



**Wekesa v Waswa & another (Environment & Land Case 17 of 2017)  
[2024] KEELC 1253 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1253 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 17 OF 2017**

**EC CHERONO, J**

**MARCH 7, 2024**

**BETWEEN**

**VICTORIANA NANJALA WEKESA ..... PLAINTIFF**

**AND**

**CLEOPHAS WANYONYI WASWA ..... 1<sup>ST</sup> DEFENDANT**

**ROY SASAKA TELEWA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**a. Introduction And Pleadings**

1. By way of a plaint dated 31<sup>st</sup> January, 2017 the Plaintiff sought for the following orders against the Defendants;
  - a. A declaration that the land sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendant dated 3<sup>rd</sup> January, 2017 is null and void for lack of a spousal consent.
  - b. A permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendant acting by themselves, their agents and/or servant from ejecting the plaintiff and her children from E.Bukusu/ S.Skanduyi/ 9137 & 9138.
  - c. Costs of this suit
  - d. Interest on (c) at court rates
  - e. Any other relief.
2. The plaintiff's case is that she got married to the 1<sup>st</sup> defendant on 11<sup>th</sup> December, 1998 and that their marriage was blessed with four issues. She states that jointly, they bought a parcel of land which was eventually subdivided into parcel no. E.Bukusu/ S.Skanduyi/ 9137 & 9138 ("the suit properties").



They thereafter constructed their permanent matrimonial home on plot no 9137 and the 1<sup>st</sup> defendant put up a timber business on plot no 9138.

3. It is stated that the plaintiff and the 1<sup>st</sup> defendant have other parcels of land where they have constructed residential houses which are rented out and the proceeds thereof are used to educate the issues of the marriage. The plaintiff avers that the 1<sup>st</sup> defendant deserted their matrimonial home in 2015 and sometime on 3<sup>rd</sup> January, 2017 sold E.Bukusu/ S.SKanduyi/ 9137 & 9138 to the 2<sup>nd</sup> defendant for KShs. 10,000,000/=. The plaintiff argues that the alleged sale was irregular, null and void as it lacked a spousal consent. She further argued that the enforcement of the purported sale would render her and her children destitute.
4. The 1<sup>st</sup> defendant filed a statement of defence dated 6<sup>th</sup> March, 2017 wherein he denied the plaintiff's claim. He stated that the plaintiff never contributed any funds to towards the purchase and construction of the houses comprised in the suit properties. The 1<sup>st</sup> defendant argued that the plaintiff and the children will not suffer any prejudice since the 1<sup>st</sup> defendant has alternative residential houses on land parcel no. E.Bukusu/S.Kanduyi/8578, 8579 and L.R No. E.Bukusu/E.Sang'alo/2124.
5. It was further the 1<sup>st</sup> defendant's testimony that at the time of his marriage to the plaintiff, he had two other wives and the plaintiff was fully aware of these fact. It is further alleged that the plaintiff was aware of the sale of the suit properties as they had agreed that the family would be moved to land parcel no. E.Bukusu/S.Kanduyi/8578 & 8579. The 1<sup>st</sup> defendant prayed that the plaint be dismissed with costs.
6. The 2<sup>nd</sup> defendant on the other hand filed his statement of defence dated 8<sup>th</sup> June, 2017. In his defence, he averred that he legally purchased the suit properties after conducting due diligence. He stated that being the bona fide purchaser for value, he is entitle to vacant possession of the land. He argued that the plaintiff has not satisfied the grounds for granting the orders of injunction. The 2<sup>nd</sup> defendant further averred that he was approached to purchase the suit properties to save the plaintiff from bank loans that were sinking her. He therefore asked the court to dismiss the suit with costs.
7. There were various interim applications file prior to the matter proceeding for hearing. I will refrain from getting into those issues as they were heard and determined. Parties complied with pre-trial directions and the matter proceeded for hearing by way of viva voce evidence. All parties called one witness each.

