

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

MATRIMONIAL PROPERTY CASE NO. 5 OF 2023 (O.S)

IRENE MUTHONI NJIRU.....PLAINTIFF

VERSUS

AGAPIUS M. MUNYI NTHAMBIRI.....1ST DEFENDANT

JANE NJERI NJUGUNA.....2ND DEFENDANT

JUDGMENT

Brief facts

1. The plaintiff instituted this suit vide Originating Summons dated 23rd June 2022 seeking for orders that:-
 - a) A declaration that land parcel number THIKA MUNICIPALITY BLOCK 24/268 with all buildings and developments is matrimonial property owned jointly by the plaintiff and 1st defendant.
 - b) A declaration that the transfer or purported transfer of LR. No. THIKA MUNICIPALITY BLOCK 24/268 to the 2nd defendant is unlawful, fraudulent and illegitimate.
 - c) An order cancelling or revoking the title deed in respect of LR. No. THIKA MUNICIPALITY BLOCK 24/268 issued to the 2nd defendant

and reverting the same to the joint names of the plaintiff and the 1st defendant.

- d) A declaration that 50% or such other higher proportion of LR No. THIKA MUNICIPALITY BLOCK 24/268 do belong to the plaintiff.
 - e) An injunction do issue restraining the defendants, their servants or agents from selling, transferring, alienating, wasting and damaging and/or otherwise interfering in any manner with LR. No. THIKA MUNICIPALITY BLOCK 24/268 except for the purpose of implementing the orders of this Honourable Court.
2. In opposition to the originating summons, the defendants filed Replying Affidavits dated 21st July 2022.
 3. The matter proceeded by *viva voce* evidence.

The Plaintiff's Case

4. PW1, the applicant testified that she and the 1st defendant got married in the year 1993 under customary law and solemnized the marriage in 1998 before the Registrar of Marriages. PW1 further stated that they were blessed with two issues who are currently adults. PW1 testified that during the subsistence of their marriage she acquired properties with the 1st defendant particularly land L.R. No. THIKA MUNICIPALITY BLOCK 24/628 around the year 1998-1999.
5. The witness testified that she took out loans and credit facilities towards the acquisition and construction of the suit property although the 1st defendant registered the land parcel under his name solely. Further, PW1 testified that she gave the 1st defendant a conducive environment to venture out for more capital by taking care of the children and assisting

the 1st defendant in his endeavours including monetary help. PW1 testified that due to the hostility of the 1st defendant she was forced to move out of the matrimonial home but their marriage is still subsisting as no divorce proceedings have been undertaken to dissolve the marriage.

6. The witness further testified that she learnt that the suit property was transferred to the 2nd defendant despite her placing a caution against the said property but the same was mysteriously removed without her involvement. The witness testified that the transfer was illegitimate as the suit property is matrimonial property where spousal consent was necessary and consent of the Land Control Board to effect transfer which was not obtained making the transfer fraudulent.
7. PW1 stated that the 2nd defendant was aware that she was the spouse of the 1st defendant but went ahead to transact without her involvement as both defendants had approached her on the transaction way back in 2019 but she refused as she considered the matrimonial home priceless for her family including her children.
8. On cross examination, PW1 testified that she had not annexed any loan applications, guarantees or purchase documents to show her contribution. She further testified that her contribution included looking after the children, taking care of the 1st defendant and companionship. The witness further testified that they parted ways in the year 2006. PW1 testified that the suit property was registered in the name of the defendant in the year 2018 in the 1st defendant's name after she had left the matrimonial home.
9. PW1 further testified that she did not look after her children when she moved from the matrimonial home as the 1st defendant blocked her and

one Irene Wanjiru Ndungu moved in with the 1st defendant and they had a child together. The said Irene Wanjiru gave spousal consent over the purchase of the suit property without authority to do so.

The Defendants' Case

10. The 1st defendant DW1 relied on his Replying Affidavit dated 21st July 2022 and testified that the plaintiff deserted the matrimonial home in 2006. DW1 testified that he solely acquired and developed LR No. THIKA MUNICIPALITY BLOCK 24/268 and the plaintiff did not contribute to its purchase or development as he completed paying the purchase price in 2008. The witness further testified that the owner of the suit property then could not transfer it to him as it had an unexplained restriction placed by the DCI over the property. After they were unable to establish why a restriction was placed over the property, the department wrote a letter and the property was registered in his name.

