DAW v EFNA & another (Civil Appeal E035 of 2023)
[2025] KECA 1844 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KECA 1844 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E035 OF 2023

F TUIYOTT, LA ACHODE & AO MUCHELULE, JJA

NOVEMBER 7, 2025

BETWEEN

DAW ..... APPELLANT

AND

EFNA ..... 1ST RESPONDENT

AOAA ..... 2ND RESPONDENT

(Being an application for injunction pending appeal against the judgment of the Environment and Land Court of Kenya at Malindi (M. A. Odeny, J.) de livered on 24th April 2023 in ELC Cause No. 139 of 2014)

JUDGMENT

1. There is no doubt that at some point EFNA (E or the 1st respondent) and DAW (D or the appellant) were girlfriend and boyfriend. Out of the friendship was born MAA (M). D contended that the relationship was more than a friendship, it was in fact a marriage. E disputes it.

2. The central controversy here, as was before the Environment and Land Court at Malindi (the ELC), was whether D was a beneficial owner of land known and described as Kilifi/Kijipwa/XXX (the suit land). It was his case that he lived as husband to E since 1982 and the suit property was matrimonial property. His grievance was that the suit land was sold to AOAA (A or the 2nd respondent) without his knowledge or consent.

3. His testimony before the trial court was that he married E in 1987 (not 1982 as pleaded) and cohabited with her as husband and wife since then until 10th August, 2010 when she deserted the matrimonial home. He asserted that he had bought the suit land in 1992 using his money although in the name of E as he had another family residing in his rural home at Ekambuli Kakamega County, ostensibly to avoid

conflict between the two houses. He testified that on the suit land was a matrimonial house and five other residential houses let out to tenants from where he earned rental income.

4. When he got word that E intended to sell the land behind his back, their son M filed suit against E in the Chief Magistrate's Court at Kilifi being SRMCC No. 252 of 2011 where he obtained an order restraining her from having any dealings in the land. It was the evidence of D that the order was served upon the Land Office at Kilifi, a matter contested by E. Another litigation was another commenced by E against him being HCCC No. 34 of 2012 but which had not been concluded by the time he filed his own suit.

5. The litigation before the ELC, the subject of this appeal, was triggered by news received by D that E had sold the property to A who had since been registered as the owner of the property. I&M Bank Limited, who had made certain financial accommodation to A and taken a charge over the suit land, was sued as the 2nd defendant. That claim was withdrawn.

6. In the pleadings filed before the ELC, D sought the following orders:-

    a. A declaration that the plaintiff is the beneficial owner of the suit property known as Kilifi/Kijipwa/XXX and that the sale by the 1st defendant to the 2nd defendant and subsequent charge/mortgage of the suit property to the 3rd defendant was unlawful, null and void ab initio and a permanent injunction restraining the defendants herein whether by themselves, their employees, servants and/or agents or assignees and/or any other person acting under them from selling, transferring or otherwise alienating or dealing in or disposing in exercising its statutory power of sale in relation to the plaintiff's title and/or beneficial interest in the property known as Kilifi/Kijipwa/XXX or in any manner whatsoever.

    b. An order that the registration of the 2nd defendant as the proprietor of the suit property and subsequent charge/mortgage by the 2nd defendant to the 3rd defendant of the suit property be cancelled and the title of the suit property be in the name of the 1st defendant.

    c. Costs of and incidental to this suit.

7. In her defence E asserted that she simply had a sexual relationship with D as girlfriend and boyfriend out of which she was blessed with M. She denied that D had any matrimonial, legal or equitable right of ownership over the suit land and defended her right to dispose of it and to legally convey it to A.

8. On his part, A contended the proverbial innocent purchaser for value without notice having purchased the suit property from E after due diligence, compliance with all applicable statutory requirements and payment of all relevant charges.

9. He defended the purchase as valid and unimpugnable in that: prior to the transaction, he established that there were no matters noted in the register of the suit property; he entered into a binding written agreement for sale and paid a consideration; he obtained the necessary consents and clearances required to transfer the suit property to himself; and the vendor executed an instrument of transfer of the property which enabled the suit property to be duly registered in his name.

