CKS v SOL & another (Civil Appeal E184 of 2022)
[2025] KECA 103 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 103 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E184 OF 2022

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 24, 2025

BETWEEN

CKS ..... APPELLANT

AND

SOL ..... 1ST RESPONDENT

JOSEPHAT SHICHENJE SHIROKO ..... 2ND RESPONDENT

(An Appeal from the Judgement of the High Court of Kenya at Kakamega (W.M.Musyoka) dated 8th July, 2022 in Matrimonial Cause No.1 of 2019)

JUDGMENT

1. The appellant and the 1st respondent (herein respondent) are an estranged wife and husband. The parties started cohabiting as husband and wife in 1996, and formalized the marriage in church in 2003. The marriage has been blessed with three issues. The dispute relates to matrimonial property acquired during the subsistence of the marriage.

2. By an Originating Summons dated 12th December, 2019, the appellant sought twelve orders, which can be put in four categories as follows:

    i. Declarations relating to the appellant's status and right to matrimonial property, to the effect that she is still lawfully married to the respondent and is entitled to benefit from matrimonial property acquired during the subsistence of the marriage, and that in the event of the dissolution of the marriage, she should be entitled to half share of the property.

    ii. Declarations relating to Isukha Shirere xxx (the Shirere property); Isukha Shitoto xxxx (the Shitoto property); LR Kakamega Town Block x/xxxx (the Kakamega property), which the appellant contends are matrimonial property, in particular, declarations that the respondent is holding these properties and any other matrimonial property, in trust for her; and an order

restraining the transfer, registration or any dealing in respect of the properties without the consent of the appellant.

iii. Orders relating to the [Particulars Withheld] property, in particular, a declaration that the appellant is entitled to quiet possession of that property, to the exclusion of the respondent's 2nd wife; and an injunction restraining the respondent and his agents from interfering with, trespassing on or restricting the appellant's rights, occupation and interest over the matrimonial house built on the Shirere property.

iv. Orders relating to the Kakamega property to the effect that the property is matrimonial property and ought not to have been sold, or transferred by the respondent without the appellant's consent; an order nullifying the sale of the Kakamega Property to the 2nd respondent; an order that the appellant is entitled to rental income from the property; and a permanent injunction restraining the respondent and his agents from interfering with the appellant's rights on this property. In the alternative to an order for nullification of the sale, the appellant sought an order directed at the respondent to compensate her at half the current market price of the Kakamega property.

3. In support of the originating summons, the appellant relied on an affidavit sworn on 12th February, 2019, her oral evidence during the hearing of the motion and written submissions. In her evidence, she reiterated that she got married to the respondent in 1995 and that they bought the Kakamega property in May, 1998 and moved into the property in 1999; that they raised money for the purchase of the house from their petroleum product business operated in three petrol stations; and that they also acquired other property.

4. She testified that the respondent sold the Kakamega property to Samuel Omusula Libuyi (Samuel); and that the property was sold without her knowledge or consent. As regards the [Particulars Withheld] property, she could not recall when it was bought, although she maintained that they bought the property jointly with her husband before her husband married a second wife. She produced her marriage certificate as well as a certificate for the Kakamega property and the [Particulars Withheld] property, which showed that as at the time of the search in December, 2018 and January, 2019, the properties were both registered in the name of the respondent. The appellant also stated that they bought the [Particulars Withheld] property together and produced a search certificate showing that the property was registered in the name of the respondent.

5. Under cross examination, the appellant denied knowledge of the Kakamega property being offered as security to a bank. She also denied living in the appellant's ancestral home. She maintained that they were doing the petroleum products business together from 1995, and she is the one who kept accounts and did banking, she was not however able to produce any records. She denied signing a charge over the Kakamega property to secure a loan but conceded that the property was transferred to Samuel's name; and that it is only when the appellant married a second wife that she was locked out of the business.

6. The appellant called two witnesses, her son, VMS, who testified that he was raised on the Kakamega property where he was then staying with both his parents. He did not know when the property was sold. His brother, IOS, also testified, but claimed not to know anything about the business or the loan.

