



REPUBLIC OF KENYA



**Kagunda v Njogo & 2 others (Environment & Land Case E038 of 2021)
[2024] KEELC 246 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 246 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E038 OF 2021
LN GACHERU, J
JANUARY 25, 2024**

BETWEEN

PRISCILA NYAKIEGA KAGUNDA PLAINTIFF

AND

STANLEY KAGUNDA NJOGO 1ST DEFENDANT

ELIUD MAINA KAGUNDA 2ND DEFENDANT

THE LAND REGISTRAR MURANG'A 3RD DEFENDANT

JUDGMENT

1. The Plaintiff herein Priscilla Nyakiega Kagunda, has brought this suit against the Defendants herein and has sought for judgement against the said Defendants, jointly and severally for various orders.
2. Among the orders sought are;
 - a) An order and declaration that the transfer of land parcel No. Loc 19/Gacharage-ini/414, from the 1st Defendant to the 2nd Defendant was illegal, irregular, un- procedural and fraudulent and further order that the same be cancelled and the land revert to its original status in the 1st Defendant's name.
 - b) An order and declaration that the subdivision of land parcel number Loc 19/Gacharage-ini/1284 into subsequent numbers;LOC 19/Gachageini/ 4664LOC 19/Gacharageini/4665LOC 19/Gacharageini/4666
Was illegal, irregular, unprocedural and fraudulent and a further order that those subdivision be cancelled for the land to revert to its original status as land parcel No. LOC 19/Gacharageini/1284.
 - c) An order and declaration that the trust binding on the properties;



LOC 19/Gacharageini/ 414

LOC 19/ Gacharageini/252

LOC 19/Gacharageini/1284

LOC 19/ Gacharageini/1440

be dissolved and cancellation of the sole proprietorship of the 1st Defendant and for the properties to be registered to both the Plaintiff and the 1st Defendant as joint proprietors.

- d) An order does issue empowering the Land Registrar, Murang'a, to rectify the respective registers and effect orders a), b), and c) above and be allowed to dispense with the production of old titles retained by the 1st and 2nd Defendants, if they do not cooperate.
 - e) In the alternative to b, c and d above, a declaration that the properties herein hitherto registered in the 1st Defendants name are jointly owned between the Plaintiff and the 1st Defendant in trust for himself and for the benefit of their children and further order empowering the Land Registrar, Murang'a to note the Plaintiff's spousal interest in the properties;

LOC. 19/Gacharageini/414
LOC. 19/Gacharageini/252
LOC. 19/Gacharageini/1284
LOC. 19/Gacharageini/1440
 - f) A permanent injunction restraining the 1st and 2nd Defendants or any other person claiming under them from interfering with any of the properties named in (c) above in any manner whatsoever without the Plaintiff consent.
 - g) A permanent injunction restraining the 1st and 2nd Defendants from interfering with the person of the Plaintiff and her children with regards to use of the subject properties.
 - h) A permanent order of injunction restraining the 1st Defendant from disposing off the properties named in c) above without the Plaintiff's consent.
 - i) Costs of the suit.
 - j) Any such further and /or other relief this court may deem fit to grant.
3. It was the Plaintiff's claim that at all material time, the 1st Defendant was and is still the registered owner of the land parcels Nos LOC 19/ Gacharageini/ 252, LOC19/Gacharageini/1284. (now subdivided into Loc 19/ Gacharageini/4664,4665, and 4666) and LOC 19/Gacharageini/1440. That the 2nd Defendant is the registered owner of owner of land parcel No. LOC /Gacharageini/414.
4. Further, the Plaintiff averred that she got married to the 1st Defendant in the year 1960 or thereabout vide Kikuyu Customary Law, and they have sired seven issues being: -
- i. Lydia Nyambura Kagunda
 - ii. Agnes Wanjeri Kagunda
 - iii. Eliud Maina Kagunda(2nd Defendant)
 - iv. Margaret Wangari Kagunda
 - v. Johnson Kamau kagunda



- vi. Jennifer mukami Kagunda
- vii. Timothy Mwangi Kagunda(deceased)

That the 2nd Defendant as one of the issues was sired in 1966.

