



**CKK v EJM (Civil Appeal 95 of 2018) [2021] KECA 147 (KLR) (19 November 2021) (Judgment)**

Neutral citation: [2021] KECA 147 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL 95 OF 2018  
DK MUSINGA, RN NAMBUYE & AK MURGOR, JJA  
NOVEMBER 19, 2021**

**BETWEEN**

**CKK ..... APPELLANT**

**AND**

**EJM ..... RESPONDENT**

*(Being an appeal arising from the Judgment of the Environment and Land Court,  
(A. Ombwayo, J.) dated 11th May, 2018 in Eldoret ELC Appeal No. 1 of 2015)*

**JUDGMENT**

1. This is a second appeal arising from the judgment of the Environment and Land Court (ELC) at Eldoret (A. Ombwayo, J.) dated and delivered on 11th May, 2018 in ELC Civil Appeal No. 1 of 2015.
2. The background to the appeal is that the appellant filed a plaint dated 13th January, 2011 in the Chief Magistrate's Court at Eldoret averring, inter alia, that he was the registered owner of all that parcel of land Reg. No. Nandi/Kokwet/xxx measuring 5.0 acres or thereabout, (the suit property). In the year 2009, he allowed the respondent to temporarily till the said suit property but she had declined to give him vacant possession when he requested her to do so, prompting the suit in which the appellant sought orders compelling the respondent to vacate the suit property failing which she be forcefully evicted together with an attendant order for costs and any other relief that the court may deem fit to grant.
3. The respondent filed a defence and counterclaim admitting that indeed the appellant was the registered owner of the suit property but denied being in occupation of the said suit property since 2009 or with the consent of the appellant; and further, denied having been served with any notice to vacate the suit property. Instead, it was averred that she settled on the suit property following a woman to woman marriage into the appellant's family for which marriage, dowry was paid for her with the knowledge and participation of the appellant.



4. In her counterclaim, she averred that she rightfully occupies the suit property by virtue of her woman to woman marriage and therefore sought an order compelling the appellant to transfer the whole of the suit property to her. In default, the court to execute all documents in place of the appellant to effect the transfer of the suit property in her favour, an order of permanent injunction restraining the appellant whether by himself or his agents, servants or persons whomsoever claiming through him from entering into and doing any act or deed of whatsoever nature detrimental to the respondent's quiet possession and occupation of the suit property, dismissal of the appellant's suit against her with costs to her and that her counterclaim to be allowed with costs to her.
5. The appellant filed a reply to defence and defence to counterclaim dated 21st February, 2011 joining issue with the respondent on issues raised in both her defence and counterclaim and put her to strict proof thereof.
6. The cause was canvassed through oral testimony, submissions and legal authorities. The trial magistrate (A. Alego, P.M.) evaluated the record, and identified the issues for determination. Considering these in light of the record, the learned Magistrate found the appellant's version unbelievable, but that of the respondent and her witnesses credible. The court ruled in the respondent's favour; dismissed the appellant's claim with costs to the respondent and allowed the respondent's counterclaim with costs to her.
7. The appellant was aggrieved and filed an appeal in the High Court of Kenya, ELC Civil Appeal No. 1 of 2015, raising various grounds. The appeal was canvassed through written submissions.
8. The first appellate court Judge, (A. Ombwayo, J.) re-evaluated the record before him and identified the issues for determination as follows: jurisdiction of the trial magistrate's court; the proprietorship of Nandi/ Kokwet/xxx; the relationship between the respondent and Hadija; and whether spousal interests in land apply to women to women marriage.
9. On the jurisdiction of the trial magistrates' court, the Judge ruled that the trial magistrate was properly seized of the matter as the appellant's claim before the Magistrates' court was filed on 13th January, 2011 before the enactment of the *Environment and Land Court Act* No. 19 of 2011 which came into force on 30th August, 2011. That Section 30 of the ELC Act provides that all proceedings relating to the environment or to the use and occupation and title to land pending before any court or before a Tribunal of competent jurisdiction shall continue to be heard and determined by the named forum until the ELC Court established under the Act came into operation or as may be directed by the Chief Justice or the Chief Registrar of the Judiciary. That on 9th November, 2012, the Chief Justice published Practice Directions whose import was that Magistrates' Courts shall continue to hear and determine all cases relating to the environment and the use and occupation of and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction. In light of the totality of the above, the Judge found that the Magistrates' Court had the pre-requisite pecuniary jurisdiction to determine the matter, dismissed the ground of appeal raised on want of jurisdiction on the trial court to determine the claim between the respective parties herein.
10. On the proprietorship of the suit property, the Judge took into consideration the entries in the register of the suit property which indicated that it was opened on 4th September, 1968 in relation to the registration of title in the name of KAS. The title to the property was subsequently issued in the name of the appellant, CKK indicated as also known same as KAS on the 27th September, 2010. On the 18th September, 2013, the respondent lodged a caution claiming a beneficiary's interest. On the 25th April, 2014, a decree was issued by the Magistrates' Court transferring the whole of the said land to the respondent.