7. In response to the originating summons, the respondent swore an affidavit on 25th February, 2019, and also testified at the hearing of the originating summons. He conceded that he was married to the appellant, but maintained that they have been estranged since 2008, when the appellant abandoned the matrimonial home and moved elsewhere; that at the time he married the appellant, she was just a school leaver, unemployed and without any source of income; that he, that is the respondent, was an established businessman and the sole contributor to the family welfare. The respondent added that all

the properties listed by the appellant as matrimonial properties were acquired by him through his own efforts without any contribution from the appellant.

8. The respondent explained in his evidence that he bought the Kakamega property in August, 1996. He has been taking up loans, using the property as security. Initially, the bank was not asking for spousal consent. He denied that the appellant was in any way involved in the business, asserting that the business was his alone. He decided to sell the Kakamega property because his business was not doing well. He sold the property to Samuel so as to raise money to offset the bank loan and Samuel directly repaid the bank. He produced his agreement with the bank and stated that he involved his wife and children before selling the property.

9. The respondent maintained that it was agreed within the family that they utilize the surplus amount realized from the sale of the Kakamega property to buy another piece of land. He bought a piece of land in Matungu and put up a four bedroomed house for the family, but the appellant continued staying at the Kakamega property, because the respondent continued to pay rent. He asserted that the appellant has no entitlement to the Kakamega property by virtue of her marriage, as the Kakamega property now belongs to the purchaser and cannot be matrimonial property. He denied the appellant's allegation that she had stayed on the [Particulars Withheld] property, and explained that he has an ancestral home in Khwisero, and the [Particulars Withheld] property has never been part of the matrimonial home.

10. Under cross examination, the respondent conceded that he did business together with his wife, but she was not a signatory to the account. He denied that she was assisting in the petroleum business, and argued that the appellant knew that he took a loan with the Kakamega property as security, and that the first loan was in 2003 before the requirement for spousal consent came into force. He maintained that the appellant consented to the Kakamega property being sold to Samuel. He could not recall the date when the appellant signed the consent but explained that she did so at his house. He denied having a mental illness though he admitted that he underwent head surgery. He admitted that his second wife JK was staying in his land in Lurambi Plot No. 103.

11. Samuel objected to the originating summons through an affidavit sworn on 27th February, 2019. He also gave evidence during the hearing of the motion. In brief, his position was that: he purchased the Kakamega property on 26th April, 2018. He produced a copy of the agreement of sale and explained that the property was previously charged to CFC Stanbic Bank, and was due for sale as the bank loan was in arrears. He maintained that he bought the Kakamega property for value from a third party long before the marriage between the appellant and the respondent, and that the property was not matrimonial property. He produced a copy of the certificate of lease showing that the property was registered in his name on 12th October, 2018.

12. In his evidence at the plenary hearing of the originating summons, Samuel reiterated that he bought the Kakamega property from the respondent at a consideration of Kshs.22 million; that it is the respondent who took spousal consent forms to his wife for signature, and that the spousal consent was one of the documents lodged with the land's office. That at the time he bought the property there were tenants on the land and the appellant who was one of the tenants, was the one collecting rent from the other tenants.

13. Mr. David Masina Kimauru, the Deputy Land Registrar Kakamega County, testified on behalf of Samuel. Referring to the original card for the Kakamega property, he confirmed that Samuel was the current registered owner of the property from 9th November, 2018. He identified from the land parcel file in regard to the transfer to Samuel, a spousal consent signed by the appellant as the spouse to the respondent. The spousal consent was dated 26th April, 2018. He identified the signature of Monica

Bor, the land registrar who registered the Kakamega property in favour of Samuel, as he had worked with her and was familiar with her signature.

14. Upon hearing the matter, the learned Judge of the High Court found that the appellant and the respondent were married; that the Kakamega property was acquired by the appellant and the respondent when they were in matrimony; and that the property was developed in the course of their doing business together. The learned Judge also found that the property was sold and transferred to Samuel, and, therefore, does not qualify to be matrimonial property; that although the appellant maintained that there was no valid spousal consent given by her for the transfer of the Kakamega property, she did not prove her allegation.

15. The learned Judge, therefore, issued orders declaring that the appellant and the respondent were still lawfully married and that the appellant is entitled to benefit from the matrimonial property acquired or accumulated jointly during coverture; that in the event of dissolution of the marriage between the appellant and the respondent, the appellant would be entitled to half share of the property jointly acquired during the subsistence of the marriage.