5. The Plaintiff also averred that when she got married to the 1st Defendant, they started to live in land parcel No. LOC /Gacharageini/1440(0.81 HA), which the 1st Defendant inherited from his late father, and which land the 1st Defendant holds in Customary trust for his family, as it is a customary law and which has been in the family for generations.
6. Further, the Plaintiff averred that during the subsistence of the marriage, she contributed towards purchase and acquisition of the matrimonial properties;
 - i. Land parcel no. LOC.19/Gacharageini/ 414(3.56HA) acquired in the year 1979 or thereabout.
 - ii. LOC 19/ Gacharageini/252(1.7HA) acquired in the year 1969, or thereabout and the Plaintiff son Johnson Kamau Kagunda resides on this parcel of land.
 - iii. LOC 19/Gacharageini/1284(2.02HA) acquired in the year 1979, and the same has been subdivided into three portions namely LOC/Gacharageini/ 4664, 4665 and 4666.
 - iv. LOC 19/Gacharageini/Plot No. 154 which was sold by the 1st Defendant in the year 2015, or thereabout.
7. That in addition to equally purchasing the suit properties, the Plaintiff was actively involved in the development of the same through planting of various, crops such as maize and beans, and therefore, the Plaintiff was able to raise up their children and provides them with basic needs and education.
8. She further averred that without her consent, the 1st Defendant secretly transferred the land parcel No LOC 19/Gacharageini/414, to the 2nd Defendant in the year 2006, or thereabout. Therefore, the Plaintiff is apprehensive that the 1st Defendant will continue to dispose off the other parcels of land without her consent, despite her having contributed both financially and to acquisition of the same.
9. It was her further claim that the issue of the said transfer has been discussed by the clan sometime in the year 2008; the Plaintiff's son. Johnson Kamau Kagunda was summoned by the District Commissioner and the Defendants Advocate and warned not to farm on the suit land. No. 252. That the 1st and 2nd Defendants have been jointly intimidating the whole family, by chasing them not to use the subject properties. That the other children were even charged with a criminal case over the suit properties, but they were all acquitted.
10. The Plaintiff also averred that all the properties acquired during the subsistence of the marriage were registered in the name of the 1st Defendant to hold them in trust for her and the whole family. It was her allegation that she used her earnings from farming to acquire the suit properties which were registered in the name of the 1st Defendant.
11. Therefore, the Plaintiff averred that she is entitled and has beneficial interest as a joint owner of the suit properties under her constitutional and spousal rights. The Defendants ought to be estopped from denying her the enforcement of her rights.
12. Consequently, the Plaintiff averred that the transfer, interference, subdivision, disposal and/or alienation occasioned by the Defendants is fraudulent and an illegality, unlawful and void ab-initio,



for contravening the constitutional rights of the Plaintiff. She particularised the malice occasioned to her by the Defendants on Para 17 of the plaint.

13. The Plaintiff urged the Court to allow her claim.
14. The suit is opposed by the Defendants. The 1st and 2nd Defendants filed their Defence on 24th January 2022, through the Law Firm of T.M Njoroge & Co Advocates and denied all the allegations made in the plaint.
15. It was the 1st and 2nd Defendants' allegations that the suit against them is hopeless, incompetent and bad in law as the parcels of land are not family land and therefore, they cannot be subjected to customary law trust.
16. Further, the 1st and 2nd Defendants averred that the land parcel No. 1284, was registered in the name of the 1st Defendant through sale as is evident from the abstract of title and therefore, the land is not family land.
17. They also averred that the suit as filed against them is time barred under the *Limitation of Actions Act*, as 12 years had lapsed since the alleged cause of action arose. Further that the suit herein defies the legal and jurisprudential aspects as the Plaintiff cannot sue the Defendants both in law and equity as such action is unlawful and illegal. Therefore, the court lacks jurisdiction to hear and determines this suit.
18. They also averred that there was no trust noted in the register and the suit is lacking in the requisite legal stratum and the transfers effected by the 1st Defendant was all above board and were not tainted with fraud and /or malice as alleged by the Plaintiff. Therefore, the orders sought by the Plaintiff have no basis in law as the Plaintiff cannot sue her husband during his lifetime. The Court was urged to dismiss the suit.
19. The 3rd Defendant too filed its defence through Scola Wanjiru, the State Counsel. The 3rd Defendant averred that it is a stranger to the contents of the Plaint. Further, it averred that if any transfer or registration over the suit property was effected, then it was based on the documents presented before the 3rd Defendant's office, who exercised due diligence and the said documents being believed to be genuine were thus registered.
20. It was also averred that if at all there were any transactions in relation to the suit properties, then the 3rd Defendant was not privy to the transactions and did put the Plaintiff to strict proof. Further, the 3rd Defendant denied the particulars of fraud and illegality as enumerated in the Plaint. Again, it was averred that if there was any registration of the suit land, the same was conducted in accordance with the law.
21. In conclusion, the 3rd Defendant averred that the Plaintiff is not entitled to the prayers sought, and urged the Court to dismiss the Plaintiff's suit with costs.
22. The suit herein proceeded by way of viva voce evidence. The Plaintiff gave evidence for herself and called three more witnesses. The 1st and 2nd Defendants called one witness to support their case. The 3rd Defendant called one witness and closed its case.

