



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mutisya v Helmuth (Civil Appeal E056 of 2021)
[2024] KECA 750 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KECA 750 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E056 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
JUNE 21, 2024**

BETWEEN

MARIA MUTISYA APPELLANT

AND

KIEZIL HELMUTH RESPONDENT

(Being an appeal from the judgement of the Environment and Land Court at Mombasa (Yano, J.) delivered on 20th September 2018 in Environment and Land Court Case No. 8 of 2015)

JUDGMENT

1. The respondent, Kiezil Helmuth, filed suit against the appellant, Maria Mutisya, by way of a Plaint dated 15th January 2015 seeking a declaration that the suit parcels of land, being Subdivision No. 1723 (Original No. 386/9) of Section III Mainland North, and Subdivision No. 1725 (Original No. 386/11 (the subject plots), belonged to him solely; an order that the name of the appellant be expunged from the entries in the Lands Office; a permanent injunction restraining and/or barring or prohibiting the appellant whether by herself, her servants, her agents, relatives from entering, claiming and/or interfering with his possession of the plots; damages; interest and costs.
2. The respondent met the appellant who was a resident in Germany in 2008. They began a romantic relationship and, in 2009, they decided to visit Kenya. He fell in love with the country and decided to buy some land. Together with the appellant, they identified the subject plots which, as he stated, he intended to buy alone. However, on the advice of his advocate and a promise by the appellant that she would pay half the purchase price, they entered into a contract in writing dated 29th May 2009 with, and agreed to purchase the subject plots from, Suleiman Athman and Dhahabu Shadrack Chondo at a purchase price of Kshs. 9,000,000.
3. The respondent claimed that it was agreed that they were to pay Kshs. 4,500,000 each and have the property registered in their joint names, but that, on the completion date, the appellant informed him



that she did not have enough money and requested him to pay the entire amount, whereafter she would refund him her half share. The respondent stated that, on the appellant's word, he paid the purchase price in full, but that, thereafter, the appellant refused to reimburse him the portion paid on her behalf; that for this reason, and although they were registered as joint owners, he claimed ownership of the subject plots to the exclusion of the appellant; that the subject plots were unjustly registered in both their names jointly, as no consideration was paid by the appellant; and that she had induced him to pay the entire purchase price by promising to refund the amount equivalent to her contribution, yet she failed to honor that promise.

4. On her part, the appellant denied the claim. She stated that she and the respondent were husband and wife having married under Kamba customary law; and that they had agreed to purchase the subject plots on 29th May 2009 and instructed their lawyers M/s Omondi Waweru and Company Advocates to represent them in the transaction. While she admitted that the respondent funded the entire transaction, she denied that they had agreed that she would pay half of the purchase price. In her counter-claim, she contended that they had intended to hold the property jointly as part of their matrimonial property with equal rights thereto. She sought an order of declaration that the suit property be sold and the proceeds shared equally between them.
5. In his reply to defence and defence to the counter-claim, the respondent denied that they were husband and wife or that they were marrying under Kamba customary law. He averred that he did not pay any dowry to the appellant's family.
6. During the trial, the respondent testified that he is a citizen of Austria residing in Mtwapa, Mombasa in Kenya. He stated that he met the appellant online and later met her physically in Germany in 2008; that they had a romantic relationship and, in 2009, they came to Kenya for a holiday with each of them meeting their own expense.
7. Whilst in Kenya, they stayed in the appellant's house in Shanzu, Mombasa, and that he fell in love with the area and decided to buy the subject plots; that the purchase price was agreed at Kshs. 9,000,000, which he paid into the appellant's account; and that, thereafter, Kshs. 8,326,350 was transferred to M/s Omondi Waweru & Co. Advocates, who issued a receipt and prepared the agreement for sale dated 29th May 2009, which was executed by both of them.
8. The agreement was prepared in English and translated into German and, when he was given a copy, it did not bear a stamp of any institution. He had intended to purchase the subject plots alone, but since his Advocates advised against it, he decided to include the appellant's name as a joint owner, even though she did not contribute towards the purchase price. He stated that he resided in the subject plots and the appellant who resided in Germany would visit him whenever she was in the country on holiday, which would last about 3 to 4 weeks before she would go back to Germany; that there was a house keeper who took care of the house whom they both paid. He stated that he moved out of the house about three (3) years ago leaving the house keeper in the house because it was too big for him.
9. In rebuttal to the claim of marriage, he testified that, in 2009, they visited Shimba Hills where they met the appellant's mother and brother; that he did not pay any dowry and was not aware that they were going to undertake a customary marriage. He stated that they were no longer in any romantic relationship with the appellant.
10. During cross-examination, he confirmed visiting the appellant's family in Shimba Hills and giving them money to purchase a goat which was slaughtered, but denied paying any dowry. He reiterated that he did not want the appellant's name appearing on the title as a joint owner as she had not paid anything towards the purchase price.



