

**IN THE COURT OF
APPEAL AT NAIROBI**

(CORAM: KIAGE, MUCHELULE & KORIR,

JJ.A.) CIVIL APPEAL NO. 349 of 2019

BETWEEN

JAMES WAKIBI MUNGAI.....APPELLANT

AND

JAMES NJUGUNA NJOROGE.....1ST

RESPONDENT ESTHER RUGURU NJOROGE.....

2ND RESPONDENT

*(An appeal against the judgment and decree of the Environment and
Land Court at Thika (**Gacheru, J.**) dated 13th October 2017*

in
ELC NO. 21 OF 2011)

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JUDGMENT OF THE COURT

- 1.** Our duty as the first appellate Court is to re-evaluate and re-appraise the evidence that was tendered before the Environment and Land Court (ELC) at Thika and to satisfy ourselves that the court came to the correct conclusions, but while bearing in mind that we did not have the advantage that the court had of seeing and hearing the witnesses as they testified (see **Abok James Odera -vs- John Patrick Machira [2013]eKLR**).
- 2.** From the record kept by the ELC, there is no dispute that the deceased Njoroge Njabi alias Peter Njoroge Njabi and the 2nd respondent, Esther Ruguru Njoroge, got married under

Kikuyu customary law in 1962. They lived together and had a family of

eight children. One of their children was James Njuguna Njoroge, the 1st respondent. The marriage later on had challenges which led the 2nd respondent to file **HCCC No. 353 of 1998 (OS)** seeking divorce and division of matrimonial property between her and the deceased.

3. It is also not in dispute that the deceased was the younger brother of Ndiguitha Njabi. Their brothers were Njiri Komu and Karanja Njagi. Their mother was Gaceke Komu. The family owned a parcel of land, Kiambaa/Ruaka/139, which was registered in the name of Ndiguitha Njabi to hold in trust.
4. Ndiguitha Njabi died in 1969. The deceased took out letters of administration which led to his being registered as proprietor of the parcel of land. Again, on behalf of the family. On 3rd April 1974, the deceased acknowledged in writing that he would give one acre to each of his brothers and one acre to his mother. He subsequently purchased the shares of his brothers Njiri Komu and Karanja Njagi by paying to each Kshs.15,000/=.
5. In 1997, the deceased subdivided Kiambaa/Ruaka/139 into Kiambaa/Ruaka/1338 and Kiambaa/Ruaka/1339. On 29th September 2008 he caused the two subdivisions to be combined into Kiambaa/Ruaka/3250, still in his name. On 3rd November 2008 he subdivided Kiambaa/Ruaka/3250 into five portions, Kiambaa/Ruaka/3255 to Kiambaa/Ruaka/3259. He transferred these portions to different persons, one being

the

appellant, James Wakibi Mungai to whom he transferred Kiambaa/Ruaka/3257, 3258 and 3259.

6. The 2nd respondent and her children, including the 1st respondent, had moved out of the matrimonial home, following the couple's differences, by the time of the subdivisions and transfers in 2008. They were not aware of the subdivisions, and believed that title Kiambaa/Ruaka/139 was still in place. That is why on 6th July 2010 the 2nd respondent placed a caution on the title, claiming beneficial interest. In 1998, through **HCCC No. 353 of 1998 (OS)** she had filed for divorce and division of matrimonial property. On 23rd February 1998 the Court had issued injunctive orders in the matter restraining the deceased from selling the parcels she considered matrimonial property, which included Kiambaa/Ruaka/139. The deceased died before the finalization of the originating summons.
7. By amended plaint dated 13th October 2011, the respondents sued the appellant seeking to recover parcels Kiambaa/Ruaka/3257, 3258 and 3259; for the titles in his name to be cancelled and retransferred into the name of the 2nd respondent or back into the estate of the deceased; permanent injunction; the appellant's eviction therefrom; damages; and costs and interest. Their case was that the parcels constituted family and matrimonial property on which the 2nd respondent and the deceased had raised their family; property that had been acquired and developed by

the couple; property in which

the respondents had beneficial claim and which they were entitled to inherit from the deceased; and that the transfer to the appellant was a scheme to defraud and to disinherit. It was claimed that the transfer and registration of the three parcels in the name of the appellant was subject to the beneficial claim and that he held the titles in trust for them.