The Plaintiff's Case

23. PW1; Priscilla Nyakiega Kagunda, the Plaintiff herein adopted her witness statement dated 9th November 2021, and also produced her bundle of documents as PEXB 1.

It was her evidence that she has sued the 1st Defendant who is her husband, 2nd Defendant who is her elder son and the Land Registrar because her husband did not tell her about the transfer of the suit land.



24. It was her evidence that all the named properties were matrimonial properties acquired during her marriage to the 1st Defendant. Further that the said land parcels were registered in the name of the 1st Defendant to hold in trust for her and her family.
- 25) In cross examination by the counsel for 1st and 2nd Defendants, she stated that she moved out of the matrimonial home in July 2022, because she had a conflict with her husband. That her husband gave her 2 weeks to move out of the Matrimonial Home. It was her evidence that she has sued her husband on her own behalf and her children as there is a trust.
26. She also stated that the land was purchased by herself and her husband and that she was taking care of the home while the husband worked in Nairobi. That she used to till the land and kept dairy cattle. She availed a receipt to show that she used to sell tea leaves. She however did not have proof that she contributed in purchase of the suit land.
27. That one parcel of land was purchased from one Muchunu, during the subsistence of their marriage, but she did not have a marriage certificate. However, there was Ngurario ceremony, though she did not have evidence of such ceremony.
28. It was her further evidence that she wanted the land to revert back to Stanley, her husband so that the land can be shared by the other children. That though the other children live on the suit land, they can be evicted any time by the 1st and 2nd Defendants.
29. On cross exam by Counsel for the 3rd Defendant, she testified that she would like the land to be transferred by the Land Registrar back to Stanley, the 1st Defendant, as she did not consent to the transfer. It was her claim that the Land Registrar colluded with the 1st and 2nd Defendants to change the registration of the suit land. Further, she testified that she did not report the Land Registrar to the Police, but she reported Stanley and that the Land Registrar ought to have known that she contributed to the purchase of the suit land.
30. On re-exam, she stated that she moved out of the matrimonial property because she was threatened by Eliud Maina. She also testified that she contracted a traditional marriage and her Identity Card reads Priscilla Nyakiega Kagunda. She reiterated that she wanted the land registered back in the name of her husband so that it can be shared equally among all the children.
31. PW2, Johnson Kamau Kagunda, testified that the Plaintiff is his mother and the 1st Defendant is his father. Further that the 2nd Defendant is his brother. He adopted his statement recorded on 9th November 2021, as his evidence in chief.
32. In cross exam by the counsel for 1st and 2nd Defendants, he testified that he is of age, but has not sued on his own behalf. He testified that he is only a witness in this case between his parents and a brother. That he lives on the suit land, which was bought by their father and who is holding the land in trust for them. It was his evidence that the said land was bought by his mother and father and that he is supporting his mother, and Eliud is supporting their father.
33. He further stated that his mother is not registered in the suit land, but his father is holding the suit land in trust for his family.

In re-exam. He confirmed that he lives on land parcel No. 252, while their mother lives on land parcel No.1440. That he has lived on that parcel of land for 28 years.
34. PW3, Margaret Wangare Kagunda, stated that she lives at Kiamuturi area and she is a peasant farmer. She adopted her witness statement dated 9th November 2021, as her evidence in court.



In cross exam by counsel for 1st and 2nd Defendants, she stated that the Plaintiff is her mother, the 1st Defendant her father and 2nd Defendant her brother. It was her further evidence that the suit land was given to her father by their grandfather.