11. On her part, the appellant testified that she resides and works in Germany. She reiterated the evidence as narrated by the respondent, but went on to state that, when the respondent visited her mother in Shimba Hills in January 2009, he paid for a traditional marriage ceremony and purchased three goats, two of which were slaughtered. She produced photographs of the occasion. She further stated that they stayed at her house in Shanzu and thereafter decided to buy the subject plots.
12. She admitted that the respondent sent her the money for the purchase of the subject plots, that they both signed the agreement, and that the title was registered in their names as joint owners. While she admitted that she did not contribute towards the purchase price, she denied that she was to pay half portion of the purchase price because they purchased it as husband and wife; that they had plans to live on the subject plots as a couple; and that she was entitled to a contribution as a wife. In cross examination, she stated that the marriage ceremony was conducted under Kamba customary law.
13. Allowing the respondent's claim and dismissing the appellant's counterclaim, the trial Judge settled on three questions for determination, namely:
 - i) whether the Plaintiff and the Defendant were husband and wife;
 - ii) whether the subject property could be regarded as matrimonial property and be shared equally, or whether the defendant's name should be removed from the entries in the land's registry; and
 - iii) whether or not an injunction order ought to be granted and the plaintiff be awarded damages.
14. Finding that the appellant was not entitled to a portion of the subject plots, the court stated thus:
 21. It is clear that no presumption of marriage and no matrimonial property can be considered. The defendant admitted that she did not make any contribution towards the purchase of the suit property. On what basis therefore should it be divided equally? Even under the *matrimonial Property Act*, 2013 ownership of the property rests in the spouses according to the contribution of either spouses towards its acquisition, and shall be divided between the spouses if the (sic) divorce or the marriage is otherwise dissolved (see Section 7 of the *Matrimonial Property Act*, 2013). Even if the property were found to be matrimonial property, the law requires that the same be divided according to each spouse's contribution. The Court of Appeal has stated so in the case of PNN – ZWN [2017] eKLR.
 22. The upshot of this is that the plaintiff has proved his claim. I do hold that the suit property belongs to the plaintiff exclusively..."
15. Aggrieved by the decision, the appellant has filed an appeal to this Court on grounds that: the learned Judge misapprehended the chronology of events from the sale to the subsequent registration of subject plots; in believing in each and every allegations by the respondent, yet the allegations were not proved or substantiated; in failing to appreciate that the appellant had contributed towards maintenance and houseboy, and was entitled to ownership of the subject plots; in failing to consider the appellant's evidence; in failing to recognise the sanctity of Title as contemplated by law; and in failing to weigh all the evidence placed before him.
16. Both the appellant and the respondent filed written submissions. Whilst highlighting the submissions during the hearing on a virtual platform, learned counsel, Mr. Mulandi for the appellant, submitted that the subject plots were matrimonial property purchased by both parties, and that they were registered in their joint names; and that, therefore, they were both entitled to ownership. It was further submitted that the respondent admitted having lived with the appellant, and to visiting her parents.



17. Counsel submitted further that the purchase of the subject plots was driven by mutual understanding and trust between the appellant and the respondent as husband and wife; that the inclusion of the appellant's name as a joint proprietor was in accordance with the law which the Judge ought to have considered; and that the Judge also did not take into account the appellant's immense contribution towards the maintenance and smooth running of the properties as her contribution towards the purchase price of the subject plots.
18. Counsel argued that the learned Judge failed to consider the appellant's evidence and documents, and delivered a Judgment that was unfair, unjust and discriminatory; that the appellant was denied justice and a fair hearing, which was in contravention of the principles enshrined in Articles 47(1) and 50(1) of *the Constitution*.
19. On their part, Ms. Omollo, learned counsel for the respondent, submitted that no marriage existed between the appellant and the respondent since there was no proof of dowry paid, and that no independent witnesses were called to testify to the alleged customary marriage; that the appellant and the respondent were merely friends who had lived together for a very short period; that, furthermore, the appellant was in another relationship and could not have had two husbands at the same time.
20. It was further argued that the appellant admitted that she did not contribute towards the purchase of the subject plots and that, therefore, on that basis and on lack of proof of marriage, there was no basis upon which the subject plots should be divided equally between the parties as claimed by the appellant. Counsel submitted in conclusion that the subject plots have since changed hands to new buyers, hence rendering the appeal a futile academic exercise.
21. The mandate of this Court on a first appeal as set out in rule 31(1) (a) of the rules of this Court is to reappraise the evidence and draw our own conclusions. In *Peters vs. Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."
22. See also *Abok James Odera T/A A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where this Court held:

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."
23. We have considered the record before this Court, the impugned Judgment, the submissions of the parties and begin by observing that the respondent's claim, in the first instance was that though registered as joint owners, he was entitled to the subject plots to the exclusion of the appellant, since she had not paid any consideration towards the purchase price. Consequently, the respondent sought orders for a declaration that the subject plots belonged to him solely, and an order that the appellant's name be expunged from the entries in the Lands Office; a permanent injunction be issued restraining the appellant, her servants, her agents, and relatives from entering, claiming or interfering with his possession of the plots.