16. The learned Judge, however, declined to make any orders in regard to the [Particulars Withheld] property, due to want of evidence, or to make any further orders regarding the question of title to the Kakamega property due to want of jurisdiction. The learned Judge declared that the appellant was entitled to half share of the Kakamega property before it was sold, and that upon the sale of the property, the appellant should be entitled to half the proceeds of sale after discounting the amount paid as outstanding loan.

17. The appellant, who is aggrieved by the judgment of the High Court, has lodged this appeal raising sixteen grounds, focusing on alleged errors in the interpretation and application of the relevant law, concerning spousal consent and mandatory provisions of the *Matrimonial Property Act*, and the *Land Registration Act*. The appellant also contended that the High Court disregarded crucial evidence and legal requirements.

18. In support of the appeal, the appellant through her advocate, Shaban & Company Advocates, filed written submissions in which the sixteen grounds stated in her memorandum of appeal were compressed into four issues. These were:

    i. whether the learned Judge erred in law and fact by disregarding the clear and mandatory provisions of Section 12 of the *Matrimonial Property Act*, 2013, thereby reaching an erroneous finding that spousal consent is a concept in the Land Legislation and not in the *Matrimonial Property Act*;

    ii. whether the learned judge disregarded the clear and mandatory provisions of Section 93 of the *Land Registration Act* Cap. 300;

    iii. whether the learned Judge erred by disregarding evidence and the law on the fact that the respondent and Samuel could not lawfully enter into a contract regarding the Kakamega property, so as to defeat the clear provisions and requirements of the law; and

    iv. whether the learned Judge erred in law and fact by disregarding pleadings and evidence before him and exhibiting bias towards the appellant by disallowing the appellant's alternative prayer for compensation of at least half the current market value of the Kakamega property.

19. In regard to the first issue, the appellant submitted that Section 12 of the *Matrimonial Property Act* provides, in mandatory terms 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"

20. The appellant argued that her evidence as acknowledged by the High Court showed that the Kakamega property had all the hallmarks of a matrimonial property, and, therefore, there was a prerequisite that spousal consent be obtained before any interest in the property could be transferred to a third party, but that contrary to section 12 of the *Matrimonial Property Act*, the appellant's spousal consent was not obtained for the sale of the Kakamega property.

21. The appellant pointed out that there were two transactions involving the Kakamega property: a charge and a sale, and both were distinct dispositions, each requiring spousal consent. She faulted the learned Judge for allowing the Deputy Land Registrar to testify of a purported spousal consent which was in the register, when the respondent had admitted that there was no such consent; and no such spousal consent was included in the respondent's list or bundle of documents nor was any produced in evidence before the High Court. The appellant argued that the burden of proof shifted to the respondent to prove that the appellant had given an informed consent for the disposition of interest in the Kakamega property.

22. On the second issue, the appellant submitted that Section 93 of the *Land Registration Act*, Cap. 300, was mandatory; that spousal consent was necessary, and therefore a disposition involving matrimonial property is void at the option of the spouse who has not consented to the disposition; and that such disposition could be voided at the option of the offended spouse. Consequently, the appellant faulted the learned Judge for failing to issue the declaratory judgment that the Kakamega property was matrimonial property, or to nullify the transfer of the Kakamega property. She cited MWK -vs- SKK & 5 Others [2018] eKLR, in support of her submission.

23. On the third issue, the appellant pointed out that the respondent downplayed the fact that she did not sign the sale agreement while Samuel was not concerned about the spousal consent. She submitted that the respondent and Samuel violated Section 3(3) of the *law of Contract Act* and Section 93(3)(b) of the *Land Registration Act*; that although the respondent alleged that he sold the property due to a bank loan, there was no evidence of any forced sale of the suit property; and that the Court cannot on the basis of indefeasibility of title, sanction irregularities and illegalities.

24. Finally, on the fourth issue, the appellant reiterated that there was no spousal consent produced, but that the High Court nevertheless, and without any basis, assumed that there was spousal consent, and disallowed the appellant's alternative prayer. The appellant referred to Section 10(3) of the *Matrimonial Property Act*, arguing that the parties were entitled to share equally any liability incurred during the subsistence of the marriage, for the benefit of the marriage, or reasonable and justifiable expenses incurred for the benefit of the marriage. The appellant therefore urged the Court to allow the appeal, set aside the judgment of the High Court, and nullify the purported sale and transfer of the Kakamega property.

