



SMN v TCW (Civil Appeal 48 of 2017) [2022] KECA 715 (KLR) (22 July 2022) (Judgment)

Neutral citation: [2022] KECA 715 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 48 OF 2017
DK MUSINGA, F SICHALE & S OLE KANTAI, JJA
JULY 22, 2022**

BETWEEN

SMN APPELLANT

AND

TCW RESPONDENT

*(An Appeal from the judgment of the High Court of Kenya at Nyeri
(Ombwayo, J.) dated May, 2016 IN CIVIL SUIT (ELC) No. 126 of 2010)*

JUDGMENT

1. The respondent, TCW, the then plaintiff filed an Originating Summons dated 24th September, 2010. She sought an order, in the main, that:

“It be declared that half share of L.R. No. Muhito/gaturia/xxxx with all buildings and improvements thereon, which property was acquired with the joint efforts of funds of the plaintiff but registered in the name of the defendant, is held for and on behalf of the plaintiff who should thus be registered as proprietor of half share thereof and receive half share of proceeds therefrom.”
2. The summons was supported by the respondent’s affidavit sworn on 24th September, 2010 in which she deponed that she is SMN (the appellant) wife, having been married on 12th November, 1979; that in the year 1988, they jointly purchased LR No. Muhito/Gaturia/xxxx (the suit property) which was registered in the appellant’s name; that they built 22 rental units on the suit property; that in the year 2008, the appellant “sought” to alienate the suit property and because of her apprehension that the appellant may sell the suit property, she instituted the originating summons (OS) that has given rise to this appeal.
3. In response to the O.S, the appellant filed a replying affidavit dated 29th October, 2010, a supplementary affidavit dated 2nd February, 2011 and a further supplementary affidavit dated 14th January, 2013. The



import and tenor of the appellant's affidavits are that he was the sole owner of the suit property which he has sold for Kshs 4 million; that from the proceeds of the sale of the suit property, he purchased a bigger parcel of land known as Githi/Igana/xxxx which has a permanent house, 500 coffee trees, napier grass and a cowshed. Further, the appellant deponed that he has set up a matrimonial home on another property known as LR NO. Muhito/Gaturia xx.

4. On 14th May, 2013, the trial commenced before Ombwayo, J. who recorded the respondent's evidence, that of Peter Muthoni, Advocate (D.W1) and the appellant's evidence. The trial court heard that the appellant and the respondent entered into holy matrimony in the 1970s and were blessed with seven children. The two are still in holy matrimony and live together as husband and wife. The respondent's evidence was that they jointly contributed to the development of the suit property, having purchased it in 1987 from one Githinji Maundu; that later she was shown an agreement signed by D.W1 that the suit property was in the process of being sold. Besides the said agreement indicating an intention to sell the suit property, the appellant brought her another agreement showing that he had sold the land. She reported the matter to the Chief of the area and to the District Commissioner. She also placed a caution on the title of the suit property which was subsequently removed without any notice to her. As she was apprehensive that the appellant was intent on selling the suit property, she instituted the O.S, the subject of this appeal.
5. In his evidence, the lawyer, Mr. Peter Muthoni (D.W.1) confirmed that indeed in the year 2008, he prepared a sale agreement between the appellant and one Samuel Maina Gathege for the sale of the suit property for Kshs 4 million; that on 1st September, 2010, he made a further agreement confirming that the full purchase price had been paid.
6. On his part the appellant testified that he solely purchased the suit property, obtained title and carried out developments thereon. He further stated that he has since sold the plot to Samuel Maina Gathege after the latter paid him the full purchase price of Kshs 4 million and that he used the proceeds of the sale to invest on behalf of the family by purchasing a bigger parcel of land (Githi/Igana/xxx) which had developments thereon.
7. The trial court (Ombwayo, J.) found that the respondent had contributed to the establishment of the suit property and hence, had a beneficial interest. Further, that she was entitled in filing the caution objecting to the issuance of the consent to transfer the suit property. The learned judge rendered himself as follows:

“The upshot of the above is that the court finds that half share of L.R. No. Muhito/Gaturia/xxxx with all buildings and improvements thereon which property was acquired with the joint efforts or funds of the plaintiff but registered in the name of the defendant is held for and on behalf of the plaintiff who should thus be registered as proprietor of half share thereof and receive half share of proceed therefrom. Each party to bear own costs as this is a family dispute.”
8. The appellant was aggrieved by the said outcome and in a Memorandum of Appeal dated 28th April, 2017, he listed 12 grounds of appeal. In the main, the trial judge was faulted for rendering a judgment which was against the weight of the evidence; in finding that the suit property was matrimonial property; that there was no privity of contract between the respondent and Samuel Maina Gathege (D.W2) so as to vitiate the lack of consent of the Land Control Board and finally, that the trial judge failed to take into account that D.W2 had exponentially developed the suit property.
9. On 6th December, 2021, the appeal came up before us for plenary hearing via “Go to meeting” link due to the Covid-19 protocols. There was no appearance by the advocates on record for the parties



inspite of service of the hearing notices upon them on 22nd November, 2011 at 3.45 p.m. via email. The appellant having filed his submissions on 27th February, 2018 and the respondent having filed her submissions on 18th April 2018, we reserved the judgment for 18th March, 2022 (now past).