11. DW1 testified that by the time the plaintiff left the only development he had on the property was a three-bedroom house that they moved into before completion as he was unable to develop the house fully because he was not in secure employment and the plaintiff was unwilling to assist. DW1 further testified that he is a stranger to the plaintiff's loans and credit facilities as they were not applied or utilized in the acquisition or development of the suit property. Further during the period of cohabitation, the plaintiff would leave the entire burden of providing for the children unto him and on leaving she did not take any responsibility towards the children. The witness testified that he brought up the children and educated them up to university level without the plaintiff's help thus she did not make any non monetary contribution.

12. DW1 further testified that when the plaintiff left, he bought another property and developed the suit land into multiple dwelling units for rental purposes. The witness further testified that in 2018 he fell into financial problems and decided to dispose off land parcel THIKA MUNICIPALITY BLOCK 24/628. He further testified that since the property was not matrimonial property, he did not consult her and it is after he placed the 2nd defendant in possession that the plaintiff placed a caution on the property. The witness further testified that he informed the Land Registrar that the caution was unlawfully placed as the plaintiff was not a licensee on the property and a letter was written informing her of the Registrar's intention to remove the caution but she failed to file an objection. Consequently, the caution was lawfully and procedurally removed and thus the transfer to the 2nd defendant was proper and legitimate.

13. On cross examination the witness testified that the plaintiff placed a caution in 2006 after she left the home and he came to learn of it in 2007 as he was transferring the land to the 2nd defendant. The plaintiff filed the caution through the DCI Thika and he went to find out if there was any OB report to back the caution but they found that there was none. The caution was removed by the Land Registrar and he sold the land in 2018. The witness further testified that the second caution was placed by the plaintiff in 2021 when the 2nd defendant had completed payments for the purchase of the property.

14. DW2, the 2nd defendant relied on her Replying affidavit dated 21st July 2022 and testified that she is an innocent purchaser for value as in January 2019, land brokers informed her that land parcel number THIKA MUNICIPALITY BLOCK 24/628 which comprised of 2 units of 2

bedrooms, 2 units of 3 bedroom and 1 unit of 1 bedroom was on sale. DW2 further testified that at the time of viewing the property 4 units were occupied by tenants while 1 unit was vacant and the 1st defendant did not reside in any of the units.

15. The witness testified that she met the 1st defendant who gave her a copy of the title deed and on 30/1/2019 she instructed her daughter known as Jacinta Njuguna to conduct an official search which confirmed that the 1st defendant was the registered owner and the property had no encumbrances, inhibitions, cautions or restrictions. DW2 testified that on 30/1/2019, they approached the firm of J.G Waweru & Co. Advocates to prepare the sale agreement and transfer of documents and further the 1st defendant obtained spousal consent from his wife Irene Wanjiru Ndung'u. DW2 further testified that on 9/11/2019 she appointed her daughter as the manager of the said premises and she wrote to all the tenants informing them of the new management details and on 19/12/2019, she obtained bill of land rates and realized that the records of the County Government of Kiambu indicated Nelson Njiru as the owner. In April 2022, the 1st defendant availed a letter of consent from the land control board and on 25/4/2022, she was issued with a title deed for the said property. The witness testified that she conducted due diligence and obtained all the necessary documents of the transfer as required by law.
16. On cross examination, the witness testified that she did not see a marriage certificate between the 1st defendant and Irene Wanjiru but they showed her birth certificates of their children. The witness further testified that she conducted a search and found a caution in place and when she contacted the 1st defendant he sorted it out and told her that it was placed by his former wife.

17. DW3, Irene Wanjiru Ndungu testified that she married the 1st defendant in 2006 and they have three children. She further testified that she signed a spousal consent in respect of the suit property. On cross examination, she testified that she brought up the 1st defendant's children with him for the plaintiff did not visit their home or see her children. She further testified that the 1st defendant borrowed 2-3 loans from BAT where he had worked and as he left employment, he told her that he would sell the suit property and repay the loan. She further added that the 1st defendant had constructed most of the units after she got married to him.
18. DW3 further testified that she was not legally married to the 1st defendant but she lived with him since 2005.
19. Parties agreed to dispose of the suit by way of written submissions.

