



**W & another v N (Environment and Land Appeal E035 of 2021)  
[2024] KEELC 253 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 253 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E035 OF 2021**

**DO OHUNGO, J  
JANUARY 31, 2024**

**BETWEEN**

**VJW ..... 1<sup>ST</sup> APPELLANT**

**IMM ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LWN ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief  
Magistrate’s Court at Kakamega (Hon. E Malesi, Principal Magistrate)  
delivered on 6th July 2021 in Kakamega MCELC No. 555 of 2018)*

**JUDGMENT**

1. Litigation leading to this appeal commenced in this court on 31<sup>st</sup> December 2015 when the respondent filed her plaint dated 21<sup>st</sup> December 2015. Later, the matter was transferred to the Chief Magistrate’s Court at Kakamega for hearing and determination. Consequently, the matter became Kakamega MCELC No. 555 of 2018.
2. The respondent averred in the plaint that she was the second appellant’s wife and that she had been in possession of the parcel of land known as E/Wanga/Eluche/xxxx (the suit property) which was registered in the second appellant’s name, and which was her matrimonial home. She further averred that the appellants fraudulently caused the suit property to be registered in the first appellant’s name without her consent. She therefore prayed for judgment for a declaration that the transfer was illegal, cancellation of the transfer, a declaration that she was entitled to a half share of the suit property and an order for transfer of the half share to her.
3. The appellants filed a joint statement of defence in which they admitted the marriage and proprietorship. They denied the allegations of fraud and matrimonial property and urged the court to dismiss the suit with costs.



4. Upon hearing the matter, the Subordinate Court (Hon. E Malesi, Principal Magistrate) delivered judgment on 6<sup>th</sup> July 2021 wherein it granted a declaration that the transfer to the first appellant was illegal, ordered cancellation of the transfer and awarded the respondent a half of the costs of the suit.
5. Dissatisfied with the outcome, the appellants filed this appeal through Memorandum of Appeal dated 23<sup>rd</sup> July 2021. The following are the grounds of appeal as listed in the memorandum:
  1. That the learned trial magistrate erred in law and in fact in failing to find that his Court sitting as a land Court had no jurisdiction to handle matrimonial property causes and hence this case.
  2. That the learned trial magistrate erred in law and in fact in finding that Land Parcel No. E. Wanga/Eluche/xxxx was a matrimonial property contrary to the evidence on record.
  3. That the learned trial magistrate erred in law and in fact holding that spousal consent was necessary before the 2<sup>nd</sup> Appellant disposed of his property it being not a matrimonial property in terms of the provisions of the *Matrimonial Property Act*.
  4. That the learned trial magistrate erred in law and in fact in holding that the sale of Land Parcel No. E. Wanga/Eluche/xxxx to the 1<sup>st</sup> Defendant was illegal contrary to the provisions of the *Matrimonial Property Act*.
  5. That the learned trial magistrate erred in law and in fact in misapprehending the provisions of the *Matrimonial Property Act* relating to the definition of what constitutes Matrimonial Property hence occasioning in miscarriage justice.
  6. That the learned trial magistrate erred in law and in fact in designating the house on the suit land a matrimonial home contrary to the evidence on record.
6. The appeal was canvassed through written submissions. Directions to that effect were given in the presence of counsels for all parties. The appellants filed written submissions, but the respondent did not file any.
7. The appellants argued that in view of Section 5 of the *Matrimonial Property Act*, the suit property was not matrimonial property and that the trial court erred in holding that it was matrimonial property. That, consequently, the Subordinate Court sitting as an Environment and Land Court did not have jurisdiction to hear and determine the suit. The appellants further relied on Section 17 of the *Matrimonial Property Act*, Article 162 (2) (b) of *the Constitution*, and Section 13 (1) (2) and (7) of the *Environment and Land Court Act* and argued that although they did not raise the issue of jurisdiction before the Subordinate Court, jurisdiction can be raised at any point of litigation. They therefore urged this court to allow the appeal.
8. As the first appellate court in this matter, this court has an obligation to re-consider and re-evaluate the evidence and to determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. *See Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
9. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issues that arise for determination are whether the Subordinate Court had jurisdiction and whether the reliefs sought should have issued.
10. It can hardly be overemphasised that jurisdiction is key in any judicial proceedings. Jurisdiction is the very soul of all judicial proceedings, without which the proceedings come to a certain end and the



court cannot make any further step. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR. As the Supreme Court stated in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR:

A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.  
.....

11. In *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR, the Court of Appeal stated:

... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. ....

12. The appellants' contention is that the suit property was not matrimonial property and that the Subordinate Court sitting as an Environment and Land Court did not have jurisdiction to hear and determine the suit. As noted at the beginning of this judgment, the suit that gave rise to this appeal was filed in this court on 31<sup>st</sup> December 2015 and was later transferred to the Chief Magistrate's Court at Kakamega for hearing and determination.

