



REPUBLIC OF KENYA



**Kogo v Yego (Environment & Land Case 280 of 2014)
[2024] KEELC 7554 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7554 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 280 OF 2014
JM ONYANGO, J
NOVEMBER 14, 2024**

BETWEEN

EDWIN MARTIM KOGO PLAINTIFF

AND

DANIEL KIPTANUI YEGO DEFENDANT

JUDGMENT

1. The Plaintiff who is the registered proprietor of land parcel number Mogobich/ Cheptilik/ Block 2/70 filed suit against the Defendant vide a Plaint dated 27th August 2014 which was subsequently amended on 18th September 2014. In the Amended Plaint, he states that sometime in 2012 he sold the suit property to the defendant on condition that the defendant would pay the sum of Kshs.292,461 that the Plaintiff owed to Trans National Bank. He further avers that the Defendant only repaid part of the outstanding amount, forcing the plaintiff to sell his posho mill in order to repay the balance. He thus alleges that the defendant breached the sale agreement and further that the same became null and void for failure to obtain of the consent of the Land Control Board within a period of six months. The Plaintiff seeks the following reliefs:
 - a. An order declaring that the agreement dated 4th April 2014 and/or any other agreement in respect of the suit land is null and void for lack of the consent of the Land Control Board and further for having been frustrated.
 - b. An order of declaration that the Defendant and his agents are trespassers on the Plaintiff's Land Reference No. Mogobich/ Cheptilik/ Block 2/70.
 - c. An order of permanent injunction to restrain the Defendant and/or his agents from entering, re-entering and/r trespassing onto, occupying or continued occupation of the parcel of Land Reference No. Mogobich/ Cheptilik/ Block 2/70 and/ or from doing anything whatsoever



thereon and in particular constructing structures and/or a house (s) thereon that will interfere or violate the plaintiff's proprietary rights over the said parcel of land.

- d. An order of eviction against the Defendant, his servants and agents and demolition of any structure(s) which has been constructed on the suit Land Reference No. Mogobich/ Cheptilik/ Block 2/70.
 - e. Costs of this suit
 - f. Mesne profits.
 - g. Interest.
2. The Defendant filed a Defence dated 15th September 2014 and a Reply to Amended Plaint dated 20th April 2015 denying the Plaintiff's claim and stated that he and his family were legitimately in occupation of the suit property. He also raised a preliminary objection claiming that the court lacked the jurisdiction to hear this case as there was a similar suit in the Chief Magistrate's Court between the same parties. The Preliminary Objection was dismissed and the case was set down for hearing.

The hearing commenced on 26th May, 2016 before Justice Ombwayo who took the evidence of the Plaintiff. Owing to the COVID 19 pandemic the case was delayed for a while but Justice Kibunja subsequently took the evidence of PW2 ,PW3, DW1,DW2, DW3 and DW4 before he was transferred in September 2022. The proceedings were then typed and I took the evidence of DW5 after which the Defendant closed his case in December 2023.The parties were then granted time to file their final submissions.