The Plaintiff's Submissions

20. The plaintiff submits that she and the 1st defendant were lawfully married in 1998 and the 1st defendant admitted that the marriage has never dissolved. The plaintiff further submits that the suit property was acquired and developed between 1998 and 2008 during the subsistence of the valid marriage and the 1st defendant did not seriously dispute that the family moved into and used the property as their matrimonial home. The 1st defendant's defence that the property is not matrimonial because she deserted him in 2006 is legally irrelevant as only a court decree can terminate a marriage.
21. Relying on the case of **PWK vs JKG [2015] KECA 535 (KLR)**, the plaintiff argues that the suit property is matrimonial property and the 1st

defendant held the registered title subject to her beneficial interest as his lawful spouse.

22. The plaintiff submits that she took out loans and credit facilities to facilitate the acquisition and construction of the property and that she provided a conducive environment for the 1st defendant by caring for their children and supporting his endeavours. While the 1st defendant denies her monetary contributions, he admits that when she left in 2006, their children were young and that he subsequently educated them up to university level. Thus the plaintiff argues that the said admission implies that during the critical early years, she as the mother and wife was primarily responsible for child care and home management, a significant non monetary contribution that enabled the 1st defendant to focus on income generation and property development. The plaintiff refers to the case of **TKM vs SMW [2020] KECA 684 (KLR)** and submits that the law is settled that such domestic and familial contributions are to be accorded equal weight to financial contributions.
23. The plaintiff relies on Section 12 of the Matrimonial Property Act and submits that a spouse shall not deal with matrimonial property without the consent of the other spouse. The 1st defendant admits that he transferred the property without the plaintiff's knowledge or consent which renders the transaction fundamentally defective and voidable. The plaintiff further argues that the 1st defendant procured a consent from DW3, a person he knew was not his legal wife and the 2nd defendant accepted it and relied on it. Thus they both engaged in a scheme to circumvent the law and defraud the true spouse which constitutes fraud. The plaintiff relies on the case of **Gitungo vs Kamau & Another (Environment and Land Appeal E034 of 2023) [2026] KEELC**

26(KLR) and submits that a title obtained through fraud is not indefeasible. Thus, the 2nd defendant is not a bona fide purchaser for value without notice as she was put on notice by the existence of her caution on the title. Further her own documents show the Land Control Board Consent was sought and obtained in late April 2022 long after the sale agreement in 2019 suggesting an attempt to regularize a flawed transaction. The transfer was executed in the breach of statutory duty and through fraudulent misrepresentation and it is therefore unlawful, null and void and ought to be set aside.

The 1st Defendant's Submissions

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24. The 1st defendant relies on **Section 6 and 7 of the Matrimonial Property Act** and the case of **Echaria vs Echaria [2007] eKLR** and submits that the plaintiff failed to adduce any evidence of monetary contribution such as payments, loans or remittances. She further failed to demonstrate non monetary contribution such as management, companionship, or domestic support during the acquisition and development. The 1st defendant further refers to the cases of **P.N.N vs Z.W.N [2017] eKLR**; **J.O.O vs M.B.O.O (2023) eKLR** and **R.A.A. vs T.O.O (2024) eKLR** and submits that Article 45(3) of the Constitution does not guarantee an automatic fifty fifty division of property and entitlement is dependent on contribution. Further, property acquired after separation, where no contribution is not shown cannot be claimed merely on the basis of marriage. The 1st defendant submits that the plaintiff testified that she deserted the matrimonial home in 2006 and never returned. Further, he completed payment for the property in 2008, long after the plaintiff had left thus the acquisition of the property was solely done by him.

25. Relying on the case of **SN vs FM [2019] eKLR**, the 1st defendant argues that he cannot be faulted for disposing the property acquired and developed solely by him as the plaintiff admitted that she had not lived with him for years and had no involvement in the property. Further, the 1st defendant relies on the case of **T.K.M vs S.M.W (2020) eKLR** and submits that property acquired after separation or desertion and before marriage does not amount to automatic matrimonial property.
26. The 1st defendant further refers to the case of **Katende vs Haridar & Company Limited [2008] 2 EA 173** and submits that the 2nd defendant is a bona fide purchaser for value without notice pursuant to Section 26 of the Land Registration Act. There was no caution, restriction or court order registered against the property at the time of sale and thus the plaintiff cannot seek to defeat a lawful transaction through afterthought litigation.