35. She testified that she wished the land to be transferred back to her father who is holding the said land as trustee to their family. That they have come to Court to resolve that issue of trusteeship. She also stated that they reported the matter to the Police at Kiria-ini, but the DCIO advised them to file a civil suit and thus this case.
36. In re exam, she confirmed that the other parcels of land were purchased by her father and mother.
37. PW4, Benard Mutahi Ngumi from Gatuguru village testified that he knows Priscilla the Plaintiff herein. That she is the wife to the 1st Defendant and a mother to the 2nd Defendant. He adopted his witness statement dated 9th November, 2021.
- 38) In cross exam by the counsel for 1st and 2nd Defendants, he stated that the suit land Loc.19/Gacharageini/1440, is for their grand father and he knew that as he found their grandfather alive. He also confirmed that the land parcel No 414 was purchased through an auction.
39. PW5, Susan Wangui Kariuki, from Gikoe village also adopted her witness statement dated 9th November 2021, and stated that Priscilla, the Plaintiff is her sister.
40. In cross exam, she stated that the 1st Defendant owns four parcels of land which parcels of land were purchased by both the Plaintiff and the 1st Defendant. She also testified that Priscilla contributed to purchase of the parcels of land and her other children live on the said parcel of land.
41. In re exam, she confirmed that she was present when the parcels of land were purchased. That the 1st Defendant used to work in Nairobi and the Plaintiff was a peasant farmer.

1st and 2nd Defendants' Case.

42. DW1, Stanley Kagunda Njogo, stated that he is the father to the 2nd Defendant and the Plaintiff is his wife. That he has two other sons and one is deceased. That Kamau his son has colluded with their mother to sue him. He testified that he bought the suit lands and they are not ancestral lands. He adopted his witness statement as his evidence in chief.
43. It was his further evidence that the Plaintiff cannot ask for their share during his life time and he also stated that he bought the land parcels alone without the assistance of the Plaintiff and she did not contribute to the purchase of the said parcels of land. He also testified that the Plaintiff lives on the suitland Loc. 19/Gacharageini/1440. He also stated that his son Kamau does not have a family and so, he cannot subdivide the land.
44. It was his evidence that the Plaintiff is not entitled to his share of the family land Loc. 19/Gacharageini/1440, as he obtained the land in 1960, and the land was in the name of his father and it was later transferred to his name in 1984. He reiterated that the Plaintiff has no right to sue him while he is still alive. That they should buy their own land.
45. In cross exam by counsel for the Plaintiff, he stated that he got married to the Plaintiff in 1960. He could not remember when he purchased the land parcel No 414, but he confirmed that he purchased the suit property after marrying the Plaintiff.
46. He also confirmed that he subdivided the land parcel No 1284, into three portions and land parcel No 414, he gave it to his son, and during such subdivision, he did not avail the spousal consent. That he



transferred it to his son Eliud in in 2006 and in 1960, when he married the Plaintiff, she was a house wife, and he used to work then in Nairobi.

47. While being cross examined by counsel for the 3rd Defendant, he testified that he registered the land using the due procedure and that he bought the land and followed the due procedure.
48. In re exam, he reiterated that he followed the due process to acquire the parcel of land and he appeared before the Kangema Land Control Board.

The 3rd Defendant's Case.

49. DW2, Mike Sego Manyaki, the Land Registrar based in Murang'a stated that he recorded his witness statement on 4th October 2022, which he adopted as his evidence in chief. He also produced the list of documents as DExhts.

It was his evidence that due process was followed in the transfer and registration herein. That when the 1st Defendant presented the documents, there was no indication that the same was a matrimonial property.