Plaintiff's Case

3. In summary, the Plaintiff's case is that he entered into a land sale agreement with the Defendant dated 20th March 2014 for the sale of Land Reference No. Mogobich/ Cheptilik/ Block 2/70 measuring 1.050 acres at an agreed purchase price of Kshs.1,300,000 which was to be paid by instalments. The Defendant paid a deposit of Kshs.300,000/=. Before he could pay the full purchase price, the Plaintiff entered into second sale agreement with the Defendant for the sale of his entire parcel of land at a price of Kshs.2,160,000/=. The second agreement superseded the first one. The two sale agreement were produced as PEX 2 and PEX 3. The Plaintiff told the court that he was paid a sum of Kshs.1,150,000/ = leaving a balance of 1,010,000/=. It is his case that even though the defendant was to deposit the balance of the purchase into the Plaintiff's loan account with Trans National Bank, he failed to do so. He denied receiving cheques in the sum of Kshs.617,000/= and Kshs.250,000/= from the Defendant's advocates although he admitted that the defendant deposited the sum of Kshs.500,000/= in his KCB account. He insisted that he repaid the loan with Trans National Bank on his own.
4. He denied that he had gone to the firm of S.K Kitur & Co Advocates to sign transfer forms and application for consent of the Land Control Board. Although he confirmed that he had promised to vacate the suit property by December 2014, he denied having signed the undertaking dated 22nd July 2014. He testified that the Defendant had taken possession of his land measuring 0.3 of an acre where he had constructed a house for his son and they are staying on the land to date.
5. The Plaintiff called his wife Ellen Chepchumba Martim Kogo who testified as PW2. She testified that they agreed to sell the Defendant a piece of land measuring 2 acres in order to repay some loans that her husband had taken from the bank but she denied that she signed any sale agreement in the office of Kipkosgei Choge & Co Advocates. It was her testimony that the Defendant failed to pay the full purchase price. She told the court that the Defendant had occupied a portion of their land and he had



constructed a house thereon. The remaining portion of the land is occupied by herself and her family and that her son has constructed his house thereon.

6. The Plaintiff's son Robert Kipkoech who testified as PW3 told the court that his mother had informed him about the sale of their portion of land measuring 2 acres in order to get money to repay the bank loans that his father had taken. He however denied having gone to any advocates' office to sign the sale agreement. He also denied having signed the undertaking dated 22nd July 2014 demonstrating his commitment and that of his parents and brothers to vacate the suit property by 22nd October 2014. He testified that he occupies 0.8 of an acre of the suit property and he has various developments thereon including a house, trees and cattle feed. He said he objected to the sale of the suit property as it was family land which his father had inherited from their grandfather.

Defendant's Case

7. The defendant testified that he entered into an agreement with the plaintiff for the sale of 2.6 acres after he had viewed that land and agreed on the details with the Plaintiff. The agreed purchase price was Kshs.1,300,000/=. He paid Kshs.300,000/= upon signing the agreement on 20th March 2012 and Kshs.350,000/= on 22.3.2012. He was supposed to pay the balance on 1.4.2012 but on the said date, the plaintiff offered to sell him the entire parcel of land measuring 4.45 acres together with all the developments thereon at a price of Kshs.2.160,000/=. As at 1.4.2012 he had paid Kshs.1,250,539/= . He subsequently cleared the balance of the purchase price by depositing various amounts in the Plaintiff's bank accounts at KCB and Transnational Bank. The said receipts were marked as DMF1(3(a)- (k).
8. He testified that the plaintiff signed an acknowledgement for the sum of Kshs.1538,539 and signed an undertaking dated 8.11.2013 to obtain the Discharge of Charge and sign the necessary transfer documents. He subsequently signed another undertaking dated 22nd July 2014 in which he agreed to transfer the suit property and vacate the same by 22.10.2014. The said acknowledgement and undertaking was also signed by his wife Hellen Chepchumba Kogo and his son Stanley Kipsang Tum. He stated that the Plaintiff's wife was involved in the sale transaction and she appended her thumb print to the sale agreement.
9. The plaintiff subsequently signed the application for Land Control Board consent and Transfer forms and furnished his advocate with his passport photo but failed to attend the meeting of the Land Control Board. The Defendant was later informed by his advocate that the Plaintiff's advocate had written a letter to the Chairman of the Land Control Board objecting to the transfer of the suit property to the Defendant on the grounds that it was the plaintiff's matrimonial home. The defendant later went to the suit property but he was met with hostility. This is what prompted him to file suit in Kapsabet court where he obtained an order of injunction against the Plaintiff. The plaintiff then responded by filing the instant suit.
10. The Defendant called 4 witnesses. Kipkosgey Choge Advocate who testified as DW2 informed that court that he witnessed the sale agreement dated 20th March, 2014 in which the plaintiff agreed to sell the suit property measuring 1.050 ha. He testified that the vendor was accompanied by 6 witnesses including Ellen Chepchumba who signed the agreement. He later prepared another sale agreement dated 4th April, 2022 in which the plaintiff agreed to sell the entire parcel of land together with the developments thereon at Kshs.2,160,000/=. This second agreement superseded the first one. It indicated that the defendant had paid Kshs.1,250,539/= and the balance was to be paid by monthly instalments to be deposited in the plaintiff's bank account at Transnational Bank. The said agreement was signed by the plaintiff, his wife Ellen Chepchumba and other witnesses.