11. As to which of the two claimants was the rightful claimant to the suit property, the Judge upon considering the totality of the record expressed himself thereon as follows:

“I do find that the respondent demonstrated that she was legally married to Hadija who settled her in the suit land. The customary woman to woman marriage being legally recognized, I do find that the respondent established that she had beneficial interest in the said property as the spouse to Hadija who had settled her on the disputed parcel of land...”

12. The Judge also took into consideration section 30 of the *Registered akn/ke/act/2012/6 Land Act*, Cap 300 Laws of Kenya (repealed) and expressed himself thereon as follows:

“I do find that the respondent’s interest though not noted on the register were overriding interests by virtue of section 30 of the Registered Land Act Cap 300 Laws of Kenya (repealed). The respondent is entitled to this property having been in possession of the same for a very long period of time from 1983 to 2011 when the suit was filed...”

13. On the conclusion reached by the trial magistrate, the Judge ruled that the trial magistrate did not misdirect herself on the existence of a woman to woman marriage between Hadija. Secondly, that the suit property belonged to Hadija. Thirdly, that the respondent was entitled to the suit land as the spouse to Hadija. Fourthly, that both Hadija and the respondent had resided on the suit property before the death of Hadija. She had therefore acquired overriding interests in the suit property. Fifthly, the respondent’s claim as a person in occupation of the suit property had primacy over that of the appellant who had never lived on the suit property notwithstanding that he had obtained title with regard thereto on 27th September, 2010. On the totality of the above assessment and reasoning, the Judge dismissed the appeal with costs to the respondent.

14. The appellant was aggrieved and is now before this court on a second appeal raising five (5) grounds of appeal subsequently condensed into four (4) thematic issues for determination, namely:

- 1) The proprietorship of land parcel Nandi/Kokwet/xxx.
- 2) The relationship between appellant and Khadija (Hadija).
- 3) Whether the respondent is entitled to the whole of land parcel number Nandi/Kokwet/xxx by virtue of woman to woman marriage.
- 4) Whether Khadija held any proprietorship interest over land parcel number Nandi/Kokwet/xxx

15. The appeal was canvassed through written submissions filed by learned counsel for the respective parties fully adopted by learned counsel without oral highlighting. Learned counsel, Mr. Talam, appeared for the appellant while learned counsel Mr. Kipkosgei Choge appeared for the respondent.

16. On the issue of proprietorship of the suit property, the appellant submitted that the suit property was registered in the names of the appellant’s father, KAS on 14th September, 1968 and subsequently transferred into the names of CKK, the appellant. It is also the appellant’s position that in the absence of the respondent providing evidence that the appellant acquired the suit property either fraudulently or through misrepresentation, sections 24 and 25 of the *Land Registration Act*, 2012 protects the appellant’s proprietorship and ownership of the suit property. It was also submitted by the appellant that there was no link between the appellant and the respondent as Khadija, whom the respondent allegedly got married to under the Nandi Customary Law under a woman to woman marriage, was not