50. It was his further evidence that the land parcel No 252, was in the name of Stanley Kagunda Njogo, the 1st Defendant herein, while land parcel No 4664, was still in the name of 1st Defendant and land parcel No 414, is in the name of Eliud Maina Kagunda. Further that land parcel No 1284 was closed upon subdivision. That due process was followed by the office of the Land Registrar and therefore, there was no fraud and/ or illegality.
51. On cross exam by counsel for the Plaintiff, he testified that there was rectification of the register and he was not sure when rectification was done. He confirmed that land parcel No. 414, was transferred to ELIUD on 9th September 2006, and it was not a must to have spousal consent.
52. On cross exam by counsel for 1st and 2nd Defendants, he stated that there was no fraud on the part of the 1st Defendant, and that no spousal consent was required in 2006, and there was no trust registered on the register. That Stanley kagunda Njogo is the registered proprietor of the suit land.
53. In re exam, he stated that spousal consent is a post 2012 Land Acts, which applies to matrimonial property, and when the property is registered in the name of both parties.
54. After the close of viva voce evidence, parties through their respective advocates filed and exchanged written submission,
55. The Plaintiff filed her submissions on 19th June 2023, through the Law Firm of Wangui Gachango & Associates Advocates and submitted that the Plaintiff has proved her case on the required standard of balance of probabilities. She relied on various case Law and urged the court to allow her claim.
56. The 1st and 2nd Defendants filed their written submissions on 26th June 2023, through the Law Firm of T.M Njoroge & Co Advocates, and urged the Court to find that the Plaintiff had not proved her case on the required standard, and urged the court to dismiss it with costs.
57. On his part, the 3rd Defendant too filed his submissions on 14th august 2023, through Scola Wanjiru, Senior State Counsel at the Attorney General's office, and urged the court to dismissed the Plaintiff's case with costs. He relied on various decided cases and Order 2 Rule 4, of the Civil Procedure Rules, on the issue of fraud.
58. This Court has carefully considered the available evidence, the relevant provisions of the law and the rival written submissions and finds as follows: -



59. There is no doubt that the Plaintiff here and the 1st Defendant are husband and wife. From the pleadings, it is alleged that they both got married in the year 1960.

Together, they have seven issues. There was common evidence that one of the issues is deceased. Further, it is evident that the 2nd Defendant is the son to the Plaintiff and 1st Defendant.

60. It is also not in doubt that the parcels of land named in the pleadings were all initially registered in the name of the 1st Defendant. However, land parcel No. LOC 19/ Gacharageini/ 414, was later transferred in favour of the 2nd Defendant in the year 2006. There is no evidence that the Plaintiff ever protested this registration in favour of 2nd Defendant then (2006). The Land Registrar in his evidence in court stated that this land was transferred to 2nd Defendant as a gift.

61. The Plaintiff on her part alleged that all the parcels of land including parcel No. 414, were matrimonial property and that the transfer of this parcel of land to 2nd was without her consent, and thus was illegal and fraudulent. The 1st Defendant could hear none of this and claimed that all the suit properties were his and the Plaintiff did not contribute in their purchase and therefore, her claim should be dismissed with costs.

62. It is the Plaintiff who has alleged, therefore the burden of proof lies upon her as it is trite that he who alleges must prove; - See Section 107 of the Evidence Act which states;

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

63. Bearing in mind the above provisions of law, the court finds the issues for determination are: -

1. Whether the all the suit properties herein are matrimonial properties and whether the 1st Defendant has been holding them in trust for the Plaintiff herein.
2. Whether there was need for spousal consent before land parcel no. 414, was transferred to 2nd Defendant herein and before land parcel no. 1284 was subdivided.
3. Whether the 2nd Defendant acquired good title to land parcel no. 414 and whether the said acquisition should be cancelled.
4. Whether the Plaintiff is entitled to the prayers sought.
5. Who should bear costs of the suit.

64. Before this court delves into the issues for determination, it will first settle the issue of jurisdiction, which issue was early dealt by the Court in its ruling of **19th May 2022**, but has been raised by the 1st and 2nd Defendants in its submissions.

65. It is trite that jurisdiction is everything and without it, the Court has no option but to down its tools. See the case of **Owners of Motor Vessel Lillian S” vs Caltex oil (Kenya)ltd (1989) KLR**, where the Court held;

“Jurisdiction is everything. without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..... jurisdiction must be acquired before judgement is given”



66. This court in its ruling had found that though the suit herein revolves around parcels of land referred to as matrimonial property by the Plaintiff, the court relied on the case of **Muranga ELC. No 379 of 2017: B WM vs JMC (2018) eKLR**, and held that the claim revolves around the title, use and occupation of the suit properties and therefore, it has jurisdiction. This Court cannot depart from its early decision and it finds and holds that it has jurisdiction to hear and entertains this matter.

i. Whether all the suit properties herein are matrimonial properties and whether the 1st Defendant is holding them in trust for the Plaintiff?

67. As per the pleadings and the evidence on record, the properties in issue are; Loc 19/Gacharageini/252, Loc 19/Gacharageini/1284, Loc 19/Gacharageini/414, Loc 19/Gacharageini/1440.

68) As per the evidence of DW2, the Land Registrar, the parcels of land were registered as follows; Land parcel no 414, was registered in the name of the 1st Defendant on 18th January 1979, Land parcel no. 1284 was registered in the name of the 1st Defendant on 5th June 1980, and land parcel No 252, on 18th April 1991, and land parcel no 1440 on 8th July 1985.

69. The land parcel No 414 was later transferred to the 2nd Defendant in the year 2006 and land parcel no. 1284, was closed for subdivision in the year 2020.

70. It is on record that the Plaintiff and the 1st Defendant got married in 1960.

If that is the case, all the above properties were registered in the name of the 1st Defendant during the subsistence of the marriage. Though the said properties are registered in the name of the 1st Defendant, the Plaintiff alleged that She contributed to their purchase and thus the suit properties are matrimonial properties. This averment has been vehemently opposed by the Defendants.

71. The Plaintiff had also alleged that Land parcel No. 1440, was an ancestral land, since the 1st Defendant inherited it from his late father and therefore, the 1st Defendant is holding the said parcel of land in trust for his family through customary trust. It is trite that customary trust is never implied, but it is proved through facts and evidence. See the case of **Mumo v Makau [2002] 1EA.170**, the Court held that;

"trust is a question of fact to be proved by evidence...."

See also the case of **Gichuki Vs Gichuki C.A Civil Appeal No. 21 of 1981**, where the Court of Appeal held that it is trite law that trust is a question of fact to be proved by evidence.

72. The Court has seen the green card for land parcel **No. 1440**. It shows that the same was acquired by the 1st Defendant after partitioning of land parcel **No. 662**. There was no evidence that the same was acquired through succession and that initially the said land was owned by the father of the 1st Defendant.

73. This Court cannot hold that land parcel **No 1440**, is a family and/ or ancestral land, and that the 1st Defendant is holding the said land in trust for his family through customary trust.

74. However, what is evident is that all the suit properties enumerated in the Plaintiff were registered in favour of the 1st Defendant during the subsistence of his marriage to the Plaintiff herein. The Plaintiff alleged that they set their matrimonial home on land parcel **No 1440**, and they later purchased the other parcels of land through joint effort as husband and wife.

75. According to **section 2 of the Matrimonial Property Act, 2013**, matrimonial home is defined as follows;



"...matrimonial home means any property that is owned or leased by one or both spouses and occupied or utilised by the spouses as their family home, and includes any other attached property."

76. Further, **Matrimonial property** is defined in **section 6**, of the said Act as: -

"for the purposes of this Act, Matrimonial Property means;

- a. The matrimonial home or homes
- b. Household goods and effects in the matrimonial home or homes
- c. Any other immovable property owned and acquired during the subsistence of the marriage"

77. It was the Plaintiff submissions that all the properties acquired during the subsistence of marriage is held in trust for the spouse and so the 1st Defendant held the suit properties in trust for the Plaintiff herein. Indeed, **Section 14 of Matrimonial Property Act** provides that;

"where matrimonial property is acquired during marriage;

- a. In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
- b. In the name of the spouses jointly, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal".

78. Having noted that the suit properties herein were registered in favour of the 1st Defendant during the subsistence of the marriage and given that section 27 of the Registered Act, Cap 300(repealed) vests in such a registered owner, the absolute proprietorship an all rights appurtenant thereto, this Court does not hesitate to find the 1st Defendant as such proprietor.

79. However, spousal rights are found to be an overriding right as provided by Section **30(g) of Registered Land Act Cap 300 (now repealed)** and as provided above, if the property is found to be matrimonial property, the 1st Defendant will be deemed to be holding the said properties in trust for the Plaintiff, his spouse. The Defendant has denied this allegation.

80. The Plaintiff has alleged that the suit properties are matrimonial properties as they were purchased during the subsistence of the marriage and she contributed to purchase them by farming, taking care of the home and children while her husband the 1st Defendant worked in Nairobi. Her evidence was supported by PW4 Susan, who stated that she was aware that the Plaintiff contributed in the purchase of the suit properties. It is evident that all the suit properties were acquired during the subsistence of the marriage.

81. It is trite that ownership of matrimonial property vests in a spouse according to the contribution of either spouse. Therefore, a spouse must prove his or her level of contribution. This contribution can be either monetary or non-monetary. Non-monetary contribution includes;

- a. Domestic work and management of matrimonial home
- b. Child care
- c. Companionship
- d. Management of family business or property



- e. Farm work. (see the case of **ZJ & SJ vs IG (2018) eKLR pg.**)
82. The Plaintiff herein claimed that she contributed to acquisition of the suit properties by taking care and managing the farm while the 1st Defendant worked at Nairobi. That she took care of the children and their matrimonial home. This evidence was not controverted by the Defendants especially the 1st Defendant. This court finds and holds that the Plaintiff contributed to the purchase of the suit properties herein.
83. Having found that the Plaintiff contributed in the purchase of the suit properties, then the said suit properties are matrimonial properties as they were acquired during the subsistence of the marriage, and as provided by section 14 of the *Matrimonial Property Act*, then the 1st Defendant is holding the suit property in trust for the Plaintiff and consequently, the Plaintiff acquired beneficial interest over the said properties. (**In the case of Mugo Muiru Investments Ltd vs E.W.B & 2 others (2017) eKLR**, the Court of Appeal held;

"the appellant did not regard the issue of trust imposed on the charger, SB and its effect on the sale and transfer by HFCK as significant. As stated above, even though the matrimonial property was registered in the name of SB alone, he held the title and legal estate in trust for both himself and Elizabeth, jointly. This proposition is buttressed by the decision in *Gissing v Gissing (1970) 2 E.R 780. (1971) AC 886*. Lord Diplock held..... In nearly all these cases, the inexorable inference is that the husband is to hold the legal estate in the house in trust for them both, for both to live in for the foreseeable future....."*

84. Further, the court held in the above case that: -

"even before the *Land Registration Act*, came into force on 2nd May 2012, the equitable beneficial interest of a spouse in a matrimonial home occupied by such spouse was an overriding interest and therefore transfer of the title to matrimonial home was subject to such overriding interest. It is immaterial that there was not at the time statutory provision expressly declaring it to be an overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on the person, who acquires an interest in the property."

ii. Whether spousal consent was required before land parcel No. 414 was transferred to the 2nd Defendant herein, and before land parcel No. 1284 was subdivided.

85. This Court has held and found that all the land parcels were registered in the name of the 1st Defendant during subsistence of the marriage and thus, they are all matrimonial property. The Court too has held that the Plaintiff herein did contribute to their acquisition.
86. Having also found that the spousal rights was an overriding interest as provided by section 30 of the Registered *Land Act* (cap 300 repealed) and now mirrored in section 28 of *Land Registration Act*, 2012, then the 1st Defendant could not deal with the said land parcels as an absolute proprietor without considering the beneficial interests of the Plaintiff herein.
87. It is evident that land parcel No. 414, was transferred to the 2nd Defendant in 2006. By then **Cap 300** did not require spousal consent. However, given that spousal interest was an overriding interest, the 1st Defendant ought to have informed the Plaintiff of this transfer of the land to the 2nd Defendant.



88. It is also evident that land parcel number 1284 was subdivided into three portions being 4664, 4665 and 4666 in 2020. The said transaction was subject to [Matrimonial Property Act, 2013](#), which came into force on 16th January 2014.

Section 12 of the [Matrimonial Property Act](#) provides,

"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"

89. Therefore, this court finds and holds that before the two parcels of land could be transferred and or subdivided as the 1st Defendant did, then the Plaintiff who had beneficial interest over the said property as a spouse ought to have been informed and also her spousal consent was needed before land parcel no.1284, could be subdivided.

iii. Whether the 2nd Defendant acquired a good title over suit property 414 and whether the same should be cancelled?

90. As already held by this court, the above suit properties was a matrimonial properties, and the Plaintiff herein had an overriding interest over the same, see the case of **Mugo Vs Muiru(Supra)**. The Plaintiff ought to have been informed before the said transfer was effected. Though the 1st Defendant is the sole registered owner, he could not deal with the said land parcel without considering the beneficial interest of the Plaintiff. This is so as section **28 of Cap 300(repealed)** provides that the rights of a registered proprietor can be defeated in accordance to the Act and overriding interest is one of such provision, which overriding interest is provided for in **Section 30 of Cap 300(repealed)** now **Section 28 of [Land Registration Act](#)**.