11. He testified that he subsequently wrote a letter (DEX13) dated 8th August, 2014 to the Plaintiff raising concerns about his failure to transfer the land and stopping the defendant from developing the same. He had earlier written a letter dated 22nd January, 2013 (DX15) asking the plaintiff to collect the balance of the purchase price and move out of the suit property. He explained that he had been given post-dated cheques by the defendant which were to be deposited in the plaintiff's account. He stated that Ellen Chepchumba who had been introduced to him as the vendor's wife signed both agreements though she did not have her National ID card. It was his testimony that he was not sure if the purchase price had been paid in full although he witnessed the defendant pay the second instalment of Kshs.350,000/=.
12. Duncan Kimtai Talam who testified as DW3 stated that he had worked with the firm of S.K Kitur since 2019. He said he witnessed the final payment of Kshs.617,000/=. He also produced the acknowledgment note for Kshs.1,538,539/= dated 22nd July, 2014 which contains an undertaking to obtain a Discharge of Charge and transfer the title in respect of the suit property to the defendant. He testified that the document was signed by Mr. Kitur Advocate whom he had worked with and whose signature he was conversant with.
13. Julius Kipchirchir Kipsigak testified as DW4. He stated that the Defendant informed him that he wanted to buy land and he linked him up with the Plaintiff through a friend called Samule Alusei. He later accompanied the Defendant and Plaintiff together with their witnesses to the advocates office where they entered into a written sale agreement and he signed as a witness. He was also present when they signed the second sale agreement and when the last installment of Kshs.617,000/= was paid by the defendant. He explained that on 22nd July, 2014 the Defendant deposited Kshs.500,000/= in the Plaintiff's bank account at KCB and gave him the balance of the purchase price in cash. The plaintiff and defendant then signed the acknowledgment before the late Mr. Kitur and handed him their photographs and copies of their identity cards. They then signed the Transfer Form to which their photographs had been affixed. He testified that the advocate handed over the title deed to the Plaintiff so that he could process the transfer at the lands office. He confirmed that the Defendant is in occupation of a portion of the suit property measuring 0.3 of an acre.

Plaintiff's Submissions

14. The Plaintiff's submissions are dated 4th March, 2024. Learned counsel for the Plaintiff submitted on 3 main issues: Firstly, he submitted that the Plaintiff only entered into one land sale agreement with the plaintiff dated 20th March 2012 whose terms he did not fully agree with. He denied that the plaintiff entered into any subsequent agreement with the defendant as the alleged agreements were never subjected to forensic examination after the Plaintiff's signature and that of his wife were disputed. He contended that Duncan Kimutai, Advocate could not authenticate any of the documents that were prepared and signed by the late Mr. Kitur Advocate as he admitted that he was not an expert in handwriting and signatures. Regarding payment, Counsel submitted that there was no evidence that the Defendant had paid the full purchase price for the suit property. He relied on the case of Esther Kabugi Njuguna v Martha Chebet & 3 Others (2020) KLR for the proposition that burden of proving payment of the purchase price rested with the Defendant.
15. He added that the Defendant purported to transact on the suit property yet he knew that it was encumbered. He relied on the case of Botwa Farm Company Ltd V Settlement Fund Trustee & Another (2019) eKLR where the Court relied on the case of John Kamunya & Another v John Nginyi Muchiri & 3 Others. In this case the court observed that no contractual relationship with regard to the suit land could be legally created as between the purchaser and seller before the seller had discharged his indebtedness to the Settlement Fund Trustees and the title to the suit land transferred to his name.



16. It was therefore counsel's submission that the purported transaction was invalid as the Plaintiff did not have a good title at the time of the transaction.
17. Secondly, counsel submitted that section 6 of the *Land Control Act* requires that the consent of the Land Control Board be obtained within 6 months for any transactions relating agricultural land. The lack of consent of the Land Control Board therefore rendered the sale null and void. He relied on the cases of *Hirani Ngaithe Githire v Wanjiku Munge* (1979) eKLR; *Bartonjo Kiptala v James Kipkemboi* (2013) eKLR, *Gabriel Wamukota v Sylvester Nyongesa Donati*(1987)eKLR and *Nakuru Civil Appeal No. 84 of 2004 Fred C. Fedha & Another v Edwin E. Asava*.
18. Thirdly, counsel submitted that the defendant did not obtain spousal consent with respect to the sale of the suit land which is matrimonial property as the plaintiff's first wife lives on the suit land with her children.
19. He submitted that the advocate who prepared the sale agreements never prepared a declaration for spousal consent as required by section 12 of the Matrimonial Properties Act. In particular Section 12 (1) of the said Act provides that:
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- (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."
20. Counsel relied on the case of *EKN v AS & 2 Others* (2019) eKLR where the court observed that section 12(1) makes provision for a monogamous union by providing that both spouses must consent before matrimonial property is alienated. The learned judge further observed that:
- "My own interpretation of the law is that if it is the position that consent is required of all spouses in a monogamous union, then by analogy consent would be required of all spouses in a polygamous union unless there is clear demonstration that the property does not constitute matrimonial property or that through custom , because customary law is applicable under section 11 of the *Matrimonial Property Act* or other legal provision, the other spouses cannot have any recognizable interest in such property and their consent is thus not necessary"
21. It was counsel's contention that since the Defendant knew that the Plaintiff was a polygamous man, he should not have assumed that he could transact in the suit property without the involvement of his second wife. He therefore urged the court to grant the reliefs sought.

Defendant's Submissions

22. In his submissions dated 4th March 2024 learned counsel for the defendant submitted on three main issues; the court's jurisdiction to hear this case; the validity of the sale agreement between the Plaintiff and the Defendant and whether the plaintiff is entitled to the reliefs sought.
23. With regard to jurisdiction, it was counsel's submission that this court lacks the jurisdiction to hear this suit as the Defendant filed a suit at Kapsabet Chief Magistrate's Court which is still pending. He argued that in accordance with Section 15 of the *Civil Procedure Act* which delimits the jurisdiction of the court, Kapsabet Chief Magistrate' court has original jurisdiction to hear and determine the case as both parties reside within the territorial jurisdiction of the said court. He relied on the cases of *Fortis Management Ltd v Trendmark Computes Ltd* (2018) eKLR and *Meeli Ole Naiserwa v Benson*



Gachuki Kinyanjui (2016) eKLR for the proposition that suits ought to be instituted in a court within the local limits of whose jurisdiction the Defendant resides or carries on business. He further contended that assuming jurisdiction in this matter, the court denied the subordinate court an opportunity to hear and determine the suit thus indirectly denying the Defendant a right of appeal to this court. See *Anna Kimitei Isaack v Kipkater Tallam & 2 Others* (2021) eKLR

24. With regard to the validity of the sale agreement, counsel submitted that the parties entered into valid sale agreements signed by both parties before an advocate and the same were in conformity with the law. It was his submission that the Plaintiff's first wife consented to the transaction and she was physically identified Mr. Choge, Advocate who attached a certificate to the agreement to verify that she had given her consent.
25. Counsel urged the court to admonish the Plaintiff for attempting to engage in a deceitful transaction. He submitted that the court should not allow a party to engage in unlawful conduct and make an order to benefit a wrongdoer. He referred to *Standard Chartered Bank Kenya Limited v Intercom Services & 4 Others* Civil Appeal No. 37 of 2003 (20004) 2 KLR183 and *Ethiopian Airlines V Motunrola* (2005) 2 E.A 57.
26. It was counsel's submission that the plaintiff's conduct demonstrated willful intention to defraud. He submitted that the Defendant entered into a binding contract in accordance with section 3 of the *Law of Contract Act*. He relied on the case of *Jeremiah Muchera Ndibu v David Gichure* (2019) eKLR for the proposition that a party cannot run away from the terms of its agreement and that courts must enforce contracts without re-writing the parties' contracts. He described the Defendant as a bona fide purchaser for value who paid valuable consideration for the suit property without notice of any prior adverse claims as defined in the case of *Lawrence Mukiri v Attorney General & 4 Others* (2023) e KLR.
27. Counsel relied on the case of *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR where it was held that in the absence of Land Control Board consent, the court could imply a constructive trust.

Analysis and Determination

28. I have considered the pleadings, evidence on record and rival submissions and the issues that lend themselves for determination are as follows:
 - i. Whether this court has the jurisdiction to hear and determine this case.
 - ii. Whether the parties entered into valid and binding agreements in respect of land parcel number Mogobich/ Cheptilik Block 2/70
 - iii. Whether the suit property is matrimonial property
 - iv. Whether the Plaintiff obtained the requisite spousal consent in respect to the sale of the suit property
 - v. Whether the Defendant obtained the consent of the Land Control Board.
 - vi. Whether the plaintiff is entitled to the reliefs sought.

Whether the court has jurisdiction to hear and determine this suit.

29. At paragraph 17 of his Defence, the defendant stated that this court has no jurisdiction to entertain the Plaintiff's claim as there was another suit Kapsabet PMCC No. 1 of 2014 between the same parties. The Defendant subsequently filed a Notice of Preliminary Objection dated 16.9.2014. The Preliminary Objection was fixed for hearing on 9.12. 2014 but on the said date, it would appear that



the defendant and his advocate did not attend court and the Preliminary Objection was dismissed for want of prosecution.

30. The Defendant filed an application dated 9th December, 2014 seeking that the Preliminary Objection be reinstated but the said application was compromised and on 19th February, 2015 the both counsel entered into a consent that the suit be fixed for hearing. Having failed to pursue the application to revive the Preliminary objection, the Plaintiff cannot raise the issue of the court's jurisdiction at this stage as the court had already dealt with the issue, though summarily. In any case the Plaintiff submitted to the court's jurisdiction by consenting to fix the case for hearing.

Whether the parties entered into multiple valid agreements in respect of land parcel No. Mogobich/ Cheptilik Block 2/70 and whether the defendant was paid the full purchase price.

31. There are two sale agreements at the centre of this dispute. The first sale agreement is dated 21.3.2012. In the said agreement the plaintiff agreed to sell a portion of land parcel no. Mogobich/ Cheptilik Block 2/70 measuring 1.050ha at an agreed purchase price of Kshs.1,300,000/= payable by 3 instalments of Kshs.300,000/=, Kshs.350,000/= and Kshs.650,000/= before 30th April, 2012. There is no dispute that the plaintiff and the defendant both signed the said agreement.
32. The Plaintiff acknowledges that he only received a sum of Kshs.1.150,000/= and denies having received the balance of the purchase price.
33. On the other hand, the Defendant testified that before he could pay the balance of the purchase price, the Plaintiff offered to sell him the entire parcel of land comprised in land parcel No. Mogobich/ Cheptilik Block 2/70 measuring 1.805 Ha or thereabouts together with the developments thereon at an agreed purchase price of Kshs.2,160,000/= and they entered into a second sale agreement dated 4th April 2012. A copy of the said agreement was produced as Defendant's exhibit 3. According to the Defendant, the second agreement superseded the first sale agreement. It is the Defendant's case that he paid the entire balance of the purchase price by depositing various amounts into the Plaintiff's account at Transnational Bank and KCB Bank. He produced a copy of an acknowledgement dated 8th November, 2013 in which the plaintiff acknowledged receipt of Kshs,1,538,000/= being the balance of the purchase price pursuant to the sale agreement dated 4th April, 2012. He also produced a copy of an undertaking dated 22nd July, 2014 in which the plaintiff agreed to vacate the suit property on 22nd October, 2014. Additionally, he produced undated Transfer form signed by the plaintiff.
34. The plaintiff however denied that he entered into the agreement dated 4th April, 2012 and claimed that his signature was forged. He equally denied having signed the acknowledgment dated 8th November, 2013, the undertaking dated 22nd July, 2014 as well as the Transfer form. He refuted the Defendant's claim that he had helped him clear his loan with Transnational bank. He however acknowledged the sum of Kshs.500,000/= deposited by the Defendant in his account at KCB Bank.
35. The Plaintiff's evidence was controverted by Mr. Kipkosgey Choge, Advocate who testified as DW1. He categorically stated that the vendor and purchaser who are the plaintiff and defendant herein respectively appeared before him with their Identity cards and signed the sale agreement dated 20th March, 2012 in his presence. They were accompanied by six witnesses including Ellen Chepchumba of ID No. 4003439. He also testified that he found the second sale agreement dated 2017 (sic) amending the one dated 20.3.2012. In the said agreement the Plaintiff wanted to sell to the Defendant the entire parcel of land known as Mogobich/ Cheptilik Block 2/70 together with developments thereon at a price of Kshs.2,160,000/=. Paragraph 3(a) of the said agreement indicated that Kshs.1,250,539/= had been paid as of 4th April, 2012. Kshs.617,000/= was to be paid on or before 31st December, 2012 and the balance of Kshs.292,461/= was to be paid directly to Transnational bank by instalments until payment



in full. He told the court that he once again witnessed the plaintiff, defendant and witnesses sign the agreement. He stated that Ellen affixed her thumb print on the agreement.

36. Mr. Choge testified that he later wrote a letter dated 8th August, 2014 to counsel for the Plaintiff expressing his client's concern over the Plaintiff's failure to transfer the suit property to him. He stated the Ellen had been introduced to him as the Plaintiff's wife. He confirmed that he saw her signing the sale agreements on the two occasions. He said he was given postdated cheques for the balance of the purchase price by the Defendant. He then wrote to the Plaintiff to collect the balance from him.
37. Duncan Kimatai Talam of Kitur & Company Advocates who testified as DW3 stated that the acknowledgement dated 8th November, 2013 in which the plaintiff acknowledged receipt of Kshs.1,538,539/= was signed by Mr. Kitur, Advocate who has since died. He confirmed that he was conversant with Mr. Kitur's handwriting as he had worked with him for over a year before he died. He produced the acknowledgment and Transfer forms and confirmed that they were from his office.
38. Julius Kipchirchir (DW4) testified that he was present when the Defendant paid the Plaintiff the sum of Kshs.617,000/= as he is the one who had acted as an agent in the transaction.
39. I am inclined to believe the evidence of DW2 and DW3 who witnessed the Plaintiff and his wife Ellen sign the 2 sale agreements and the acknowledgement. It is therefore my finding that the plaintiff and defendant entered into two sale agreements dated 21st March, 2012 and 4th April, 2012 and that the plaintiff signed the acknowledgement dated 8th November, 2013.
40. Regarding the payments made by the Defendant, although the Defendant produced various deposit slips for amounts deposited in the Plaintiff's account, the same do not amount the sum of Kshs.2,160,000/=. In particular, the Defendant did not produce any document in support of the amount of Kshs.617,000/= allegedly paid on 31st December, 2012. The Plaintiff was categorical that he only received the sum of Kshs.1,150,000/=.
41. It is trite law that he who alleges must prove. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In the case of Esther Kibugi Njuguna v Martha Chebet & 3 Others (2020) eKLR the court held as follows:

“The burden to prove payment of the purchase price rested on the 1st Defendant. In the instant there is no dispute that the transfer of the suit property to the 1st Defendant was effected before the purchase price was paid to the Plaintiff. The transfer could only be valid if the purchase price could be shown to have been paid. If the purchase price was not paid, the transfer would be ineffectual as it would have been effected without consideration. Given that the transfer of the land was effected to the 1st defendant before she had paid he purchase price to the Plaintiff and the plaintiff contends that the transfer was carried out behind his back, it was imperative for the 1st defendant to prove that the Plaintiff was actually paid the purchase price. I am not satisfied that the 1st defendant proved that the purchase price was paid to the plaintiff.

... There was no evidence that the plaintiff was paid the purchase price and consequently there was lack of consideration of the contract. The lack of consent vitiated the contract and the same was rendered null and void”

42. In the instant case, even though the Plaintiff was able to prove that he made some payments under the sale agreement dated 20th March, 2012, he failed to prove that he paid the entire purchase price as the acknowledgment dated 8th November, 2013 was in respect of Kshs.1,538,539/=.



Whether the suit property is matrimonial property and if so, whether the necessary spousal consent was obtained in terms of section 28 of the [Land Registration Act](#).

Section 6 of the [Matrimonial Property Act](#) defines matrimonial property as follows:

‘For the purposes of this Act matrimonial property means:

- a. The matrimonial home or homes
- b. Household goods and effects in the matrimonial home or homes
- c. Any other movable or immovable property jointly owned and acquired during the subsistence of the marriage

Under section 2 of the [Matrimonial Property Act 2](#)

“a matrimonial home means any property that is owned or leased by one or both spouses and occupied by the spouses as their family home”.

43. It is not in dispute that one of the Defendant’s wives lives on the suit property with her children and therefore it constitutes matrimonial property. Section 93 of the [Land Registration Act](#) No. 3 of 2012 provides that where property is obtained during the subsistence of a marriage, it should be dealt with under the provisions of the [Matrimonial Property Act](#) No. 49 of 2013. The said Act protects matrimonial property. In particular section 12 of the Act provides as follows:

“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.

- (2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man’s wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.
- (3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.
- (4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except—
 - (a) on the sale of any estate or interest in the matrimonial home in execution of a decree;
 - (b) by a trustee in bankruptcy; or
 - (c) by a mortgagee or charge in exercise of a power of sale or other remedy given under any law.
- (5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.



44. Counsel for the Defendant submitted that since the plaintiff is a polygamous man with two wives he had to seek consent from both wives. On his part, Counsel for the Plaintiff contended that the Plaintiff's wife was positively identified by Mr. Choge, Advocate as the same person who visited his office to participate in the land transactions and that he had attached a certificate to the agreement to verify that that she had given her consent to the disposal of the suit land.
45. The issue of spousal consent within a polygamous marriage was discussed in the case of *EKN v AS & 2 Others* (2019) eKLR where the court was of the view that even though section 12 specifically applied to monogamous unions where consent from both spouses is required, then by analogy in a polygamous union, consent would be required from all the spouses, unless there is clear demonstration that the property does not constitute matrimonial property, or that through custom or other legal provision, the other spouses does have any recognizable interest in such property and consent is thus not necessary.
46. In the instant case, it is clear that Ellen Chepchumba (PW2) who is the Plaintiff's first wife participated in the sale. She signified her consent by affixing her thumb print to the sale agreements dated 20th April, 2012 and 4th April, 2012 as one of the witnesses in the presence of Mr. Choge. She was therefore not being truthful when she denied having gone to the advocate's office. The only challenge that arises is that her co-wife did not consent to the sale nor was it demonstrated that her consent was not necessary. The absence of spousal consent therefore renders the said agreement void.
47. Be that as it may, even if the court was to assume that there was spousal consent, there is the issue of consent of the Land Control Board which I will proceed to deal with.