24. The appellant for her part denied the respondent's claim, and stated that, she and the respondent were husband and wife having married under Kamba customary law. In her counter-claim, she contended that they had intended to hold the property jointly as part of their matrimonial property with both having equal rights. She therefore sought a declaration that the suit property be sold and the proceeds shared equally between them. The respondent denied that they were husband and wife and that they married under Kamba customary law or that he took any dowry to the appellant's home.
25. When the judgment is considered, it becomes apparent that, the issues framed by the trial judge, centered on whether the appellant was married to the respondent, and whether she contributed towards purchase of the subject plots.
26. In view of the appellant's claim of the existence of a marriage, section 93 of the [Land Registration Act](#) Cap 300 comes into effect. It provides:
- "Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co- ownership and use of both spouses or all spouses, such property may be deemed matrimonial property and shall be dealt with under the [Matrimonial Property Act](#)."
27. The appellant having claimed that she was a joint owner of the suit property, by virtue of section 93, the suit ought to have been determined as a matrimonial dispute. In determining the issues in the manner set out, we think that this was a misdirection on the part of the trial judge for the reason that they were not matters that fell within the jurisdiction of the Environment and Land Court. Though the question of jurisdiction was not raised by either party, it is essential that we pronounce ourselves thereon because, it has a bearing on the manner in which the matrimonial matters raised herein ought to have been determined.
28. The mandate of the Environment and Land Court is set out in Article 162(2) and (3) of [the Constitution](#) and section 13 (1) and (2) of the Environment and [Land Act](#). Article 162 (2)(b) states that the Environment and Land Court has the mandate to hear and determine disputes relating to use and occupation and title to land.
29. Under Article 162(2)(b), [the Constitution](#) provides that the Court shall have power to hear and determine disputes—
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
30. Additionally, section 13 of the Environment and [Land Act](#) sets out the jurisdiction of the Court thus:
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of [the Constitution](#) and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.



- (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land”.
31. Clearly therefore, the mandate of the Environment and Land Court is limited by Article 162(2) and (3) of *the Constitution* and section 13 (1) and (2) of the *Environment and Land Court Act* to land use, occupation, title to land and to environmental matters.
32. On the other hand, Article 165 (3) of *the Constitution* accords the High Court amongst other matters, unlimited original jurisdiction in criminal and civil matters.
33. In this regard, in the case of Rachael Muaka vs Kahawa Sukari Ltd & Another [2010] eKLR it was stated that:
- "The High Court of Kenya is only one court with unlimited original jurisdiction in civil and criminal matters, and such jurisdiction and powers as may be conferred on it by *the Constitution* or any other law”.
34. In the instant case, the appellant’s defence and counter claim was brought under section 17 of the *Matrimonial Property Act* which provides the procedure by which a party may seek redress relating to a right over matrimonial property:
17. Action for declaration of rights to property
 1. A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
 2. An application under subsection (1)—
 - a) shall be made in accordance with such procedure as may be prescribed;
 - b) may be made as part of a petition in a matrimonial cause; and
 - c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”
35. Although it is worthy of note that the *Matrimonial Property Act* does not specifically define the “court” under whose remit it is to hear and determine matrimonial causes, it cannot be disregarded that, the express provisions of *the Constitution* and the Environment and *Land Act* do not clothe the Environment and Land Court with jurisdiction to determine matrimonial causes and matters that fall under the *Matrimonial Property Act*. Such matters are the preserve of the High Court which has unlimited jurisdiction to hear civil matters such as the one that was before the trial court.



36. As stated in the Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd [1989] eKLR:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

37. And in the case of Samuel Kamau Macharia vs Kenya Commercial Bank Limited and 2 Others [2012] eKLR the Supreme Court held that:

(68) “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.”

38. Since the express provisions of *the Constitution* and the Environment and *Land Act* limit the jurisdiction of the Environment and Land Court to land and environment matters, and the fact that a court cannot arrogate itself with jurisdiction, we find that the trial court exceeded its mandate by determining the suit which turned out to be a matrimonial cause founded under sections 6 and 17 of the *Matrimonial Property Act*. As a consequence, it is necessary to set aside that decision for want of jurisdiction. Having done so, what recourse would then be available to the parties?

39. In the Supreme Court case of Benson Ambuti Atega & 2 others vs Kibos Distillers Limited & 5 others [2020] eKLR when faced with a similar situation, it was held on the question of jurisdiction that the court may opt in light of the provisions of Article 50 of *the Constitution*, rather than strike out the matter or remain silent which would amount to shutting the litigant out of the seat of justice completely; a court should remit the dispute to the appropriate court or tribunal for determination. The court observed that:

“The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate court should have at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio, and that the appellate court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance.”

40. In view of the conclusions that we have reached, we consider it prudent to remit the matter back to the High Court for determination of the question of whether the appellant and the respondent were



married, and if so whether the appellant contributed towards the purchase and maintenance of the subject plots.

41. In view of the above, the appeal is merited and succeeds, and we make the following orders and directions:

1. The judgment of the Environment and Land Court dated 20th September 2018 be and is hereby set aside;
2. The suit is hereby remitted to the High Court for determination on whether the appellant and the respondent were married, and if so, whether the appellant contributed towards the purchase and maintenance of the subject plots; and
3. Costs to the appellant.

It is so ordered.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