#### **b. Parties Evidence.**

8. PW1 Victorina Nanjala Wekesa adopted her witness statement dated 31<sup>ST</sup> January, 2017 as her evidence in chief. He also produced as documentary evidence her list of documents dated 31<sup>st</sup> January, 2017 which contained 10 items as PExhibit 1-10. The witness testified that she has been married to the defendant for 29 years and has lived in the suit properties which is her matrimonial home for 20 years. She stated that she came to know about the sale of the suit property after the 1<sup>st</sup> defendant had sold it to the 2<sup>nd</sup> defendant who was unknown to her.
9. She denied the allegation that the land was sold to settle pending bank loans as she was servicing the loans and even after the sale the pending loan was not settled. She testified that she did not consent to the sale of the suit properties. It was her evidence that the 1<sup>st</sup> defendant married another wife and moved out of their matrimonial home to reside with his new wife in another property. It is then that he neglected her and her children and denied her use of the other properties except for the suit properties where she gets her livelihood. She urged the court to allow her prayers as this was her matrimonial home where she had raised her children and invested in.



10. In cross examination by counsel for the 1<sup>st</sup> defendant she stated that she contributed towards the acquisition of the suit properties although it is the 1<sup>st</sup> defendant who conducted the purchase. It was her evidence that they moved to the suit properties in the year 2002. She testified that they have constructed residential houses in land parcel no. E.Bukusu/S.Kanduyi 7490 and 7967 and also in E.Bukusu/S.Kanduyi 8578 and 8579. She added that in the various plots they have a worker's house, a three bedroomed house and structures for poultry animals and pigs.
11. It was her evidence that she indeed took up a 1.2 million loan with Family bank and a 1.7 million loan with Equity bank both guaranteed by the first defendant with land parcel no. Bukusu/S.Kanduyi8578 and 8579 as security. She admitted to being in arrears as a result of the 1<sup>st</sup> defendant cutting her off from benefiting from their properties but insisted that she is still servicing the loans. She stated that she played her role in supporting the family as she was doing farming, running a timber business and collecting rent from their residential plots. The witness denied the allegation that she agreed to the sale of the suit properties and to move to alternative property.
12. During cross examination by the 2<sup>nd</sup> plaintiff the witness testified that she lives in parcel no. 9137 but does business in plot no. 9138. She reiterated that she had taken up loans but was repaying the same with income from her timber business, rent collection and farming. She denied the allegation that the proceeds of the sale of the suit property were used to settle the loan arrears and balance. It was her evidence that she did not consent to the sale of the suit properties which was her matrimonial home.
13. In re-examination, the plaintiff (PW1) reiterated her evidence and thereafter closed her case.
14. Cleophas Wanyonyi Waswa(DW1) Was sworn and requested to adopt the contents of his replying affidavit dated 6<sup>th</sup> March 2017 as his evidence- in -chief. He produced in his evidence documents contained in a list of documents annexed to his replying affidavit as DExhibit 1-8. In addition, he also produced documents contained in his further list of documents dated 6<sup>th</sup> March, 2017 containing 15 items ad DExhibit 9-23.
14. During cross-examination by the plaintiff, he stated that he obtained a verbal consent from the plaintiff on 3<sup>rd</sup> January, 2017 to sale the suit properties to the 2<sup>nd</sup> defendant. He confirmed that the proceeds of the sale were not used to settle the 2.8 million loan the plaintiff was servicing.
15. In cross- examination by the 2<sup>nd</sup> defendant, he testified that he was selling the suit properties because the bank was threatening to exercise their statutory power of sale. He acknowledged receipt of the purchase price from the 2<sup>nd</sup> defendant.
16. In re-examination, he stated that he sold the suit properties because the other properties have caution and restrictions in favour of the plaintiff.
17. John Masiga Saeni (DW2) sought to adopt his witness statement dated 4<sup>th</sup> August,2018 as his evidence- in -chief. In cross-examination, he testified that he introduced the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant who was his cousin for purposes of disposal of the suit property. It was his testimony that the 1<sup>st</sup> defendant was selling the suit properties to settle loan arrears incurred by the plaintiff. The witness testified that a few weeks later, the 2<sup>nd</sup> defendant informed him that he had bought the suit properties which information was confirmed by the 1<sup>st</sup> defendant. It was his testimony that together with the 1<sup>st</sup> defendant, they summoned the plaintiff and informed her of the sale and sought for her consent to the sale. He testified that it was agreed that the plaintiff and the family would move to an alternative property.