- a beneficiary to the suit property originally registered in the names of the appellant's father as the first registered owner of the suit property. Neither was she the wife to the appellant's father nor related in any way to the appellant's mother. It was therefore erroneous for the two courts below to concurrently hold and find that the respondent held a beneficial interest in the suit property.
17. The appellant also submitted that the learned judge failed to appreciate that since the suit property was never registered in Khadija's name, it was never her property at any one particular time. The appellant therefore urged the court to overturn the concurrent findings of the two courts below and substitute thereto with a holding that all the proprietary interest over the suit property vested in the registered persons, namely, KAS as the first registered proprietor and the appellant being a son to the first registered proprietor as the second registered proprietor.
  18. In rebuttal, the respondent cited the case of the *Estate of Cherotich Kimongonyi K – Monica J. Katani vs. Jackson Chekwony & Another* MSA Succession Cause No. 212/10 wherein J.B. Ojwang J. (as he then was) found the existence of woman to woman marriage under the Nandi Customary Law. The Court was therefore urged to affirm the concurrent findings of the two courts below that the evidence tendered in court by the respondent and her witnesses was not only consistent but also provided sufficient proof of payment of dowry for the respondent under the Nandi Customary Law woman to woman marriage. It was also evident from the record that the said agreement was reduced into writing and produced in evidence as an exhibit. It was also never ousted by any other evidence tendered by the appellant to the contrary. In the respondent's view, the above uncontroverted position was sufficient proof of the existence of the woman to woman marriage between the respondent and Hadija.
  19. The respondent further relied on section 28 of the *Land Registration Act*, 2012 and submitted firstly, that the Judge correctly found that overriding interests did not require to be noted on the register and subsequent proprietorship of the land would be subject to them. Second that, section 28 provides for spousal rights over matrimonial property as an overriding interest.
  20. Relying on the case of *Janet Ngendo Kamau vs. Mary Wangari Mwangi*, Civil Appeal No. 173 of 2003, *Kangi vs. Muthiora* (1984) KLR 712 and *Mugo Muiru Investments Limited vs. EWB & 2 Others* (2017) eKLR, the respondent submits that the suit property formed the respondent's matrimonial property upon her marriage to Khadija in 1982, who according to evidence on record was the beneficial owner of the suit property. That contrary to the appellant's claim that he leased the suit property to the respondent five (5) years prior to the commencement of the suit against her, the evidence tendered by the respondent and her witnesses demonstrated clearly that the appellant neither had a home thereon, nor had he ever lived on the suit property, utilized or improved the same in any way. He therefore had no legitimate interest in the suit property. His claim over the said property was therefore not well founded and was rightly rejected by the two courts below.
  21. Further, that on the face of the record, the transmission from the original registered proprietor to the appellant was suspect as no evidence was adduced by the appellant to show how the transmission was effected considering that the original title holder was deceased as at the time title to the suit property was transferred to the appellant.
  22. The respondent appreciates that although under section 26 of the *Land Registration Act* 2012, title to land registered under the said Act is prima facie proof of who the registered proprietor is, the appellant's title can be impeached if there is demonstration that it was procured illegally, un-procedurally and or through corrupt means in the absence of the appellant's demonstration of how title moved from the original owner's name into his name. The respondent cited the case of *Elijah Makori Nyangwara vs. Stephen Mungai Njunguna & Another*, Eldoret ELC Case No. 609B of 2012 and *Alice Chemtuai Too vs. Nickson Kipkirui Korir & 2 Others* (2015) eKLR in support of the above proposition.