The 2nd Defendant's Submissions

27. The 2nd defendant submits that the plaintiff deserted the matrimonial home in 2006, ceased cohabitation with the 1st defendant and did not reside in the suit property thereafter. The suit property was then converted into a purely commercial rental investment by the 1st defendant after he moved his children to a new home. Neither the 1st defendant nor his children resided on the suit property at the time of sale and the plaintiff had no possession, occupation or beneficial enjoyment thereof.
28. The 2nd defendant further submits that the plaintiff has failed to prove any direct or indirect contribution towards the acquisition or development of the suit property. Although she made allegations of loans and credit facilities, she did not provide any documentary proof of the same. Thus,

the plaintiff's claim to matrimonial property cannot defeat a registered title held by a third party.

29. The 2nd defendant submits that fraud must be pleaded and strictly proved to a standard higher than balance of probabilities which the plaintiff has failed to do. The 2nd defendant argues that she adduced evidence to show that prior to the purchase, an official search was conducted confirming the 1st defendant as the absolute registered proprietor and revealing no encumbrances, cautions or restrictions against the suit property. She inspected the property, confirmed it was a rental investment, engaged advocates to conduct conveyancing, paid the full purchase price and relied on express warranties by the 1st defendant that he held the suit property absolutely and not in trust for any person.
30. The 2nd defendant submits that the alleged caution placed by the plaintiff had already been lawfully removed due to lack of formal police report or complaint to back the caution. At the time of sale, there was no legal or equitable interest registered or disclosed against the title. The 2nd defendant thus submits that she cannot be faulted for relying on the land register which the law deems conclusive evidence of proprietorship.
31. The 2nd defendant submits that the evidence before the court is that the suit property had been developed and utilized exclusively for rental purposes since 2008 and it was not occupied by the 1st defendant, the plaintiff or their children. The plaintiff merely appears as a spouse on paper and not in fact the long cohabitation between the 1st defendant and Irene Wanjiru Ndung'u establishes her as the spouse in fact. The 2nd defendant further submits that she bore no legal obligation to conduct a genealogical or historical inquiry into the 1st defendant's prior marital

relationships. She further submits that she was entitled to rely and did in fact rely on the 1st defendant's express representations and warranties that he held absolute title and the requisite authority to sell as well as the spousal consent executed by one Irene Wanjiru who the 1st defendant presented and affirmed to be his spouse. The 2nd defendant further argues that the duty to obtain spousal consent rests with the vendor and not the purchaser and failure if any, does not automatically vitiate the title of an innocent purchaser for value without notice.

32. The 2nd defendant submits that she is a bona fide purchaser for value without motive whose title is protected by the shield of indefeasibility under Section 26 of the Land Registration Act. The 2nd defendant submits that she had no notice of the plaintiff's claim and the 1st defendant provided all the necessary legal documentation including a spousal consent from his current wife whom he presented and affirmed to be his spouse at the material time. She further submits that there is no proof that she was a party to any fraud or misrepresentation and her title is absolute and protected from cancellation and interference.

33. The 2nd defendant submits that cancellation of the title would be a disproportionate remedy and a miscarriage of justice against an innocent third party. The property has already passed on to her and possession has been taken and third party tenancy rights exist. The plaintiff's remedy if any lies in a claim for a share of the proceeds of the sale against the 1st defendant.

Issues for determination

34. The main issues for determination are:-

- a) Whether there was existence of a valid marriage between the plaintiff and 1st defendant.
- b) Whether the title to the 2nd Defendant was lawfully acquired from the 1st Defendant.
- c) Whether L R Thika Municipality Block 24/268 is a matrimonial property of the plaintiff and the 1st defendant.
- d) Whether the plaintiff is entitled to the orders sought.
- e) Who shall meet the costs of the suit.

The Law

35. It is not disputed from the evidence of the parties that the plaintiff and the 1st defendant are legally married but have been living apart for several years. Despite the separation, the marriage has not been dissolved.

Section 7 of the Matrimonial Property Act provides:-

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

36. The law as above stated is clear that for matrimonial property to be divided between the parties, dissolution of marriage must have taken place which is not the case herein. The court will therefore, restrict itself

to the issues that can be determined within its jurisdiction in the current scenario.

37. Among other prayers, the plaintiff seeks for a declaration that the suit property was acquired jointly through the subsistence of the marriage. Declarations of matrimonial property rights is enshrined under **Section 17 of the Matrimonial Property Act** which provides:-

1) A person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.

2) An application under sub section (1)-

i. Shall be made in accordance with such procedure as may be prescribed;

ii. May be made as part of a petition in a matrimonial cause; and

iii. May be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.