18. Upon cross-examination by the 2<sup>nd</sup> defendant, the witness confirmed that the suit property was a matrimonial home.
19. For the 2<sup>nd</sup> defendant's case one witness was called Roy Sasaka Telewa (DW1) After being sworn sought to adopt his witness statement dated 8<sup>th</sup> June,2017 as his evidence in chief. He produced in his evidence a list of documents dated 8<sup>th</sup> June,2017 which contains five items as D2Exhibit no. 1-5. The witness testified that he met the plaintiff on 27<sup>th</sup> December, 2016 in the presence of the 1<sup>st</sup> defendant who is also her husband.
20. On cross- examination by the 1<sup>st</sup> defendant, he testified that the purpose of the said meeting was to agree on the purchase price and for a site visit of the land. He stated that the plaintiff informed him that she was under pressure to settle loan arrears thus the sale.
21. When cross- examined by the plaintiff, the witness reiterated his evidence- in -chief. He stated that it was a requirement of the sale agreement that the 1<sup>st</sup> defendant provides him with a spousal consent. He also stated that he is aware of the remedies available to him in case of breach of the sale agreement. The witness thereafter closed his case after re-examination in which he generally confirmed his testimony.
22. At the close of their respective cases, the Parties took directions and agreed to file written submissions.

#### **c. Parties Written Submissions**

23. The plaintiff in her submissions dated 8<sup>th</sup> November,2023 stated that she did not consent to the sale of the matrimonial property and as such, the sale agreement between the defendant was invalid. She relied on the case of *Mugo Muiru Investments Limited v EWB & Others* [2017] eKLR. It was argued that being a married man the 1<sup>st</sup> defendant was required to seek the consent of the plaintiff to complete the transaction as was held in the case of *MVK v SKK & 5 Others* [2018] eKLR. The plaintiff submitted that the fact that she was not a witness to the sale agreement indicates that she was not aware of the transaction.
24. The plaintiff urged the court that there were gaps in the defendant's case. They argued that despite both defendants testifying that the suit properties was sold for the purpose of offsetting loan arrears incurred by the plaintiff, the same were not cleared. It was submitted that the way the sale transaction was conducted was suspicious as the consideration was paid to a law firm which had no stake in the agreement. The plaintiff argued that the conduct of the defendants was such that they seemed to have conspired to evict her from her house. They relied on the case of *Esther Kabugi Njuguna vs. Martha Chebet & 3 others* (2020) Eklr.

#### **d. Analysis And Determination**

25. I have considered the pleadings, documents produced by the plaintiff as well as the defendants as exhibits, submissions and authorities cited. From the materials placed before me, the issues for determination are as follows;
  - (i) whether the suit properties comprise matrimonial land?
  - (ii) whether the sale agreement dated 3<sup>rd</sup> January, 2017 is null and void for want of spousal consent?
  - (iii) whether a permanent injunction can be issued as against the defendant and
  - (iv) who bears the cost of this suit?



26. From the evidence adduced, it is common ground that the plaintiff and the 1<sup>st</sup> defendant are husband and wife having been married in the year 1998 and a certificate of marriage issued. It is not also in dispute that the suit properties are registered in the name of the 1<sup>st</sup> defendant with certificates of title having been issued in the year 1999. The 1<sup>st</sup> defendant contends that he sold the suit properties to the 2<sup>nd</sup> defendant and has every intention to transfer the same. However, the plaintiff being the spouse of the 1<sup>st</sup> defendant contends that she was not consulted in the purported sale transaction and therefore she did not give her spousal consent. The plaintiff therefore seeks to have the sale agreement dated 3<sup>rd</sup> January, 2017 declared null and void and the defendants stopped by an injunction from evicting her from the suit properties. The 1<sup>st</sup> and 2<sup>nd</sup> defendants on the other hand wish to have the transaction completed and a transfer effected in favour of the 2<sup>nd</sup> defendant.
27. The plaintiff averred that the suit properties are matrimonial properties and her consent has to be sought before any sale can be effected. From the facts adduced in this case, it is clear to me that first, the property in issue was acquired by the parties after they got married. Section 93 of the [Land Registration Act](#), Act No. 3 of 2012 provides that property obtained during the subsistence of a marriage ought to be dealt with under the [Matrimonial Property Act](#), Act No. 49 of 2013. The [Matrimonial Property Act](#), defines what a “matrimonial home” is and also what “matrimonial property” is. A “matrimonial home” is defined in Section 2 as follows:-
- “matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;
28. Section 6 of the Matrimonial Properties Act lists the assets that fall within the description of matrimonial properties. The properties in issue and the matrimonial home is part of what is to be considered “matrimonial property” as defined by Section 6 (1) (a) of the [Matrimonial Property Act](#) set out above. What now remains for determination is whether, one spouse can proceed to sell matrimonial property, or part of matrimonial property, without the consent of the other spouse.
29. On the second issue which is tied to the question whether the plaintiff in the instant case gave consent for the disposal of the suit properties which would therefore make the sale agreement dated 3<sup>rd</sup> January, 2017 valid. In that regard, I refer to Section 12(1) of the [Matrimonial Property Act](#) which provides as follows :-
- Special provisions relating to matrimonial property
- (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.
30. In the case of [Mugo Muiru Investments Limited v E W B & 2 Others](#) [2017] eKLR, the Court of appeal stated as follows;
- 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 the matrimonial home was subject to such overriding interest. It is immaterial that there was not at the time statutory provision expressly declaring it 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 a person who acquires an interest in the property”.