10. Having heard five (5) witnesses and taken closing submissions, the trial Court (Ondeny, J.) curved out three issues for determination: who between D and E purchased the suit land; whether D had proved that the suit land was a matrimonial home; and whether he (D) was entitled to the reliefs sought. To those issues, the trial court returned the following findings. The trial Court had no jurisdiction to deal with division of matrimonial property but at any rate there was no evidence to show that there was a marriage between the two; all the documsents produced by D supported the case for E that she was the registered owner of the suit land; there was no evidence to hold that the land was held by E in trust

for D; and the ownership of the land by E was protected by the provisions of sections 24, 25 and 26 of The *Land Registration Act*. With those salient findings, the trial court dismissed the suit with costs to E and A.

11. Aggrieved by the judgment, the D is before us in this first appeal in which he raises three grounds. In a sum, however, his grouse is that the outcome of the impugned decision was against the weight of evidence. The appellant seeks reversal of that decision and judgment in his favour as pleaded at trial.

12. At plenary hearing of the appeal, learned counsel Mr. Odhiambo for the appellant and learned counsel Mr. Gikandi who represented both respondents gave brief highlights of written submissions filed on behalf of their respective clients. We shall consider those submissions in the context of our role as a first appellate court whose remit is to re-evaluate the evidence before the trial court with a view to reaching our own conclusion always remembering that, unlike the trial court, we suffer the handicap that we did not hear and see the witnesses testify for which we give due allowance.

13. D contended that his relationship with E began in 1980, and they cohabited from 1982, having five children together, although only one survived. This long cohabitation, spanning over 24 years, it was argued, gave rise to a presumption of marriage. Cited in support was the decision in Okeno & 2 others v JOSY (Civil Appeal E027 of 2020) [2024] KECA 1915 (KLR). D submitted that his evidence was corroborated by the evidence of Kaingu Mweni Mramba (PW2) who testified to knowing the couple as husband and wife since 1992. M (PW2) too, their surviving son, also confirmed their relationship. Furthermore, it was pointed out, E did not deny the contents of the birth certificate of M which showed the two as father and mother. It was submitted that the ELC had erred in concluding there was no marriage simply because no dowry was paid and there was no marriage certificate.

14. On beneficial interest in the matrimonial property, the central claim by D was that he provided the funds for its purchase having paid Kshs. 197,000.00 out of the full purchase price of Kshs. 200,000.00. He reiterated that the title deed was registered in the name of E only because he feared his other family would attempt to claim the land after his death. The trial Judge is faulted for concluding that he had not proved that he purchased the property and was unemployed at the time of the acquisition when the evidence showed that he was employed by the Maritime Foundation.

    In fact, it was E who was unemployed when the suit property was purchased.

15. It was submitted for D, that M testified that both D and E were in the meeting where the issue of sale/purchase of the suit property was discussed. M had testified that he filed a case against E to stop the sale of the suit property and a court order was issued to that effect. To prove his contributions and interest, D had produced pleadings, affidavits, and court orders from previous cases (SRMCC No. 252 of 2011 and HCCC No. 34 of 2012). He highlighted that in her own pleadings in HCCC No. 34 of 2012, E had averred that D and herself were residing on the suit property but their relationship strained in 2010. Further, that D was in physical occupation of the suit property, and that in the same case, D had maintained that E held the land in trust for their only surviving child, PW3. In addition, it was the case for D that his long, uninterrupted period of possession, occupation and use of the land gave him an overriding interest in it.

16. Regarding the sale of the property to A, we were urged to find that it was null and void for failure to comply with mandatory legal provisions. As the land was matrimonial property, the consent of the spouse was necessary pursuant to the mandatory provisions of the *Land Act* and *Land Registration Act* which were in effect during the registration of the transfer dated 2nd August, 2012 on 16th August, 2012. Second, it was contended that the respondents did not prove they had followed the provisions of the *Land Control Act*: there was no evidence of a proper application being made; and minutes of the supposed Land Control Board meeting were not produced to prove that the application was genuinely

considered and that any objections from D and M were heard. The speed of the transaction was also highlighted. The transfer was prepared on 2nd August, 2012 and the title deed issued on 16th August, 2012, the same day the consent was supposedly issued. Lastly, the sale agreement was dated 5th April, 2012 but was attested on the same day the transfer was prepared, 2nd August, 2012.

17. Finally, D submitted that Afroze was not an innocent purchaser as he admitted that he never carried out a physical search of the property or made inquiries with neighbours before buying it, which would have revealed the occupation of D and the existence of houses on the property.