Whether the Defendant obtained the consent of the Land Control Board

48. It is common ground that the suit property herein is agricultural land to which the provisions of Section 6 of the *Land Control Act* applies. The said section provides as follows:

6. Transactions affecting agricultural land;

- (1) Each of the following transactions that is to say—(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
- (b) ...is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.
49. Under section 7 of the *Land Control Act*, consideration paid for a transaction which becomes void is recoverable as a debt subject to section 22 of the Act. An application for consent is made under section 8 (1), which requires that the application for consent should be made in the prescribed form within six months of the making of the agreement.
50. In Nakuru Civil Appeal No. 84 of 2004 *Fred C. Fedha & Another v Edwin E. Asava Majani*, the Court of Appeal held that:

“In this case it is incontestable and we find that in the absence of the consent of the Board to transfer the suit land, the agreement of sale dated 1st July 1989 being a controlled tenancy was void for all purposes and equity would not compel specific performance of a contract which was illegal.



The court further observed that :

“ The order of specific performance by its character was incapable of execution and the Court erred in making an order in vain”.

51. In the present case, the Defendant testified that he applied for the consent of the Land Control Board but he was served with a letter by the Plaintiff's advocates indicating that the Plaintiff's wife and children were opposed to the sale of the suit property. It was his further testimony that when he attended the meeting of the Land Control Board he found hostile family members of the Plaintiff who told him that they were not ready to part with their land.

52. Counsel for the Defendant relied on the case of *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR where the Court of Appeal held that in the absence of Land Control Board consent, a constructive trust is established. The Court observed as follows:

“ the learned Judge made the findings of fact in terms of paragraph 3 above and also made a finding of law that the appellant created a constructive trust in favour of the respondent. It was not in dispute that the appellant sold a 2 acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on 4th December, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case.

As we have held in essence that, the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit.”

53. However, this case is distinguishable from the case of *Willy Kimutai Kitilit* (supra) as the Defendant has failed to prove that he paid the full purchase price. The Defendant was also not put in possession by the Plaintiff as he only entered the suit property pursuant to an order of the court. The absence of the consent of the Land Control Board therefore renders the sale agreement null and void.

54. Another fatal blow to the Defendant's case is that he purported to buy land that was encumbered before the title was discharged and therefore no title could be transferred to him. In the case of *Botwa Farm Company Ltd v Settlement Fund Trustee & another* (2019) eKLR the court relied on the case of *John Kamunya & Another v John Nginyi & 3 Others* (2015) eKLR where the court held that no contractual relationship with regard to the suit land could be legally created as between the purchaser and the seller before the seller had discharged his indebtedness to the Settlement Fund Trustees and the title to the suit land transferred into his name as an owner.

55. Flowing from the above analysis, the Plaintiff has proved his case on a balance of probabilities and he is therefore entitled to the reliefs sought. Accordingly, I enter judgment for the Plaintiff and make the following final orders:



- a. A declaration is hereby issued that the sale agreement dated 4th April 2012 in and any other agreement in respect of Land Reference Number MOGOBICH BLOCK 2/70 is null and void for lack of consent of the Land Control Board and for having been frustrated.
- b. A declaration is hereby issued that the defendant and his agents are trespassers on Land Reference Number MOGOBICH BLOCK 2/70.
- c. A permanent injunction is hereby issued restraining the Defendant and his agents from entering, re-entering and/or trespassing, occupying or continued occupation of Land Reference Number MOGOBICH BLOCK 2/70 and doing anything whatsoever thereon that will interfere and/or violate the plaintiff's proprietary rights over the said parcel of land.
- d. The Defendant is hereby ordered to vacate Land Reference Number MOGOBICH BLOCK 2/70 within 60 days and remove his structures therefrom failing which an eviction order shall issue.
- e. The Defendant shall bear the costs of this suit.

DATED SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF NOVEMBER 2024.

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J.M ONYANGO

JUDGE

In the presence of;

Mr. R.M Wafula for the Plaintiff

Mr. Bitok for the Defendant

Court Assistant: Kuto