13. Pursuant to Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011, designated magistrates court have jurisdiction in matters of civil nature involving occupation, title to land. The section provides:

- (3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.
- (4) Subject to Article 169(2) of *the Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —
- (a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
- (b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.

14. Further, Section 9(a) of the *Magistrates' Courts Act*, 2015 clarifies the jurisdiction specified above when it provides:

A magistrate's court shall -

- (a) in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (Cap. 12A) and subject to the pecuniary limits under section 7 (1), hear and determine claims relating to -
- (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (ii) compulsory acquisition of land;



- (iii) land administration and management;
- (iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (v) environment and land generally.

15. A perusal of the plaint and defence herein reveals that the dispute revolved around ownership of the suit property. There is no dispute that the first appellant was the registered proprietor of the suit property as of the date of trial and that he acquired it from the second appellant who was his predecessor in title. The second appellant became the registered proprietor on 4<sup>th</sup> September 2009 and remained proprietor until 17<sup>th</sup> July 2015 when he transferred the suit property to the first appellant following a sale agreement entered into in the year 2014. The respondent was not party to the sale agreement.
16. The appellants have built their case in this appeal around the argument that the suit property was not matrimonial property and that in the circumstances, the Subordinate Court was thereby deprived of jurisdiction. They relied on Sections 5 and 17 of the *Matrimonial Property Act*. To appreciate the meaning of "matrimonial property" I note that "matrimonial home" is defined at Section 2 of the *Matrimonial Property Act* to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home ....Further, "matrimonial property" is defined at Section 6 (1) (a) of the Act to mean the matrimonial home or homes.
17. It is not in dispute that the second appellant and the respondent are husband and wife, having been married in the year 2011 and that the respondent had been living in the suit property from the year 2012. She was resident therein even as of the date of the sale. Besides the respondent, the second appellant has at least one other wife, whose matrimonial home is located away from the suit property. In the context of the polygamous marriage and considering that the respondent had been living in the suit property from the year 2012, the suit property was the second appellant's and the respondent's matrimonial home even if the second appellant did not consistently reside in it. Being a matrimonial home, it was by extension the second appellant's and the respondent's matrimonial property. I am aware that the second appellant contended that he and the respondent had a matrimonial home at his ancestral land as opposed to the suit property. That contention is not helpful considering that matrimonial homes can be more than one, the polygamous marriage in issue and further in view of the fact that the respondent was resident in the suit property from the year 2012 up to the date of transfer to the first appellant.
18. Pursuant to Section 7 of the *Matrimonial Property Act*, ownership of the suit property vested in the second appellant and the respondent according to their contribution towards its acquisition. To the extent that the marriage remains undissolved, determination of the actual shares must await dissolution of the marriage. Pursuant to Section 12 of the Act, it was obligatory that the second appellant obtains the respondent's consent prior to the sale and transfer to the first appellant.
19. The second appellant stated under re-examination that he did not need the respondent's consent to sell the suit property. On his part, the first appellant stated under cross-examination:

“The 2<sup>nd</sup> defendant [second appellant] told me that the plaintiff [respondent] was staying on the [suit property]. The plaintiff [respondent] was not present when we executed the land sale agreement. ... The plaintiff [respondent] did not attend the LCB [Land Control Board]. I later informed the plaintiff [respondent] that I had purchased the [suit property]



and informed her that I was intending to pay to the 2<sup>nd</sup> defendant [second appellant] the balance of the purchase price.”

20. The second appellant did not offer any evidence to show that he obtained the respondent’s consent to sell the suit property. His attitude was that no such consent was required. On the other hand, the position taken by the first appellant confirms that no consent was obtained and that he ploughed ahead with the transaction knowing fully well that the respondent was the second appellant’s wife and that she was in occupation of the suit property.
21. Pursuant to prayer (a) of the plaint and in light of paragraph 7 of the plaint, the respondent sought cancellation of the first appellant’s proprietorship of the suit property on account of alleged illegality and fraud. Those are matters that fell squarely within the jurisdiction of the Subordinate Court pursuant to Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 as read with Section 9 (a) of the *Magistrates’ Courts Act*, 2015. Description of the suit property as matrimonial property and want of spousal consent were just grounds that the respondent used to seek to establish a basis for nullification of both the transfer in favour of the first appellant and the ensuing title. Reference to matrimonial property and want of spousal consent did not take the suit out of the jurisdiction of the Subordinate Court as regards the orders that the court ultimately made. I find that the Subordinate Court had jurisdiction to hear and determine the matter and to make the orders that it made.
22. Pursuant to Section 26 (1) (a) or (b) of the *Land Registration Act*, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme. In view of the foregoing discourse, it is manifest that the suit property was transferred to the first appellant without the respondent’s spousal consent and therefore the first appellant’s title was acquired both illegally and contrary to procedure. The learned magistrate did not err in making the orders in the impugned judgment. The reliefs granted were merited.
23. I find no merit in this appeal, and I therefore dismiss it. Considering the relationship between the parties, I make no order as to costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Munyendo for the Appellants

No appearance for the Respondent

Court Assistant: E. Juma