18. On the ownership and title of the suit property, the respondents, in response, argued that the learned trial judge did not err in finding that E was the registered owner who had good title to the suit property. It was undisputed that the property was purchased by and registered in her name pointing to documentary evidence, including the "memorandum of agreement" dated 25th May, 1992 and another agreement dated 8th July, 1992 together with the acknowledgment dated 12th August, 1992, which indicated the transaction to be between E and Mweni Mramba Masha. The respondents asserted that D failed to provide any evidence to support his claim that he contributed to the purchase of the suit property. They argued that nothing prevented D from being a party to the sale agreement if indeed he had beneficial interest in the property.

19. Citing sections 24(a) and 26(1) of the *Land Registration Act*, the respondents maintained that the title of E was absolute and indefeasible contending that D had failed to prove any fraud, misrepresentation and or illegality in the acquisition of the title, which are the only grounds for challenging a registered title under the Act. Citing the case of Opiyo & another v Olunje (Civil Appeal 148 of 2018) [2023] KECA 1539 (KLR), it was submitted that where a title is not impeached within the parameters of section 26, the court ought not to disturb the registered owner's interest.

20. On the question of matrimonial property, the respondents submitted that the trial Court was correct in finding that no marriage existed between D and E. Highlighted was the admission by D that he neither paid dowry, had a church wedding, nor registered their purported marriage. The respondents referred to section 6 of the *Marriage Act*, Cap 150, which lists the only types of marriages legally recognised in Kenya, none of which were proved. Since no valid marriage was established, it was argued that the suit property could not be classified as a matrimonial home. Consequently, the respondents submitted, the issue of spousal consent for the sale of the property to Afroze did not arise.

21. The claim by D was premised on a two-pronged theory presented as complimentary. The first is that using his own resources he solely purchased the suit property. The second is that the reason for having the property registered in the name of E was that the property, being a matrimonial home for E and himself, had to be insulated from possible contestation between his house with E and the other family residing in Western Kenya. Arising from these two propositions are three issues for our determination. Did D prove that he was a beneficial owner of the suit property? Did D otherwise establish that the suit property was a matrimonial home? If the answer to either is in the affirmative, was Afroze an innocent purchaser for value without notice?

22. The tide was always strong against D because all documents for the purchase of the property showed E as not only the purchaser of the property but also as the payer of the consideration. The documents were the "memorandum of agreement" dated 25th May, 1992, and the acknowledgments of further payments of the purchase price of 8th July, 1992 and 12th August, 1992. It did not help matters that in none of these documents was D a witness or any other manner a participant. Nor was his case buoyed by the evidence of his witness, PW2. This is the son of Mweni Muramba Masha who was the vendor of the suit property. In his oral testimony, PW2 told the trial court that he was not in the meeting in which the sale was discussed.

23. In those circumstances, it was imperative for D to show that he was the source of the money that paid the consideration. This he did not do. In addition, although he had testified that he had built rental houses on the property and enjoyed income therefrom, he did not provide evidence that he had built the houses or in the very least that he collected or received rent from the tenants. This would have been invaluable evidence in the face of the documentary evidence that was stark against him.

24. Given those deficiencies in his case, the prospects of the claim by D could not improve simply because he and M, their son, resided on the suit property. Possession would not be inconsistent with the defence by E that by virtue of the relationship as boyfriend and girlfriend in the case of D, and as mother and son in that of M, the two would have gained access to the suit property.

25. In section 2 of the *Land Act* a matrimonial home is defined to be any property that is owned or leased by one or both spouses and occupied by the spouses as their family home. The case presented by D at trial was not simply that the property, albeit registered in the name of E, was in fact a matrimonial home by virtue of his marriage to E and his occupation of it. His case was founded on the assertion that he provided the funds for the purchase of the property, he was the true purchaser and intended it to be a matrimonial home for E and himself. It is our holding that his case that the suit property was a matrimonial home falters and crumbles in view of his inability to prove the central plank of the proposition he had put forward, that he was the source of the whole or a very substantial portion of the purchase price.

26. Ultimately the findings by the trial court cannot be faulted with the outcome that the appeal is for dismissal, which we now do with costs.

DATED AND DELIVERED AT MALINDI THIS 7TH DAY OF NOVEMBER 2025.

F. TUIYOTT

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.