



Kanja & another v Wanjohi & another (Suing as Personal Representatives of the Estate of Martin Kamau Kanja) (Environment and Land Appeal E021 of 2023) [2025] KEELC 5564 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5564 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E021 OF 2023
LC KOMINGOI, J
JULY 24, 2025**

BETWEEN

MARY WANDIA KANJA 1ST APPELLANT

HANNAH NYOKABI KANJA 2ND APPELLANT

AND

PATRICK WANJOHI 1ST RESPONDENT

JULIA WANJIRU WANJOHI 2ND RESPONDENT

**SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF MARTIN
KAMAU KANJA**

*(Being an Appeal from the Judgement of Hon. P. Achieng issued on 9th
November 2023 in SPM Court in Ngong' ELC Case No. E015 of 2021)*

JUDGMENT

1. In her Judgement dated 9th November 2023, Hon. P. Achieng the Learned Trial Magistrate found that the transfer of parcel Ngong/Ngong/63911 from the late Martin Kanja to Mary Wandia Kanja without consent was illegal and ordered for cancellation of the title in favour of the 1st Appellant and ordered that the same reverts to the late Martin Kanja.
2. Aggrieved by this decision, the Appellants filed the Memorandum of Appeal dated 14th November 2023 against the decision on the grounds that:
 1. The learned trial Magistrate erred in law and in fact by disregarding the evidence presented by the Appellants, which was crucial to the case.



2. The learned trial Magistrate erred in law and in fact by forming the opinion that the 1st Plaintiff was a wife to Martin Kamau Kanja (deceased) and yet there was no proof of marriage produced by the 1st Plaintiff. The Defendants denied knowing her as a wife to the deceased and the onus was on the Plaintiff to prove her marriage.
 3. The learned trial Magistrate erred in law and in fact by forming the opinion that the transfer of the suit property from Martin Kamau Kanja (deceased) to the 1st Appellant was illegal due to the fact that the 1st Plaintiff did not give consent to the transfer and yet she was not a wife of the deceased.
 4. The learned trial Magistrate erred in law and in fact by forming an opinion that the transfer of the suit property from Martin Kamau Kanja (deceased) to the 1st Appellant was illegal even when the Plaintiffs did not prove fraud as provided for in section 26 of the *Land Act* (2012).
 5. The learned trial Magistrate erred in fact by forming an opinion that the subsequent sales and subdivisions of the suit property were illegal even when the same were done during the lifetime of the deceased when the property belonged to the 1st Defendant.
 6. The learned trial Magistrate erred in fact by not considering the fate of innocent purchasers who bought parcels during the lifetime of the deceased as a result of subsequent sub-divisions of the suit property.
 7. The judgment was against the defence evidence presented on record, and as such, it cannot stand.
3. The Appellants sought that the Appeal be allowed with costs and the orders issued at the Lower Court be set aside.
 4. This Appeal was canvassed by way of written submissions.

Submissions of the Appellants

5. Counsel submitted on the following issues as summarised hereunder.
6. On whether the Respondent proved that she was lawfully married to the deceased and whether the trial court erred in so finding, counsel submitted that the law governing customary marriage as claimed by the Respondent was Section 43 of the *Marriage Act*. However, the Respondent did not produce evidence such as payment of dowry to show that customary rites had been performed as proof of marriage. Therefore, the trial court relied on unproven customary practices to confer marital status on the Respondent. It was argued that even under the doctrine of presumption of marriage, there must be evidence to prove stable, prolonged cohabitation and public repute as being husband and wife. Reference was made to the case of *K.O & Another vs J.O* [2018] eKLR where the Court held that, “...marriage must be distinguished from sexual relationship that results into siring of children... this is not one of the safe instances where a court can presume a marriage.”
7. On whether the transfer of the suit property from Martin Kamau Kanja (deceased) to the 1st Appellant was lawful and whether the trial court erred in finding the same to be illegal based on lack of consent from the Respondent, it was submitted that the trial court erred in finding that this transfer was illegal for want of consent from the Respondent. This is because it had not been proved that the Respondent



was the deceased wife. Counsel also argued that even if she was the deceased's spouse, the suit property could not be deemed matrimonial property within the meaning of the *Matrimonial Property Act*. Because the property was transferred to the 1st Appellant on 9th November 2017, and therefore ceased to be in the name or control of the deceased before his death. That Section 7 provided that 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. And Section 9 of the Act provided that where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in property equal to the contribution made. There was therefore, no evidence that the Respondent made any contribution; financial or otherwise, towards the acquisition or improvement of the suit property. Thus, even if she were deemed a spouse, no beneficial interest can be claimed under Section 9 of the Act. Further counsel argued that as per Section 5 any immovable or movable property acquired or inherited before marriage does not form part of matrimonial property and there was no evidence that the property was acquired during subsistence of a marriage as held in SN vs FM [2019] eKLR.

