developed plot with rental units constituting its developments. It thus lacked clarity. The lack of clarity rendered the contract patently ambiguous in the sense that the contract did not state whether the sale was for an undeveloped plot or the ground together with its developments comprising rental houses which were generating monthly rental income.

47. When compared with the earlier contract dated 25th October, 2022 between the 1st defendant and ETEES AMUU, the ambiguity became stark. It was clear that in clause 1 of the earlier agreement, the parties specifically provided that the plot was being sold together with the buildings:

1. The property sold is plot number 52R measuring 50 by 100 feet situated Suguta Marmar within Samburu county together with all development therein”

48. The earlier contract of 25/10/2022 was rescinded by the mutual deed of the parties leading to the new contract of 21/11/2022 with a different purchaser. In the subsequent contract, however, nowhere did the parties mention the developments namely the rental houses standing in the said plot yet they all knew that there were permanent developments in the plot. The rental houses were a distinct improvement and development on the plot and were a fundamental term. No mention was also made that one of the units was probably the matrimonial home of the contracting parties.

49. The lack of consensus ad idem made the contract patently ambiguous on how the parties were treating the houses. This patent ambiguity could not be cured by oral testimony of the 2nd defendant. Under section 99 of the *Evidence Act* there is an express prohibition against the adoption of oral evidence to explain a patent ambiguity. This was discussed by the High Court in Kiplagat Kotut –v- Rose Jebor Kipngok (2014)eKLR (Munyao Sila J.) wherein the learned Judge held:

99. Evidence to explain a patent ambiguity

When the language used in a document is on the face of it ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

It will be seen from the above that the general rule is that where a contract is reduced into writing, then oral evidence, may not be adduced to prove the terms of such contract. There are of course some exceptions outlined in Section 98 above. These exceptions give leeway to a party to

(a) prove some extraneous circumstance which is not within the written terms of the contract but which may vitiate the contract such as fraud, intimidation, illegality and other such factors; provide terms of a separate oral contract of which the written



contract is silent, but which is not inconsistent with the terms of the written document;

- (b) provide terms of an oral agreement constituting a condition precedent to the written contract;
- (c) provide the existence of a subsequent oral agreement except in cases where the contract is required to be in writing; provide any usage or custom;
- (d) to prove a fact to show the manner in which the language of the document relates to existing facts.”

50. The effect of a patent ambiguity was to render the contract void and unenforceable and this Honourable Court so finds.

ii. Was the plot matrimonial property that required spousal consent for transfer?

51. The unchallenged evidence was that the plaintiff moved into the plot in the year 2004 after getting married to the 1st defendant. As is well settled in law, lack of documentary proof by itself does not mean that there was no marriage – there is the Common Law marriage where no documentation is required.

52. After cohabiting as husband and wife in what was essentially a Common Law marriage they jointly constructed houses on the subject plot. The allotment letter was formally issued on 23rd February, 2019 in the name of the 1st defendant whilst the marriage was subsisting. Contrary to the 1st defendant’s claims that he acquired the plot in 1997 the County Physical Planner proved that the plot did not exist in the development plans of 1982, 2001 and 2012. This would be consistent with the actual issuance of the allotment letter in 2019 when the marriage was already 15 years old.

53. There was no dispute from the 1st defendant that the plaintiff and himself jointly built up the rental units after she became his wife following the demise of his first wife. Together, they raised 5 children while living in the subject plot in one of the rental units. This made the plaintiff and her children to acquire interest in land during the subsistence of her marriage to the 1st defendant. Under section 2 of the Land Act 2012 (cap 280) “matrimonial property” is specifically defined as follows:

matrimonial home” means any property that is owned or leased by one or both spouses and occupied by the spouses as their family home;”

54. Apart from the joint development of the plot, there was joint occupation of the plot and home by the spouses and their children. In spite of this, the 1st defendant acted hastily to exclude the plaintiff from giving consent to the transaction. By the application of the parole rule, it was not available to the 2nd defendant to claim that the presence of the plaintiff in the negotiations amounted to consent since these types of transactions required written consents.