38. The foregoing provision empowers this court to make determinations on prayers for declaratory rights in regard to matrimonial property in instances where parties are yet to dissolve their marriage. In **AKK vs PKN [2020] eKLR** the Court of Appeal stated:-

A plain reading of Section 17 enables a spouse, subsistence of marriage notwithstanding, to make an application for declaratory orders. It further states that the application may be made as part of a petition in a matrimonial cause and notwithstanding that a petition

has been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act.

39. Further in **Nderitu vs Nderitu [1997] LLR 606** reported in the Family Digest Matrimonial Property wherein it was held at page 81 holding no. 2(ii) as follows:-

For a wife to succeed in a Section 17 application, all that she has to show is that (a) she is married to the husband; (b) the property in question was acquired during coverture; (c) she contributed directly or indirectly to the acquisition of the assets.

40. As such, for a declaration under section 17 of the Matrimonial Property Act to be made, the plaintiff bears the burden of proving the existence of the marriage, that the suit property was acquired during the subsistence of that marriage and as such, it is a matrimonial property based on her contribution to the acquisition of the suit property.
41. On perusal of the record, the plaintiff produced a marriage certificate demonstrating the solemnisation of her official marriage with the 1st defendant at the Registrar's Office, Nairobi on 21st October 1998, a fact admitted by the 1st defendant. The defendant having not denied the existence of the said marriage, this court finds that there exists a valid marriage between the plaintiff and the 1st defendant.
42. On whether the suit property was acquired during the subsistence of that marriage thus qualifying as matrimonial property, **Section 6 of the Matrimonial Property Act 2013**, is relevant herein. It defines

matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage.

It is, therefore, a basic tenet that for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.

43. The plaintiff has further sought for orders of invalidating the land transaction in respect to THIKA MUNICIPALITY BLOCK 24/268 that has already taken place on the basis that she had not given spousal consent. Section 93 of the Land Registration Act provides:-

Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses, or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.

44. The above provision leads to the conclusion that the suit property is matrimonial property and that this court has the jurisdiction to deal with the sale between the 1st and 2nd defendant.

45. The plaintiff maintained that she did not give spousal consent for the sale of the suit property but such spousal consent was given by DW3, who has been cohabiting with the 1st defendant after the plaintiff left the matrimonial home. As such, the DW3 is not a spouse to the 1st defendant.

Section 12(1) of the Matrimonial Property Act reveals that:-

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.

46. It is not in dispute that the plaintiff did not give her spousal consent in reference to the sale of the suit property. The 1st defendant gave the 2nd defendant a spousal consent from DW3, Irene Wanjiru Ndungu who was not his spouse but in cohabiting with him while the marriage between the plaintiff and the 1st defendant still exists. This fact has been admitted by the 1st defendant, the 2nd defendant and DW3 in their evidence. The plaintiff alleged fraud on the basis that the 2nd defendant knew that she was the wife of the 1st defendant but accepted the purported spousal consent of DW3. I have looked at the record and noted that although the plaintiff alleged fraud, she did not plead or proof particulars of the said fraud on part of the 2nd defendant.
47. It is not in dispute that the parties herein separated in the year 2006. The evidence of the plaintiff is that she contributed to the purchase and development of the land which was acquired during their union. The plaintiff produced bank statements from Cooperative Bank and Barclays Bank as well as statements of her savings and credit account at Mwalimu Sacco and Savings Credit. The statements showed that the plaintiff's monthly salary was deposited in the Cooperative Bank accounts and loans borrowed from the Sacco were also deposited in the said account. The loans shown in the statements were about Ksh.800,000 between 1998 to 2007. The statements from Cooperative Bank show various withdrawals from the salary and from the loans taken. The plaintiff testified that she worked as a teacher with Teacher Service Commission and was a member of Mwalimu Sacco and Credit Society where she

regularly saved part of her salary for a period of about nine (9) years. The statements for the plaintiff's account in Barclays Bank for the period between January 2000 to February 2007 were not indicative of any substantial deposits or loan repayments. The plaintiff further testified that she took care of the 1st defendant as a wife, gave him companionship and brought up their children as their mother and thus her non-monetary contribution.