8. Counsel also submitted that the Respondent was aware of the transfer making reference to the agreement dated 18th December 2018, where both the deceased and the Respondent signed a consent allowing the use of the suit property as a dumping site. The agreement indicated that the property was registered in the name of the 1st Appellant, and the Respondent affixed both her signature and thumbprint. At no point did she object to this or allege fraud. This demonstrates that she was fully aware of the transfer and had no issue with it at the time. Therefore, the claim that the transfer was unlawful for lack of consent was invalid.
9. On whether the trial court failed to consider the interests of innocent purchasers for value who acquired portions of the suit property through lawful transactions, counsel submitted that there was no evidence before the trial court to demonstrate that the 1st Appellant procured the title fraudulently, unprocedurally, or through misrepresentation, nor that the purchasers were party to any such impropriety. The 1st Appellant was the registered proprietor at the time of the sale and held a valid title deed protected by Section 26(1) of the *Land Registration Act* and the purchasers were innocent purchasers for value as held in *Katende vs Haridar & Co. Ltd* [2008] 2 EA 173. The Court should therefore find that the trial court erred in cancelling the 1st Appellant's title and subsequent subdivisions, and should restore the rights of the innocent purchasers who acquired valid title in good faith.
10. On whether the trial court's orders were against the weight of the evidence and applicable law, counsel submitted that the Respondent did not meet the required threshold of burden of proof as per Section 107 and 108 of the *Evidence Act*, because most of her allegations were unsubstantiated and not backed with evidence. But despite lack of evidence, the trial court made its verdict disregarding the applicable standards of proof and should thus be set aside and the appeal allowed together with costs.

Submissions of the Respondent

11. At the time of writing this Ruling, the Respondents had not filed their submissions.

Analysis and Determination

12. The Appellants have lodged this appeal citing seven (7) grounds of Appeal that can be compressed as follows;



- i. Whether the Learned trial magistrate erred in law and in fact by forming the opinion that the transfer of the suit property from Martin Kamau Kanja (Deceased) to the 1st Appellant was illegal due to the fact that the 1st Plaintiff did not give consent to the transfer given that she was not the wife of the deceased.
 - ii. Whether the Learned Trial Magistrate erred in law and in fact by forming an opinion that the transfer of the suit property from Martin Kamau Kanja (Deceased) to the 1st Appellant was illegal even when the Respondents did not prove fraud as provided for in Section 26 of the [Land Registration Act, 2012](#).
 - iii. Whether the Learned Trial Magistrate erred in forming the opinion that the Respondents had proved their case.
 - iv. Whether the Appeal is merited and if so, who should bear costs?
13. This being a first appeal, the court is to re-evaluate, re-assess, and re-analyze the record and then determine whether the conclusions reached by the learned Judge are to stand or fall and give reasons either way. See *Pumwani Riyadha Mosque Committee & another v Gikomba Business Centre Limited* (Civil Appeal E965 of 2024) [2025] KECA 1257 (KLR).
14. Similarly in the case of *The Chairman, Secretary and Treasurer (Suing as the officials on behalf of House of Hope Vs. Wolta House Ltd* (2018) eKLR it was held thus:-
- “The general principles applicable, when the appellate Court is called upon into interfere with the exercise of discretion of the trial court is well settled and was stated as follows in *Mbogo & Another Vs. Shah* (1968) EA – 93, 96 “An appellate court will interfere if the exercise of discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of discretion of a Judge unless it is satisfied that the judge in exercising his discretion has misdirected himself or has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”
15. In *Peters Vs. Sunday Post Ltd* (1958) EA 424, cited by the Court of Appeal in *Aroni Sure & 9 Others Vs. Gesare Nyamaiko* (1988) eKLR O’Connor P stated; “An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand.” The court has relooked at the evidence presented at the subordinate court and which is contained in the Record of Appeal.”
16. This suit was filed by the Respondents through the Plaint dated 18th February 2022. The 1st Respondent claimed that she was married under customary law to the late Martin Kanja in 2011 and lived together since then. Prior to this marriage, she had five children whom the deceased accepted as his own children and assumed parental responsibility. Dowry was paid on 22nd November 2015. They were subsequently blessed with two more issues. She claimed that the late Martin’s father bequeathed the 1st Appellant with a parcel of land which she subdivided into three portions: One belonging to her, the other portion she gave to her daughter, the 2nd Appellant, and the third portion Ngong/Ngong/63911 (“the suit property) was given to the late Martin and title issued sometime in 2014. The 1st Respondent claims that this was land was their matrimonial home which they resided on until sometime in March 2017 when the house was vandalised and flattened to the ground. The title deed to the suit property got lost at this point.



17. In 2019 they found out that the 1st Appellant had fraudulently transferred the suit property back to herself. As they were following up on this issue, Martin Kanja passed away on 6th August 2021. She also stated she and her children were prevented from attending the burial despite issuance of an order to stop the burial by the District Officer. In October 2021, the Appellants went to the Respondents home and evicted them. She learnt that in 2019, the suit property was subdivided to parcels; Ngong / Ngong / 94026 - 94027 respectively without her knowledge and or consent.
18. She sought that the Title registered in favour of the 1st Appellant as well as the consequent subdivisions be cancelled and the title do revert to the late Martin Kanja's name. She also sought an injunction together with general damages for trespass, compensation and costs of the suit.
19. The Appellants in their statement of defence dated 24th May 2022 acknowledged that the 1st Appellant indeed transferred the suit property to the late Martin Kanja. She also acknowledged that the 1st Respondent cohabited with her late son on the suit property and were blessed with two children. It was her case that in the year 2019, the 1st Respondent left the suit property and only returned when Martin Kamau Kanja was deceased.
20. The 1st Appellant claimed that the 1st Respondent was aware that Martin wanted to subdivide the suit property to sell a portion to be able to construct a new house. It was her case that Martin Kamau Kanja therefore wilfully transferred the suit property to her and in 2019 the property was subdivided to parcels Ngong/Ngong/94026-94027 respectively.
21. It is not in contention that the 1st Respondent and the late Martin Kamau Kanja lived together and were blessed with two children. The Appellants however claim that there was no marriage in subsistence but only cohabitation. From the facts adduced, can a Court presume there was a marriage between the 1st Respondent and the late Martin Kanja?
22. It is now well settled that whoever alleges must prove. It was incumbent upon the 1st Respondent to prove that there existed a marriage between him and the deceased. The Appellants' denied but admitted that the two cohabited and sired two children.
23. I find that the 1st Respondent failed to tender evidence to demonstrate that she underwent any customary rites of marriage on the date alleged. She called no witnesses. No photographs were produced to confirm that such a ceremony took place. This court takes judicial notice that a dowry payment ceremony is not a small affair. It is a significant milestone. I find that she failed to prove that such a ceremony took place. She admitted that she left the Deceased's home for some time and went back after his death.
24. It is not in dispute that the late Martin Kamau Kanja transferred the suit property to the 1st Appellant during his lifetime. The 1st Appellant told the court that the suit property was sold in order for the late Martin to construct a house for his family.
25. I am of the view that the 1st Respondent failed to demonstrate that the transfer of the title to the 1st Appellant was fraudulent. In the case of *Teleposta Pension Scheme Registered Trustees Vs. Inter Counties Importers And Exporters Ltd & 4 Others* (2016) eKLR , the court held as follows;

“it is trite law that whoever alleges fraud must prove. It was therefore incumbent upon the Plaintiff to prove fraud allegations against the Defendants to the required standard. The standard of proof in fraud cases is higher than that in ordinary civil cases, it is higher than on a balance of probability. As was observed in *Njuwangu Holdings Limited Vs. Langata KPA Nairobi & 5 Others*; the Standard of proving fraud in civil cases, the courts have



consistently held, is higher than on a balance of probabilities. An allegation of fraud is a serious indictment against a party to whom it is made and though the standard of proof is not beyond a reasonable doubt as in criminal cases, it is no doubt near there but is certainly higher than on a balance of probability and thus when a party in a civil matter makes an allegation of fraud against a party he should be prepared to tender and adduce evidence to prove the allegation to the required standard. In the present case I am afraid the fraud allegations against the 1st Defendant have been generalized and lack specificity and are generally unproved.....”

Thus mere suspicion of fraud cannot suffice. It is court’s findings that besides generalisations, the Plaintiff has not proved that the 1st Defendant, acquired the title illegally or through a corrupt scheme. More particularly, there is no proof; of the fraud, allegations against the transferee, the 1st Defendant, as to warrant the cancellation of the title.”

26. I have considered the totality of the evidence tendered and I find that the Learned Trial Magistrate erred in forming the opinion that the Respondents had proved their case.
27. In conclusion I find merit on this Appeal and the same is allowed.
28. In essence the Judgement dated and delivered 9th November 2023 is hereby set aside and an order is hereby issued dismissing the Respondent’s suit.
29. Each party shall bear own costs of the Appeal and of the suit in the Lower Court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 24TH DAY OF JULY 2025.

L. KOMINGOI

JUDGE.

In the presence of:

Ms. Wambui for the Appellants.

Mr. Nabende for the Respondents.

Court Assistant – Mutisya.