91. The 1st Defendant is alleged to have transferred the suit property to the 2nd Defendant as a gift. He did so to defeat the Plaintiff's beneficial interest. The 2rd Defendant did not acquire good title over the suit property no. 414.

92. The 2nd Defendant was registered as the owner of the suit property in 2006. As provided by section 26 of the [Land Registration Act](#), he is the absolute proprietor and his registration is indefeasible. However, the said registration can be challenged if the same was acquired through **fraud, misrepresentation** or through unprocedural manner, illegally or irregularly.

93. This court has found that the said registration was done without taking into account the Plaintiff's spousal interest. Therefore, the said registration is irregular. **See the case of Kadzo Mkutano vs Mukutano mwamboje Kadosho &2 others (2016) eklr** , where the court held that:-

"section 28 of the [Land Registration Act](#), recognises spousal rights over matrimonial property as an overriding interest. Spousal consent is therefore required before a spouse can sell matrimonial property. In the absence of such a consent, the sale becomes null and void"

94. Having found that the 2nd Defendant did not obtain good title and the fact that spousal right which is an overriding interest was not considered, then the court finds that the 2nd Defendant registration is null and void. **Section 143 of Registered [Land Act](#) Cap 300 (repealed)** which is repeated in **Section 80 of the [Land Registration Act](#)** provides what would happen in such a situation. The court is empowered to cancel such a registration. This court will not hesitate to do so as provided by **Section 80 of [Land Registration Act](#)** which provides;



80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

(iv) Whether the Plaintiff is entitled to the prayers sought in the Plaint?

95. The court has found that the Plaintiff has spousal rights which are overriding interest over the suit property. Therefore, although the suit properties were initially registered in the name of the 1st Defendant, he was holding them in trust for himself and the Plaintiff who is his wife and who contributed to their acquisition. The 1st Defendant cannot deal with the said properties without involving the Plaintiff herein.

96. It is evident that the 1st Defendant did transfer the suit property No. 414, without involving the Plaintiff. He also subdivided land parcel No 1284, without the spousal consent of the Plaintiff,

However, the Plaintiff did not prove any fraud or collusion on the party of the Land Registrar. Further the Plaintiff did not prove the allegations of fraud at all. The Plaintiff is entitled to some of the prayers but not as framed in the Plaint.

v. Who is entitled to pay costs of the suit?

97. Section 27 of the *Civil Procedure Act* provides that costs are awarded at the discretion of the court. However, it is trite that costs are awarded to the successful party. The Plaintiff herein is the success party and is entitled to costs to be borne by the 1st and 2nd Defendant. There was no wrong doing by the 3rd Defendant, and therefore no costs will attach to it.

98. Consequently, the court finds that the Plaintiff has proved her case against the Defendants on the required standard of balance of probabilities.

99. Consequently, the Court enters Judgement for the Plaintiff against the Defendants in the following terms; -

1. An order and declaration that the transfer of land parcel no. 414 from the 1st Defendant to the 2nd Defendant was irregular, illegal and un-procedural for failure to consider the Plaintiff's spousal right which is an overriding interest.
2. The said transfer was irregular and the same is cancelled and the land to revert to its original status.
3. A declaration and an order that the subdivision of land parcel no 1284 into three parcels of land was irregular and un-procedural and the same should be cancelled and the land revert back to Loc 19/ Gacharageini/1284.
4. A declaration that the 1st Defendant is holding the suit properties in trust for the Plaintiff who is his wife.



5. A permanent injunction to restrain the 1st and 2nd Defendant or any other person claiming under them from interfering with any of the properties named herein in any manner whatsoever without the Plaintiff's consent.
6. The Plaintiff is entitled to costs to be borne by the 1st and 2nd Defendants herein. No costs attach to the 3rd Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA, THIS 25TH DAY OF JANUARY, 2024.

L. GACHERU

JUDGE

Delivered online in the presence of;

M/s Gachango Plaintiff

1st Defendant

Mr T M Njoroge for the 2nd Defendant

Absent - 3rd Defendant

Joel Njonjo - Court /Assistant

L. GACHERU

JUDGE

25/1/2024