31. I am from the evidence on record, the 1<sup>st</sup> defendant had alleged that he had two other wives but did not produced certificates of marriage in support of his allegation. However, the plaintiff in her testimony produced as PExhibit 2 a certificate of marriage between herself and the 1<sup>st</sup> defendant. Section 6(2) of the Marriage Act 2014 provides that a Civil marriage such as the one between the plaintiff and the 1<sup>st</sup> Defendant is a monogamous marriage. Section 9 of the same Act prohibits parties in a monogamous marriage from contracting another marriage. In my view, the plaintiff is the only legal spouse of the 1<sup>st</sup> defendant. Therefore, the provisions of Section 12(1) of the Matrimonial Properties Act apply in this case.
32. Back to the evidence tendered by parties, while the plaintiff claims her consent was not sought and obtained, the defendants on the other hand contend that the plaintiff gave consent for the alleged sell. The defendants alleged that the same was given orally and therefore they did not have a written consent. I find this hard to believe since the properties the 1<sup>st</sup> defendant purports to dispose of is where their matrimonial home stands and where the plaintiff has put up her timber business which is her source of livelihood. I equally note that the plaintiff was not even a witness in the alleged sale to show her willingness to have the properties sold.
33. It has also been alleged by the defendants that the plaintiff consented to the sale of the properties to enable the repayment of loans taken out by the plaintiff with Equity Bank and Family Bank. However, the 1<sup>st</sup> defendant has admitted that even after receiving the monies, he did not settle the loans and no explanation was given for failure to settle the loans as alleged. For the above reasons, I am not persuaded that the plaintiff gave any consent, oral or otherwise. It is therefore my humble view that the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendants dated 3<sup>rd</sup> January, 2017 is null and void for all its intent and purposes for want of spousal consent.
34. From the pleadings, the plaintiff sought for a permanent injunction against the defendants from evicting her from the suit properties. Having found that the plaintiff is a spouse to the 1<sup>st</sup> defendant and that the suit properties form part of their matrimonial properties which cannot be disposed of without the consent of a spouse and which the court has found was not sought and obtained, it is therefore incumbent upon this court to issue a permanent injunction against the defendants from evicting the plaintiff under the pretext of enforcing the purported sale agreement dated 3<sup>rd</sup> January, 2023.
35. On the issue of costs, I would have ordered the 1<sup>st</sup> defendant to pay, but given the relationship between the plaintiff and the 1<sup>st</sup> defendant, and hoping that there would be no further friction, I order each party to bear their own costs of this suit.
36. In the final analysis, I make the following orders:
  - a. The sale agreement between the 1st and 2nd defendants dated 3rd January, 2017 is hereby declared null and void for lack of a spousal consent.
  - b. A permanent injunction is hereby issued restraining the 1st and 2nd defendants acting by themselves, their agents and/or servants from ejecting the plaintiff and her children from E.Bukusu/S.Kanduyi/9137 and 9138.
  - c. Each party shall bear their own costs.

**DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 7TH DAY MARCH 2024.**

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**HON.E.C CHERONO**

**ELC JUDGE**

**In the presence of;**

- 1. Mr. Wamalw R. H/B Wanyonyi**
- 2. 1st defendant/advocate-absent**
- 3. 2nd defendant/advocate-absent**
- 4. Bett C/A present**