The evidence of the defendant was that he solely purchased the land and constructed a three-bedroom house on it which became the home of the family. He stated that the family moved into the home before it was complete due to lack of capital to complete the house. He said that the plaintiff did not contribute any funds for the purchase or for the construction of the house. As such, the 1st defendant submits that the plaintiff is not entitled to claim any share in the home or in the property. It was further argued that this was the main dispute why the defendant did not inform the plaintiff that he was selling the matrimonial home and other later developments of rental units that he made after the parties separated. These included two units of two-bedrooms and one unit of one bedroom. The defendant added that for the further developments that were made between 1999 – 2005, he borrowed loans and funded the construction solely. However, the defendant did not produce any statements to demonstrate his source of funds. He said that the plaintiff did not show interest in taking care of their two children and that most of the times he was left to look after them while the plaintiff was away. Following their separation, the 1st defendant testified that the plaintiff did not return to their home to check on the children. The 1st defendant said he single handily provided for the children and educated them up to University level. All the children are now adults.

48. In regard to the contribution made by the plaintiff, it is imperative to note that she was resident in the home as the wife and mother of the 1st defendant for a period of nine years and was also earning income as an employee with the Teacher Service Commission. The defendant said that even if the plaintiff took loans, she could not prove through documentary evidence that the loans were used to buy the land in issue or to develop it. It is generally accepted that contribution between parties to acquisition or development of matrimonial property must not be equal, direct or indirect.
49. Although the 1st defendant denied that the plaintiff made any financial contribution to the acquisition or development of the property, the plaintiff's bank statements are evidence that she was earning a salary, saving in Mwalimu Sacco where she took several loans that are shown in the statements. This is direct evidence of a spouse who earned income from her employment during the period the plot was bought and the house constructed. The mere absence of documents of expenditure of the funds drawn from her bank account cannot be used to deny her rights in the property. It must be appreciated that none of the parties in a marriage may anticipate divorce or separation during the peaceful subsistence of the marriage in years to come in order to keep receipts of purchase of building materials or keep records of funds given to the other spouse to use in the acquisition or construction of a property. It would be absurd to expect that a party who purchased hardware items or other building materials would be in possession of documents including receipts many years later. Proof of contribution is on the balance of probabilities and not beyond reasonable doubt. It is accepted norm that the conduct of spouses in a healthy relationship is mostly done in trust of each other and the need to keep documents may not arise.

50. During the time the parties stayed together the plaintiff like any other mother looked after her children, cared and nurtured her husband which contributed to him stepping out to work, earn income, and acquire property for his family. I did not believe the defendant's evidence that he is the one who cared for their children more than their mother did at their tender age of ten (10) years and below. The plaintiff as the mother of the children said she cared for her children until the time she was forced out of the matrimonial home and was prevented from going back to the matrimonial home to check on her children. Another woman came in while the marriage subsisted and replaced her almost immediately and took over her duties as wife and mother of the children. The period the plaintiff took care of her children and cared for her husband must be taken into consideration as indirect contribution in this suit as provided for under the Matrimonial Causes Act.

51. I am of the considered view that the plaintiff contributed to the acquisition and to the construction of the matrimonial home up to the year 2006 when the parties separated. Although the 1st defendant did not produce documents of his income, it is not in dispute that he contributed more financially to the acquisition and construction of the matrimonial home and solely built the additional units. In way of assessment, I would give the defendant 60% and 40% to the plaintiff only in regard to the initial development of the matrimonial home and the entire land less the value of the construction cost of the additional units.

52. In regard to the issue of the validity of the sale of the matrimonial home by the 1st defendant to the 2nd defendant, it is imperative to consider the

provisions of law as well the evidence of the parties. Section 12 of the Matrimonial Property Act provides: -

“An estate or interest, 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,”

53. This provision makes spousal consent a mandatory precondition before alienating matrimonial property.
54. The Land Registration Act, 2012, Section 93 recognises spousal interests in land acquired during marriage and subjects such dealings in such property to matrimonial property law. Section 93(4) provides that if a spouse disposes of matrimonial property without the consent of the other spouse, the transaction may be voided at the option of the non-consenting spouse.
55. It is also important to note that spousal rights over the matrimonial property are treated as overriding interests under Section 28 of the Land Registration Act. A number of decisions by Superior Courts on this subject have buttressed spousal rights in cases where such consent has not been obtained. In the case of **JKN Vs JWN (2022) eKLR** the court held that spousal consent was required before a matrimonial home could be transferred, and in the absence of such consent, the transfer could not confer good title. It was also emphasized that spousal rights constitute overriding interests which are binding on purchasers. The court held in the case of **Kadzo Mkutano Mwamboje Kadosho & Others (2016) eKLR** that:

“Spousal consent is required before a spouse can sell matrimonial property, and in the absence of such consent, the sale becomes null and void.”