55. The Court of Appeal discussed the definitions of matrimonial property in JOSEPH Njogu Ngoya v David Ngoya Njogu & 2 others [2020] eKLR (DK Musinga, AK Murgor JJ.A.)

- 9. In our view, there are two main issues for determination. The first one is whether the suit property and the motor vehicle are matrimonial properties, and the second one is whether the respondent was entitled to a share of the same.



10. Section 6 of the *Matrimonial Property Act* defines “matrimonial property” to mean either the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any movable or immovable property jointly owned and acquired during the subsistence of the marriage.
11. Section 9 of the Matrimonial Properties Act defines what constitutes matrimonial property as property acquired by one of the spouses during the subsistence of marriage in which case the other spouse can acquire an interest in the property by contributing towards its improvement.
12. The Act also prescribes what constitutes “contribution” to mean “monetary and non-monetary contributions” and includes-
 - (a) Domestic work and management of the matrimonial home;
 - (b) Child care;
 - (c) Companionship;
 - (d) Management of family business or property; and
 - (e) Farm work.”
13. Further, ownership of matrimonial property is described under section 7 of the Act as follows:

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.”

56. From the foregoing, it is the considered judgement of this Honourable Court that the plot was matrimonial property requiring spousal consent under section 12 of the *Matrimonial Property Act* cap 152 for it to be lawfully transferred or sold. This spousal consent was not obtained and tainted the transaction with illegality:

12. 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.
 - (2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man’s wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.
 - 3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.”



7. Conclusion and Final Orders

57. In the light of the analysis and findings in the preceding paragraphs, it is the considered judgement of this Honourable Court that the following orders would be just and fair to be and are hereby made:

1. A declaration is hereby made that the contract dated 21.11.2022 between the 1st defendant and the 2nd defendant was void and unenforceable for lack of meeting of minds (consensus ad idem) and for being patently ambiguous. In any event, there was no spousal consent to the sale of matrimonial property.
2. A permanent injunction is hereby issued restraining the 2nd Defendant whether by himself, his agents, servants and/or employees or anyone under him from entering, remaining in, trespassing, collecting rent or otherwise howsoever dealing with the property known as Commercial Plot no. 5XR Suguta Marmar Trading Centre, in any manner whatsoever interfering with the plaintiff's quiet enjoyment, possession and/or ownership of the said property.
3. Consequent upon Order (2) above is that a permanent injunction is hereby issued against the 1st defendant restraining him from transferring or disposing the said Plot 5XR without the written spousal consent of the plaintiff herein.
4. The defence by the 1st defendant stands dismissed with costs to the plaintiff.
5. The 2nd defendant's counterclaim stands dismissed with costs for lack of merit.
6. The prayer for an order of specific performance directing JL (the 1st defendant in the main suit) to finalize the sale and transfer of the subject plot of land by procuring and availing the requisite completion documents to the plaintiff in the counterclaim, failure of which the relevant department of the Samburu County Government to issue ownership documents to the property known as Plot No. 52R Suguta Marmar in the name of Martin Randin Kiptogom is declined.
7. Consequent upon Order (6) above the 1st defendant is hereby ordered to within the next 30 (thirty) days refund the full purchase price of Kshs 2million plus interest at 14% from the date of filing the suit till payment in full less the Kshs 75, 000 rent that the 2nd defendant had collected in the interim.
8. The prayer for refund of Kshs 500, 000 renovation costs is declined since there were no receipts to prove incurrence of the expenditure as special damages.

It is so ordered. Right of appeal is 30 days.

DATED, READ AND SIGNED AT MARALAL LAW COURTS THIS 6TH DAY OF FEBRUARY, 2025.

HON.T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS

Present

1st Defendant

Mr. Lenkidi Holding Brief For Mr. Kiriaku Advocate for Plaintiff



Mr. Kihoro Advocate for the 2nd Defendant