25. The respondent also filed written submissions duly prepared by his counsel, Momanyi Manyoni & Company Advocates. The respondent argued that the holding of the High Court, that Samuel is the owner of the Kakamega property, cannot be faulted because it is in accordance with the law, as the title was registered in accordance with Section 24(a) of the *Land Act*, which vests absolute ownership of the land together with all rights and privileges, upon the registered proprietor; that the interest of

the appellant in the Kakamega property arising from her status as a wife to the respondent, was not a registerable interest, nor was it an absolute interest. He argued that the appellant waived her rights if any by the consent that she gave to transfer the Kakamega property to Samuel.

26. The respondent maintained that the cancellation of Samuel's title can only be done if it is proved that the title was acquired in a fraudulent manner, but the appellant did not plead any wrong doing on the part of Samuel nor did she adduce any evidence to that effect. The respondent argued that the claim involving the Kakamega property was not properly before the court, as a matrimonial cause as the property ceased to be a matrimonial property when it was sold to Samuel; that the *Matrimonial Property Act* deals with properties between husband and wife and cannot be extended to persons who are strangers to the marriage; and consequently, the dispute between the appellant and Samuel can only be adjudicated before the Land Court as the High Court lacked jurisdiction in the matrimonial cause.

27. Samuel also filed written submissions through his advocate Gabriel Fwaya, in which he argued that section 12 of the *Matrimonial Property Act*, 2013, provides special provisions relating to matrimonial property; that the learned Judge found that the Kakamega property did not qualify to be a matrimonial property; and that the finding was proper as Samuel was the registered proprietor of the suit property, by the time the appellant came to court. In addition, Samuel argued that the appellant's originating summons was hinged on the provisions of section 93 and 94 of the *Land Registration Act*, which showed that the appellant was alive to the fact that the dispute involved a land transaction that had already taken place, and she wanted the Court to invalidate the transaction on the basis that she had not given her consent.

28. Samuel further submitted that the learned Judge properly found that he had no jurisdiction to determine the appellant's claim as it was a dispute involving title to land which was clearly a preserve of the Environment and Land Court as provided under Article 162 and 165 of *the Constitution*; that although the appellant claimed that she was doing business with the respondent on the suit property, and that she kept accounts and also did banking, she feigned ignorance on the issue of the Kakamega property being charged in 2010 and 2013, when it was clear that she had signed consent for the property to be charged; that the fact that there was a spousal consent for the transfer was confirmed by the Deputy County Land Registrar who testified; that the records confirmed that the appellant did give a written consent for the transfer of the Kakamega Property to Samuel; and that the issue of nullification of the sale and transfer of the Kakamega property was not within the jurisdiction of the learned Judge, as the High Court's jurisdiction was limited to making orders on how matrimonial property is to be shared.

29. Samuel maintained that the provisions of section 3(3) of the *law of Contract Act* were complied with as both the seller and the buyer signed the contract in the presence of their advocates who witnessed the agreement; that spousal consent was signed by the appellant and that there was compliance with section 93(3)(b) of the *Land Registration Act*. Samuel argued that the learned Judge did not exhibit any bias against the appellant as he made a declaration that the appellant is entitled to half share of property jointly acquired during the subsistence of the marriage or coverture; and also found that the appellant and the respondent were still in matrimony as the marriage between them is yet to be resolved. Samuel pointed out that under Section 7 of the *Matrimonial Property Act* the Court can only divide matrimonial property upon the dissolution of the marriage and this explains why the learned Judge only made a declaration. Samuel urged the Court to find that the learned Judge made sound findings on all the declarations and issues that the appellant had put before the court.