23. The respondent also relies on the case of *Monyi Maina vs. Hiram Gathiba Maina* (2013) eKLR wherein it was held, inter alia, that when a registered proprietor's root of his/her title is under challenge, it is not sufficient for such a proprietor to dangle the instrument of title as proof of ownership. The registered proprietor must go beyond the dangled instrument of proprietorship and prove not only the legality of how he acquired the title but also show that the acquisition was legal, formal and free from any encumbrances which according to the respondent, the appellant had failed to demonstrate through the evidence tendered at the trial.
24. This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina vs. Mugiria* [1983] KLR 78, *Kenya Breweries Ltd vs. Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another vs. Bernard Munene Ithiga* [2016] eKLR, for the holdings, inter alia, that on a second appeal, the Court confines itself to matters of law only, unless it is demonstrated sufficiently that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.
25. Having carefully considered the record, we find the issues that fall for our consideration are all the four condensed issues raised by the appellant in his written submissions. We find them interrelated. We shall therefore address them as one.
26. Starting with the concurrent findings of the two courts below on the proprietorship of the suit property, it is evident from the record that the two courts below considered the contents of the green card held by the area land registry for the suit property. The green card is explicit that the register was first opened on 4th September, 1968 when the title was registered in the names of KAS. It was not until 27th September, 2010 when that title changed from the names of KAS to the names of the appellant, Clement Kipkemei Keino, ID No. 6xxxxxx, with attendant indication that the appellant was also known as KAS. Both the appellant's pleadings and testimony are silent as to who Kipkemei Arap Sing'oei was to him, how the title moved from KAS to him, or why he was described in the green card as also otherwise known as KAS. All that the appellant said both in his pleadings and evidence was that he was the rightful registered proprietor simply by virtue of his being the current proprietor and holder of the instrument of registration of title in his favour.
27. The position the appellant has invited us to take in resolving the controversy as regards ownership and entitlement to the suit property is simply that provided for in section 26 of the Act whose import is that title issued under the said provision to a proprietor is prima facie proof of the proprietorship of such title until the contrary is demonstrated and proved to the threshold provided for in the same Act. In contrast, the respondent on the other hand has invited us to take the position enunciated in the case of *Monyi Maina vs. Hiram Gathiba Maina* (*supra*) that where proprietorship to land is under attack, it is not sufficient for a party to dangle the instrument of registration as proof. One has to go further and demonstrate the legality of the title. The respondent appreciates that the averments in the counterclaim did not give particulars of how the appellant's proprietorship of the suit property was unsustainable but asserts that the court is entitled to base its opinion on its appreciation of the record as currently laid before it.
28. As already observed above, all that the totality of the appellant's pleadings and evidence amounted to before the two courts below and now before us on a second appeal is that he was and still is the prima facie owner by virtue of the instrument of the registration of title in his name.
29. In contrast, the respondent's version and as corroborated by the testimony of her witnesses was that the suit property was the share of Khadija's inheritance of her (Khadija's) family property and that it had previously belonged to Khadija's late father; to which the appellant tendered no evidence in rebuttal.



30. We have considered the above. The position we take thereon is that the green card of the suit property tendered in evidence having shown that the original title holder was KAS, it was imperative upon the appellant when confronted with the respondent's implied attack on how he came to be registered as an owner of the suit property, to demonstrate the procedural and the legality of the transmission of the title from the original owner to himself, which in our view and as correctly contended by the respondent in her submissions was lacking.
31. In the absence of any evidence demonstrating who Kipkemei Arap Sing'oei was to the appellant and how title to the suit property was transmitted from the said KAS to the appellant, we find nothing on the record to fault the concurrent findings by the two Courts below that the suit property was Khadija's share of her inheritance of the family's estate and through her to her legitimate wife who is the respondent. We therefore find the conclusion reached by the two courts below with regard to the proprietorship of the suit property sound, well founded and are accordingly affirmed.
32. On the relationship between Khadija and the appellant, we find nothing in the appellant's testimony to oust the respondent's evidence as corroborated by the independent evidence of the respondent's witnesses including her uncle and the village elder that Khadija was a sister to the appellant's mother, and that both the appellant's mother and Khadija inherited their father's land with the suit property going to Khadija as her share of the entitlement of her family's property. That the appellant's mother also received her share of the family land which the appellant and his brother sold and lastly, that Khadija settled on the suit property, married the respondent through the Nandi Woman to Woman Customary Law Marriage and lived thereon with the respondent before Khadija passed on in 1985. That it was only after Khadija's death that the respondent was kicked out of the suit property. She however subsequently came back and resettled thereon with the help of the appellant's family members and local elders. It is therefore our position that her assertion that she was rightfully entitled to the suit property in the circumstances of this appeal, was properly and rightfully sustained by the two courts below, which we find no reason to interfere with for reasons already stated above.
33. The woman to woman marriage between Khadija and the respondent was proved to the required threshold through both oral and documentary exhibits produced in evidence without any challenge from the appellant. We find no reason in the totality of the testimony of the defence witnesses to suggest that this was a fabrication against the appellant especially when the appellant failed to tender to court any cogent evidence as to how the respondent came to settle on the suit property otherwise than through her version of her evidence on how she came to be settled thereon.
34. On the totality of the above assessment and reasoning, we find no error in the concurrent findings of the two courts below that the suit property belonged to Khadija who had married the respondent through a woman to woman marriage recognized by Nandi Customary Law by virtue of which the respondent and the children born to that union were the rightful owners of the suit property being legitimate successors in title to Khadija.
35. We therefore find no merit in the appeal. It is accordingly dismissed with costs to the respondent both on appeal and the two courts below.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.**

**D. K. MUSINGA (P)**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**



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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