8. The appellant denied that claim, denied that he had colluded with the deceased to deny the respondents their benefit, and stated that by the time of the orders in the originating summons Kiambaa/Ruaka/139 had long ceased to exist as the title had been variously subdivided. In his evidence, the appellant admitted that he had not paid any consideration for the parcels but that the deceased had given him the parcels because he had taken care of him (the deceased) after the family had abandoned him following disagreement with the 2nd respondent. According to him, the deceased, as the registered proprietor of the parcels, had the right to transfer them to any person he wished. Therefore, that he, the appellant, as the transferee, had a valid claim to the parcels.

9. The learned L. Gacheru, J. received evidence from the parties and was addressed by way of written submissions. In the judgment that was delivered on 13th October 2017, it was found that land parcel Kiambaa/Ruaka/139 was matrimonial property as between the deceased and the 2nd respondent; and that, although the land was registered in the name of

the deceased, the 2nd respondent, being the deceased's spouse, had

a beneficial claim to it by virtue of **sections 27, 28, 29 and 30 of the Registered Land Act** and **Article 45(3) of the Constitution**. Secondly, it was found that the 2nd respondent had contributed to the purchase of the parcel and this gave her an interest in the land under a resulting trust. Thirdly, that the parcels in the name of the appellant had been transferred to him in a manner that was not open, transparent or regular, the intention being to defeat the 2nd respondent's claim to the same. Lastly, that the transfer of the parcels to the appellant was illegal given the foregoing, and given the existence of the injunctive orders. The respondents' claim was allowed.

10. These findings aggrieved the appellant who appealed to this Court on the following grounds:-

“1. That the learned trial Judge erred in law and in fact in applying temporary orders issued in 1998 in a matrimonial cause HCC No. 353 of 1998 (OS). No orders of temporary nature could have been in force for over 10 years.

2) That the learned trial Judge erred in law and in fact by purporting to apply orders of a temporary nature to a case more than 10 years later.

3) That the learned trial Judge erred in law and in fact by applying information from Matrimonial Cause HCC No. 353 of 1998 to the ELC Case No. 21 of 2011 without consolidating the two matters.

4) The fact by translating the ELC matter before her into a matrimonial cause when the defendant had never been married to the

1st plaintiff in the ELC case.

5) The trial Judge erred in fact and in law by purporting to conduct a matrimonial cause

while one party to the marriage was already deceased.

- 6) The learned trial Judge erred in law and in fact by not addressing herself to the fact that even if matrimonial rights were to be applied, which is denied, the 1st plaintiff did not adduce any evidence as to her contribution in acquiring the land.**
- 7) The trial Judge erred in law and fact by applying the matrimonial rights provided by the Kenya Constitution 2010 in favour of the 1st plaintiff in ELC case No. 21 of 2011 when the second party to the marriage was already deceased. This application of the Constitutional provisions was retrospective in nature.**
- 8) The learned trial Judge erred in law and in fact in failing to recognize that the principal of equality would apply to all parties in a marriage. The deceased would have had right to deal with at least 50% of matrimonial property if it were so, which was denied.**
- 9) The trial Judge erred in law and in fact by purporting to apply equality principle of one of the parties in a marriage while it was impossible to apply the same in favour of the other party who was already deceased.**
- 10) The learned Judge erred in law and in fact by transferring a Land and Environment suit into a succession cause wherein the judgment addressed the question of disinheriting beneficiaries.**
- 11) The trial Judge erred in law and in fact by claiming that the deceased had by transferring a portion of his land to the defendant disinherited his family. The question as to what constituted the deceased's estate was not addressed in the matter.**

12) The trial Judge erred in law and in fact by failing to recognize that the deceased had a right of an owner over the parcels of land registered in his name. The right of an owner

includes gifting part of his land to a person of his choice.

13) The trial Judge erred in law and in fact by purporting to ascertain all rights to an estranged spouse and children and overlooking the fact that another spouse was consulted in seeking consent to transfer the land.

14) The trial Judge erred in law and in fact by failing to appreciate that all legal measures required to be undertaken to legitimately effect the transfer were actually observed.

15) The learned trial Judge erred in law and in fact by slapping costs of the suit on the defendant.

16) The learned trial Judge erred in law and in fact by failing to recognize that the property rights of an owner accruing to the defendant could not be casually defeated with proof of fraud.

17) The learned trial Judge erred in law and in fact by misinterpreting provisions of law for a desired result."

11. We heard the appeal on 7th October 2025 when learned counsel Ms. Muigai appeared for the appellant while learned counsel Mr. Mbari appeared for the respondents. Each side had filed written submissions whose oral highlighting we allowed.

12. In the submission on behalf of the appellant, it was argued that the learned Judge had improperly, and without jurisdiction, converted the court into the High Court and determined the matter as if it was a matrimonial property cause, when it was a land matter. Even if the court had

jurisdiction to deal with matrimonial property, the deceased had died and was not therefore a party to be heard before a decision was made against him. In any case, assuming that this was matrimonial property,

the most that the 2nd respondent could get from it was 50%. But more important, it was argued, there was no proof that the 2nd respondent had participated in the acquisition of the parcels in question, and that, under **section 26** of the **Registration for Titles Act**, there was no proof or fraud or illegality on the part of the appellant that could have led to the cancellation of his titles.

13. Regarding the injunctive orders, learned counsel submitted that the subdivision of Kiambaa/Ruaka/139 had been done in 1997, long before the orders had been issued. Secondly, that the orders were temporary in nature, and therefore there was no way they could have lasted until 2011 when the suit giving rise to the judgment appealed from was filed.
14. Learned counsel Mr. Mbari opposed the appeal. He submitted that the fact that the deceased and the 2nd respondent were married was not disputed. That the learned Judge had found that, the 2nd respondent had made non-monetary contribution to the acquisition of the suit properties. On that basis, it was argued, a spousal claim under **section 28** of the **Land Registration Act** and **Article 45(3)** of the **Constitution** had accrued. On the legality of the transfer to the appellant, learned counsel argued that there were court orders restraining the transfer when the deceased transferred the parcels to the appellant. This had compromised the appellant's legal claim.

15. In the rejoinder, learned counsel Ms. Muigai submitted that the learned Judge had acknowledged that **HCCC No. 353 of 1998 (OS)** was never heard or determined; and that the two causes had not been consolidated. This, it was argued, denied the ELC the jurisdiction to determine whether or not the parcels were matrimonial property.
16. We have considered the record, the impugned judgment and the submissions. There is no dispute that land Kiambaa/Ruaka/139 which was registered in the name of the deceased was family land. It was registered in his name to hold in trust for himself, his siblings and his mother. This is the root of the title that he was holding. He did not have an absolute claim to the parcel of land. He became registered when he had already married the 2nd respondent whom he settled here and begun to have a family.
17. In our considered view, the 2nd respondent may not have contributed to the acquisition of the land, but, by virtue of her marriage into the family, she acquired a spousal claim to the land. Her son, the 1st respondent, was eventually expected to inherit some of this land upon the death of the deceased. When the 2nd respondent sued the deceased, claiming that this was a matrimonial property in which she had a stake, she did not know that the land had been subdivided into portions. But, at the time, even as the injunction that was issued did not mention Kiambaa/Ruaka/139, the deceased became aware that

land,

now held in subdivisions, was the subject of the claim by his wife.

18. Technically, the injunction was being issued over a title that had been closed, but substantially the claim did not go away. In short, the 2nd respondent had a spousal claim over the land and its subdivisions, and the 1st respondent had a beneficial claim over the same. **Section 30** of the **Registered Land Act** (now repealed), and now mirrored in **section 28** of the **Land Registration Act**, was to the effect that spousal rights are an overriding interest to which a registered title is subject, even though it does not appear in the register. They are binding both on the registered owner and on the person who subsequently acquires an interest in the property. This Court in **Mugo Muiru Investments Limited -vs- E.W.B. & 2 Others [2017] eKLR** observed that a spouse had a beneficial interest in matrimonial property which her husband sold without the wife's consent.
19. The Supreme Court in **Shah & 7 Others -vs- Mombasa Bricks & Tiles Ltd & 5 Others (Petition No. 18 (E020) of 2022 [2023] KESC 106 (KLR)** emphasized that a constructive trust arises when it would be inequitable for a legal owner to deny another party a beneficial interest. The trust protects the rightful interests of disadvantaged parties when legal owners abuse their position.
20. We emphasize that the deceased knew he had a family of a wife and 8 children, yet he transferred the three titles

(Kiambaa/Ruaka/3257, Kiambaa/Ruaka/3257, Kiambaa/Ruaka/3258 and Kiambaa/Ruaka/3259) to the appellant who did not provide any consideration. We find that the action was intended to disinherit the family, the two respondents included, and that this was fraudulent. We find that the appellant's title to Kiambaa/Ruaka/3257, 3258 and 3259 was subject to the overriding interests by the respondents.

21. The evidence is clear that the appellant was related to the deceased's family and he knew that, despite the matrimonial differences in the family, the family existed.
22. These are the reasons why we find no merit in the appeal and dismiss it with costs.

Dated and delivered at Nairobi this 27th day of February 2026.

P. O. KIAGE

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JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.