30. We have considered the record of appeal, the contending submissions made by the parties, the authorities cited and the law. It is not disputed that the appellant and the respondent though estranged

are still married as their marriage has not been dissolved. The disputes concern properties which the appellant maintains are matrimonial property. Section 7 of the *Matrimonial Property Act* states that:

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

31. This means that the issue of distribution of the matrimonial property between the appellant and the respondent is premature because although the parties are estranged, their marriage has not been dissolved. The learned Judge of the High Court was alive to this fact stating in his judgment as follows:

> " 13. Secondly, the plaintiff and the 1st defendant are still in matrimony, for the marriage between them is yet to be dissolved. Under the *Matrimonial Property Act* No. 49 of 2013, the court divides matrimonial property only upon dissolution of the marriage or divorce. The policy behind this is said to be to preserve the marital union, and for stability to prevail and, for stability to prevail, a court ought not divide matrimonial property while the parties are still in coverture. I believe the court can only make declarations of rights, in the circumstances but not divide the property..."

32. In his judgment, the learned Judge resolved the first category of the orders that were sought by the appellant by declaring that the appellant being still married to the respondent, is entitled to benefit from matrimonial property acquired or accumulated jointly with the respondent during the subsistence of the marriage; and that in the event of the dissolution of the marriage between the appellant and the respondent, the appellant shall be entitled to half share of the property, jointly acquired during the subsistence of the marriage.

33. The issue regarding the appellant's status was basically not in dispute, as both the appellant and the respondent admitted that they were married, and that the marriage had not been dissolved. The *Matrimonial Property Act* is a legislation enacted to provide for the rights and responsibilities of spouses in relation to matrimonial property, and for connected purposes. The appellant's rights to matrimonial property, as a wife, are protected under that legislation subject to her meeting the requirements of that law.

34. In addition, it is not necessary for us to interrogate the declarations that were made by the learned Judge in regard to the first category of orders sought as the respondent has not filed any cross appeal challenging those orders. Suffice to state that the declarations sought by the appellant was in accordance with Section 17 of the *Matrimonial Property Act* which grants the court power to make declarations with regard to "rights to any property that is contested between that person and a spouse or a former spouse of the person," and such an order may be made even where no petition has been filed for divorce or separation under any law relating to matrimonial causes.

35. The appellant is basically aggrieved by the order of the learned Judge declining to declare that the Kakamega property was held in trust for her, and finding that the property was sold to Samuel and had thereby ceased to be a matrimonial property. In this regard Section 12(1) of the *Matrimonial Property Act* is relevant. That section states as follows:

> " 12(1) 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.

(2) ...

(3). A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.

(4) ...

(5) Matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses."

36. As the appellant claimed that the Kakamega property had been matrimonial property before it was sold, the issue was whether in view of section 12 of the *Matrimonial Property Act*, the Kakamega property was matrimonial property before it was sold, and if so, whether the sale was done with the consent of both spouses. Section 12 of the *Matrimonial Property Act* has therefore incorporated the concept of spousal consent and it is not correct that spousal consent is only a concept applicable under land transactions subject of the *Land Registration Act*.

37. Both the respondent and Samuel questioned the jurisdiction of the learned Judge to determine the question of the right to the Kakamega matrimonial property contending that the property was no longer matrimonial property. As was stated by Nyarangi, JA., in the Owners of the Motor vessel "Lilian S" -vs- Caltex Oil Kenya Ltd [1989] KLR 1:

> "... it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the courts seized of the matter is then obliged to decide the issue right away on the material before it. 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 down[s] tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

38. The issue of jurisdiction having been raised, just as the trial Judge, we have an obligation to first address and dispose of this issue. This is because it is jurisdiction that provides legitimacy to any orders that are made by a court of law. In this regard, this is how the learned Judge of the High Court rendered himself on jurisdiction in regard to the Kakamega property:

> " 17. ... I doubt whether the High Court has jurisdiction to invalidate processes that are undertaken under the *Land Registration Act* No. 3 of 2012 and the *Land Act* No. 6 of 2012. Spousal consent is a concept in the land legislation, and not in the *Matrimonial Property Act*. The plaintiff has cited section 93(3)(4) I believe of the *Land Registration Act*, on that. The High Court has jurisdiction to divide matrimonial property under *Matrimonial Property Act*, but it has no jurisdiction to deal with issues provided for under the *Land Registration Act*. The jurisdiction over such issues is conferred on the Environment and Land Court by Article 162(2) of *the Constitution* and Section 2 and 101 of the *Land Registration Act*. Section 12 and 150 of the *Land Act* is also relevant. Article 165(5) of *the Constitution* goes on to declare emphatically that the High Court shall exercise no jurisdiction whatsoever over the matters that fall under the jurisdiction of the courts envisaged under Article 162(2) of *the Constitution*. Clearly therefore, I, sitting as a Judge of the High Court have no jurisdiction to determine whether the said sale of Kakamega Town/Block II ... and its

transfer and registration to the 2nd respondent was valid and to invalidate it. That jurisdiction sits with the Environment and Land Court."