10. In his submissions, the appellant contended that D.W2 had exponentially developed the suit property, a factor not considered by the trial court; that the respondent was all along aware of the transaction between the appellant and D.W2; that the respondent failed to prove that she contributed to the establishment of the suit property; that the respondent who is “happily married” to the appellant has unrestricted use of other properties belonging to the appellant and finally, that the proceeds of sale of the suit property have been wisely invested for the benefit of the appellant’s and respondent’s family.
11. In opposition to the appeal, the respondent maintained that the suit property was a matrimonial property, with the respondent being entitled to a half-share thereof. Reliance was placed on Article 45 of *the Constitution* of Kenya, 2010 which provides:

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

12. Further, that the constitutional provisions are applicable as the *Matrimonial Property Act*, (although enacted in 2013 after the institution of the suit), echoes the provisions of *the Constitution* which was in existence at the time the suit was filed; that the respondent’s rights to the suit property is not subsumed by the sale to D.W2 and finally, that the sale is yet to receive the consent of the Land Control Board.
13. We have considered the said rival submissions, the authorities cited, the record and the law.
14. This is a first appeal. Our mandate as a first appellate court is as set out in *Selle vs. Associated Motor Boat Co. of Kenya & others* [1968] EA 123 wherein it was stated:

“I) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

“An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* [1955]22 EACA 270”.

15. We distil two main issues for our determination. Firstly, whether property acquired during the subsistence of a marriage can be distributed in piecemeal while the marriage still subsists and secondly, whether a court can make orders against a third party who was not a party to the proceedings before the ELC and before this Court.
16. The undisputed facts of this appeal are that the appellant and the respondent are a husband and wife. It is also not disputed that the appellant has set up a matrimonial home in his ancestral land, LR No.



Muhito/Gaturia/xxx where the couple resides. The respondent confirmed as much when she stated in cross-examination that “We were staying in the land that he was given by his father. The parcel that he was given by his father is intact but I do not know the number. He has the title of the land he inherited from his father. The parcel of land is his. We stay in the ancestral land. We have brought up children on this parcel of land. We work on the suit land but stay at home.”

17. The peculiar circumstances of this appeal is that we have two protagonists who are husband and wife and still enjoy marriage bliss. The respondent refers to the appellant as “Chairman” and acknowledges that he is her husband for life. It is also common ground that the appellant has other properties registered in his name. However, the respondent sought to have the suit property, to the exclusion of other properties registered in the appellant’s name shared on a 50-50 basis. It was the respondent’s submissions that whereas the *Matrimonial Property Act* had not taken effect at the time the respondent filed suit, Article 45(3) of *the Constitution* of Kenya, 2010, provides that “Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage” and that it is on account of the Constitutional dictates that the respondent was claiming half the share of the suit property.
18. Whereas it is true that the *Matrimonial Property Act* was enacted on 24th December, 2013 and that the respondent filed the suit, (subject of this appeal) on 24th September, 2010, long before the *Matrimonial Property Act* was in existence, of crucial concern to us however, Section 7 of the *Matrimonial Property Act* which provides as follows:

“Subject to Sec. 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”. (emphasis added)
19. In our view, and without making a finding as to the contribution of the respondent towards the purchase and the development of the suit property, we think that the division of matrimonial property kicks in upon divorce or dissolution of the marriage. Therefore, it is premature (and we pray that the two shall live together till death separates them), for the respondent to demand that the property acquired during a marriage be distributed during the subsistence of the marriage, and more so in piecemeal. The *Matrimonial Property Act* provides for division of such property upon dissolution of marriage.
20. The other grievance raised by the appellant was whether the suit can be determined and adverse orders made against Samuel Maina Gathege, the purchaser of the suit property, and in his absence. Again, it is common knowledge that the suit property was sold off for Kshs 4 million. The respondent is aware of the sale as this is what provoked the filing of the O.S. It is also not in dispute that the proceeds thereof were put into good use, by the purchase of land known as Githi/Igana xxx. The respondent did not include the purchaser as a party in the proceedings filed before the ELC and/or before us. The purchaser paid the full purchase price and is in occupation. Any order made touching on the suit property will affect the said purchaser, who was not accorded an opportunity to counter the respondent’s allegations. It is our considered view that the trial court erred in making orders adverse to the interests of the purchaser without giving him an opportunity to be heard.
21. Then there was the issue that the sale/purchase of the suit property did not get the nod of the Land Control Board as no consent of the said board was sought and obtained within 6 months of the sale agreement as required by the *Land Control Act*. In our view, the lack of consent of the Land Control Board as raised by the respondent is neither here nor there as this has not been raised by the appellant. In any event, the willing seller and the willing buyer may choose to “refresh” the sale agreement so as to be within the 6 month’s period within which to obtain the consent of the Land Control Board.



The appellant is still desirous of transferring the suit property to the purchaser. We find that nothing turns on this.

22. The sum total is that we find merit in this appeal. It is hereby allowed. Given the peculiar circumstances of this case, the appellant and the respondent being a husband and wife, we make no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

D.K. MUSINGA (P)

JUDGE OF APPEAL

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F. SICHALE

JUDGE OF APPEAL

.....

S. ole KANTAI

JUDGE OF APPEAL

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I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