56. The property in question, according to the 1st Defendant was sold to the 2nd Defendant in 2019. The 1st defendant in his defence said that he was not bound to seek the consent of the plaintiff for reason that she had not contributed to the acquisition and development of the said property. As for the 2nd defendant, she testified that she was an innocent purchaser and that she conducted due diligence and established that the land was registered in the name of the 1st Defendant. The 1st Defendant then provided a spousal consent from his wife one Irene Wanjiru Ndungu who was his witness in this case.
57. I have perused the documents produced in evidence by the 2nd defendant. The sale agreement for purchase of LR THIKA MUNICIPLAITY BLOCK 24/268 of the land by the 2nd defendant is dated 30th January 2019. However, the letter of Land Board consent is dated 7th April 2022 which is three (3) years after the agreement. The land was registered in the 2nd defendant’s name on 25/04/2022.
58. The 1st defendant explained that the delay to transfer the land to the 2nd defendant was occasioned by a caution placed by the plaintiff and also by ongoing investigations by the DCI Thika involving the said caution. It was not explained why the DCI had to be involved in removal of

the caution which is the duty of the Land Registrar or of the Court, should the Land Registrar find it not appropriate to remove the caution. It is not clear why a caution placed by a spouse was referred to the DCI for investigation while the marriage of the parties subsisted.

59. The issue for determination is whether the spousal consent by DW3 Irene Wanjiru Ndugu who cohabits with the 1st defendant was valid in regard to the sale of the matrimonial property to the 2nd defendant. This court has already declared the property in issue as the only matrimonial property that exists between the plaintiff and the 1st defendant. Secondly, both parties agree that they are still legally married and have not dissolved their marriage. As such, the plaintiff was the only person who would have given spousal consent to the 1st defendant to dispose of their matrimonial property. The said Irene Wanjiru was, and still is, a stranger to the marital issues in the marriage of the plaintiff and the 1st defendant.
60. As for the defence of the 2nd defendant that she is a purchaser in good faith and that she acted after conducting due diligence cannot override the law. It is doubtful that the 2nd defendant acted in good faith in the said transaction considering the evidence of the parties and the conduct of the 1st defendant. The plaintiff told the court that she had been approached by the 1st and 2nd defendants to remove the caution and to give spousal consent to the sale of the property before the matter was

handed over to the DCI for investigations. The plaintiff declined to grant the required consent just to learn later that DW3 had unlawfully granted consent.

61. It is my considered view that the so-called spousal consent by DW3 was null and void *ab initio* in that the executor was not a party to the marriage of the plaintiff and the 1st defendant. As such, the sale of the property by the 1st defendant to the 2nd defendant was contrary to the provisions of Section 12 of the Matrimonial Causes Act and to Section 93 of the Land Registrar Act thus rendering it of no legal effect. The 1st defendant could not validly pass the title of the matrimonial property to a 3rd party without first complying with the provisions of the law.

62. Consequently, I find the plaintiff has proved her case on the balance of probabilities. Judgment in favour of the plaintiff against the defendants is hereby entered as follows: -

a) That the purported transfer of the land and buildings thereon namely LR NO. THIKA MUNICIPALITY BLOCK 24/268 to the 2nd defendant by the 1st defendant is hereby declared null and void for all intents and purposes.

b) That the title to LR THIKA MUNICIPALITY BLOCK 24/268 is hereby cancelled and shall forthwith

revert to the name of the 1st defendant **Agpius M. Munyo Nthambiri**.

- c) That the plaintiff is entitled to a share of the matrimonial property LR THIKA MUNICIPALITY BLOCK 24/268 as pronounced in this judgment upon dissolution of the marriage
- d) That the 1st defendant shall refund the purchase price and any incidental costs of the voided transaction and transfer to the 2nd defendant within ninety (90) days.
- e) That the 2nd defendant shall render vacant possession of L.R. THIKA MUNICIPALITY BLOCK 24/268 to the 1st defendant and the plaintiff within ninety (90) days.
- f) The costs of the suit shall go to the plaintiff payable by the 1st defendant based on the unique facts of this case.

63. It is hereby so ordered.

***JUDGMENT DELIVERED VIRTUALLY, DATED AND
SIGNED AT THIKA THIS 23RD DAY OF APRIL 2026.***

F. MUCHEMI
JUDGE