39. On spousal consent the learned Judge reiterated his want of jurisdiction to address the issue as follows:

> "19. I reiterate that spousal consents to sales and other land transactions, transfers of land and registration of land are governed by land registration and in particular the *Land Registration Act*. By dint of *the Constitution* and the *Land Registration Act*, the High Court has no jurisdiction to handle disputes that arise over such issues. The mandate of the High Court is stated in the *Matrimonial Property Act* and it is limited to making orders on how matrimonial property is to be shared. Anything beyond sharing of such property should be placed before the Court with jurisdiction."

40. While the learned Judge was correct that the Environment and Land Court established under Article 162(2) of *the Constitution* and sections 2 and 101 of the *Land Registration Act*, have jurisdiction to deal with matters relating to land, the learned Judge failed to take into account Section 93 of the *Land Registration Act*, which deals with co-ownership and other relationships between spouses. That section states as follows:

> "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."

41. The implication of section 93 of the *Land Registration Act*, is that, in so far as jurisdiction concerning interest in land subject of co-ownerships and other relationship between spouses is concerned, the *Land Registration Act* has given deference to the *Matrimonial Property Act*. As such, disputes regarding such properties have to be dealt with under the *Matrimonial Property Act*, and this gives the High Court that has jurisdiction under the *Matrimonial Property Act*, jurisdiction to deal with such disputes. Therefore, the learned Judge had jurisdiction to hear the dispute between the appellant, the respondent and Samuel, provided that the dispute concerned an interest in matrimonial property subject of co-ownership and other relationship between spouses.

42. In his judgment, the learned Judge was clear that the Kakamega property was acquired during the subsistence of the marriage for co- ownership and use of the appellant and the respondent. This is how the Judge rendered himself:

> 16. From the material on record, Kakamega Town/Block II/.... was acquired when the plaintiff and the 1st defendant were in matrimony. That marriage as noted above, is still subsisting. They set up a home there although the property is leasehold. They were in business together. The property was developed in the course of doing business together, although the 1st defendant, in one breath said they did business together, and in another said the plaintiff was a housewife. There are all hallmarks of matrimonial property in Kakamega Town/Block xx/....

43. Our evaluation of the evidence reveal that the facts referred to by the learned Judge, were supported by the evidence on record. The evidence of the respondent, which was supported by documents from the lands office, showed that the property was acquired in May, 1998, which was long after the parties had started cohabiting as man and wife. Although the respondent appeared to contest the fact that the appellant contributed to the business which was the source of funding for the Kakamega property, it is clear that this property was acquired during the subsistence of the marriage, and that the family even

lived in the premises. We are therefore satisfied that the dispute over the Kakamega property concerned an interest in land acquired during the subsistence of the marriage, and therefore the dispute fell within section 93 of the *Land Registration Act*. Moreover, the provisions of section 12(1) of the *Matrimonial Property Act*, which requires consent of both spouses before an interest in matrimonial property can be disposed of, was applicable.

44. Notwithstanding the finding of the learned Judge that he had no jurisdiction to entertain the dispute, the learned Judge addressed the issue whether there was spousal consent for the transfer of the Kakamega property to Samuel. This is how the learned Judge rendered himself:

> "20. ... the plaintiff asserts that there was no consent or she did not consent to the transaction. The defendant asserts that she did. The 2nd defendant called the Deputy Land Registrar for Kakamega, one David Masira Kamauru, who came to court with the parcel file for Kakamega Town/Block xx/... He testified that the filed contain a spousal consent dated 26th April, 2018, duly executed by the plaintiff, consenting to the sale and transfer of Kakamega Town/Block xx/... to the 2nd defendant. He identified the signatures of the Land registrar who had handled the transaction and stated that he was unaware that the said spousal consent was cooked or fake. The public officer bespoke the content of the file he had. It had the consent in question. I am not persuaded that the plaintiff was able to shake him on cross examination. Whether the document is fake or forged is a matter of evidence. The usual way to deal with such allegations is to have the signature on the contested document subjected to forensics by a handwriting or document examiner. It cannot be impeached otherwise. The plaintiff did not subject the document to forensic examination, and I, therefore, have no basis to assess or determine whether or not the spousal consent in possession of the lands registry was fake or false or not. The burden shifted on the plaintiff once a consent was presented to prove that the signature on it was not hers. She did not do so, and I find that there was a valid spousal consent by her to the said sale and transfer of the land."

45. We totally agree with the learned Judge and could not have put it any better. The appellant was the one who maintained that the Kakamega property was sold and transferred without her consent. Section 107(1) of the *Evidence Act* provides that:

> "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."

46. Section 109 of the *Evidence Act* further fortifies that obligation by stating that:

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in his existence unless it is provided by any law that proof of the fact shall lie on any particular person."

47. It was for the appellant to prove her allegation that she did not give any spousal consent for the sale of the Kakamega property to Samuel. The first step in doing this, was for the appellant to demonstrate that the transfer and registration of the property was done without a spousal consent, and this could easily have been done through production of the documents that were presented at the lands office during the transfer and registration of the Kakamega property to Samuel. In this regard, the evidence of the Deputy Land Registrar for Kakamega, David Masira Kamauru, was crucial as it confirmed the

presence of a spousal consent for the transfer to Samuel. Much as the appellant alleged fraud, this was neither pleaded nor proved. For this reason, the sale of the Kakamega property to Samuel cannot be assailed under section 12 of the *Matrimonial Property Act*, as the sale was done with the consent of the appellant.

48. As regards the alternative prayer for the respondent to compensate the appellant by paying her at half the current market price of the Kakamega property, we find no justification for the appellant to be paid at the current market price nor has she adduced any evidence regarding the market price at the time of the sale and the current market price. We have no reason to fault the order that was made by the learned Judge that the appellant be entitled to half of the proceeds of sale of the Kakamega property, after discounting the amount that was paid to the bank to clear the outstanding loan. It was established that the property was matrimonial property acquired during the subsistence of the marriage. The appellant having been involved in the business from which the proceeds were used to acquire the Kakamega property, each spouse should be entitled to half the proceeds of sale subject to the loan liability. Moreover, the respondent did not file any cross- appeal in regard to the payment of half share of the proceeds of sale.

49. Finally, on the appellant's prayer for declarations that the respondent is holding the Shirere property and the Shitoto property, much as these properties appear to have been bought during the subsistence of the marriage, there was paucity of evidence regarding when these properties were purchased, or the contribution that was made by the appellant. Moreover, it would appear that the Shirere property (assuming it is the same plot said to be in Lurambi), is currently being occupied by the respondent's second wife and it would be improper to make any declaration of rights without involving all the parties who would be affected.

50. In light of our above findings, the appellant's appeal succeeds only to a very limited extent, and the orders that commend itself to us are as follows:

    i. We affirm the orders that were made by the learned Judge in response to question (1), (2) and (3) in the originating summons, in regard to the appellant's rights under the *Matrimonial Property Act*.

    ii. We affirm the orders that were made by the learned Judge in response to question (4), (5) and (6) in the originating summons, declining to issue any orders in regard to the Shirere property.

    iii. We set aside the orders that were made by the learned Judge declining to make orders in regard to questions number (7), (8), (9) and (10) in the originating summons, due to want of jurisdiction.

    iv. In response to questions (7), (8) and (9), we declare that the Kakamega property being a matrimonial property was sold to Samuel with the consent of both spouses.

    v. In response to question (10) of the originating summons, we decline to issue an order of injunction in favour of the appellant in regard to the Kakamega property, the same having been lawfully transferred to Samuel.

    vi. We affirm the order that was made by the learned Judge in response to question (11) that the appellant was entitled to half share of the proceeds of sale of the Kakamega property after discounting the amount that was paid to the bank to clear the outstanding loan and the respondent should pay the said half share to the appellant.

    vii. We order that each party shall bear their own costs.

    Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY, 2025

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR