



**PKA v SAN & another (Environment and Land Appeal E055 of 2022)  
[2024] KEELC 7044 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7044 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E055 OF 2022  
DO OHUNGO, J  
OCTOBER 22, 2024**

**BETWEEN**

**PKA ..... APPELLANT**

**AND**

**SAN ..... 1<sup>ST</sup> RESPONDENT**

**CA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of the Chief Magistrate’s  
Court at Kakamega (Hon. B. Ochieng, Chief Magistrate) delivered  
on 18th October 2022 in Kakamega MCELC No. 578 of 2018)*

**JUDGMENT**

1. The background of this appeal is that the Appellant moved this Court through Plaintiff dated 2<sup>nd</sup> August 2017. The matter was later transferred to the Subordinate Court for hearing and determination. The Appellant averred in the Plaintiff that the First Respondent was her husband and the registered proprietor of land parcels numbers Kakamega/Chekalini/xxx and Ngenyeli Market Chebarus Plot No xx which parcels they purchased jointly. She further averred that the Second Respondent was the registered proprietor of land parcels numbers Kakamega/Chekalini/xxxx and Kakamega/Chekalini/xxxx which he purchased from the Appellant. The four parcels are collectively referred to herein as the suit properties.
2. The Appellant further averred the First Respondent intended to sell the suit properties thereby rendering her and her children homeless. She therefore prayed for judgment against the Respondents for a permanent injunction to restrain them from moving into, alienating, selling, subdividing or in any manner interfering with the suit properties.



3. Upon hearing the matter, the Subordinate Court (Hon. B. Ochieng, Chief Magistrate) delivered judgment on 18<sup>th</sup> October 2022 and dismissed the Appellant's case with no order as to costs, for want of merit.
4. Aggrieved by the outcome, the Appellant filed this appeal on 15<sup>th</sup> November 2022, through Memorandum of Appeal dated 15<sup>th</sup> November 2022. She prayed that the appeal be allowed, and that the judgment of the Subordinate Court be set aside.
5. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:
  1. The learned magistrate erred in law and fact in determining a non-existing application and granting orders affecting the suit land.
  2. The learned magistrate erred in law and fact in re lying (sic) on facts disputed by the appellants yet terming them as admitted.
  3. The learned magistrate erred in law and fact in denying injunction orders based on speculation by the res pendent (sic).
  4. The learned magistrate erred in law and fact in failing to consider or even analyze the evidence and submissions by the appellant.
  5. The learned magistrate erred in law and fact in finding that the appellant was entitled to an order of injunction against the respondents notwithstanding that the principles of granting injunction had been met.
6. The appeal was canvassed through written submissions. The Appellant argued that the sole issue for determination in the appeal is whether she was entitled to the suit properties even without a registrable interest. She contended that her interest in matrimonial property subsisted even though she was no longer married to the First Respondent. She relied on Article 45 (3) of the *Constitution*, Sections 2 and 7 of the *Matrimonial Property Act* and the case of *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* (Civil Appeal No 127 of 2011) and contended that the appeal should be allowed.
7. The Respondents argued that the Appellant ought to have filed a matrimonial cause in the High Court as opposed to moving the Subordinate Court through an ELC matter. They further argued that the case was filed in a court without jurisdiction and urged this court to dismiss the appeal with costs.
8. This is a first appeal. Consequently, this court has an obligation to re-consider and re-evaluate the pleadings and the material on record and to determine whether the conclusions reached by the Learned Magistrate are to stand or not and to give reasons either way. See *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
9. I have considered the grounds of appeal, the pleadings, the evidence and the parties' submissions. The sole issue that arises for determination is whether the Appellant was entitled to the reliefs that she sought.
10. The Appellant's case was that the First Respondent was her husband with whom they were blessed with 12 children. The First Respondent conceded both the marriage and the issues thereof. He however contended that the marriage was dissolved through a decree absolute issued on 18<sup>th</sup> August 2015 in Eldoret CM Divorce Cause No 30 of 2014. The record shows that the Appellant acknowledged the existence of the divorce proceedings during cross examination.



11. It was also the Appellant's case that the First Respondent was the registered proprietor of land parcels numbers Kakamega/Chekalini/xxx and Ngenyeli Market Chebarus Plot No xx which parcels she claimed they purchased jointly. The record however reveals that she stated in her testimony during cross examination that the First Respondent acquired parcel number Kakamega/Chekalini/xxx by inheritance prior to the marriage. That is contrary to her pleaded case that they purchased the parcel jointly.
12. The Appellant also pleaded in her Complaint that the Second Respondent was the registered proprietor of land parcels numbers Kakamega/Chekalini/xxxx and Kakamega/Chekalini/xxxx. The rights of a registered proprietor of land are well spelt out under Article 40 of the Constitution and Section 24 of the Land Registration Act. Further, Section 26 of the Land Registration Act obligated the trial court to accept the Respondents' certificates of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. No case was pleaded to impeach the Second Respondent's titles. A permanent injunction could not issue against a registered proprietor whose title remains intact and unchallenged.
13. Regarding the Appellant's contention that the suit properties were matrimonial property and that she was entitled to them on that account, I agree with the Respondents that she should have pursued such a case before the family court, especially since there were divorce proceedings.
14. In view of the foregoing discourse, I find no merit in this appeal, and I therefore dismiss it. In view of the relationship between the parties, I make no order as to costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 22<sup>ND</sup> DAY OF OCTOBER 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Mondia for the Appellant

No appearance for the Respondents

Court Assistant: M Nguyayi

