



**Vincent v Kotiani & another (Environment and Land Appeal
E026 of 2023) [2024] KEELC 7544 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7544 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E026 OF 2023
EC CHERONO, J
NOVEMBER 14, 2024**

BETWEEN

JULIANA NASAMBU VINCENT APPELLANT

AND

VINCENT SIRENGO KOTIANI 1ST RESPONDENT

AGGREY MAKARI NALIANYA 2ND RESPONDENT

*(Being an appeal from the judgment by HON. C.A.S MUTAI, SPM in
BUNGOMA CM-ELC No. 142 of 2020 delivered on 03rd day of February, 2023)*

JUDGMENT

Background

1. The Appellant, Juliana Nasambu Vincent filed a suit against the Respondents in the Chief Magistrate's court at Bungoma being Cm-elic No 142 of 2020 (herein referred to as 'the former suit') seeking orders for inter-alia a permanent injunction, a declaration that the 1st defendant/respondent is holding the title to the suit land parcel No E.Bukusu/N.Kanduyi/395 in trust for her and her children and a declaration that any purported sell of a portion of the suit land measuring 3.0 HA in the absence of the plaintiff's consent is a nullity.
2. The defendants/Respondents filed a joint statement of defence through the Firm of Makokha Wattanga & Luyali denying the claim. After the case was heard, the trial Magistrate rendered himself by dismissing the plaintiff/Appellant's claim/suit on 3rd February, 2023.
3. Aggrieved by the trial court's decision, the plaintiff/Appellant preferred the present appeal vide a Memorandum of appeal dated 13th February, 2023 raising the following grounds of appeal;



1. That the learned Magistrate erred in holding and relying on the fact that that Fredrick a child to the 1st Respondent did sale and receive money from his share of the suit land at a consideration on 1,200,000/= when the said Fredrick Mukhebi failed to attend court and did not give any evidence.
 2. That the learned Magistrate erred in disregarding spousal consent as a requirement of the law.
 3. That the learned Magistrate erred in holding that the 1st Respondent held absolute and indivisible ownership of the suit land upon registration in total exclusion of his family members and spouse.
 4. That the learned Magistrate erred in holding that the 1st Respondent had subdivided the suit amongst all his children.
 5. That the learned Magistrate erred in making finding against the evidence on record.
4. When this appeal came for directions on 13/05/2024, the parties agreed to have it canvassed by written submissions.

Appellants' Submissions

5. The Appellant through the Firm of Ombito & Company Advocates referred to page 2 paragraph 2 of the trial magistrate's judgment delivered 3rd February, 2023 where the court stated as follows;

“one of his children Fredrick Mukhebi approached the 1st Defendant with a buyer that he wanted to sale his share so that he could buy land elsewhere because he was the registered owner, he signed the agreement and the son was given the money.”
6. The learned counsel submitted that by the above statement, the trial magistrate was carried away into assuming there was consent from the family members in particular his son Fredrick Mukhebi on whose account the portion was sold to the 2nd Respondent, money given to the said Fredrick Mukhebi which he used to buy land elsewhere. This assumption is misleading and occasion a severe miscarriage of justice as follows;
 - i. Neither did Fredrick Mukhebi's signature appear on the original sale agreement between the 1st and the 2nd Respondent. The only signatures which appear on the agreement dated 5th June, 2020 are those of the 1st and 2nd Respondents.
 - ii. The said Fredrick Mukhebi was not called as a witness to confirm the alleged consent. His failure to come to testify in court despite having been indicated that he would testify is fatal to the Respondents case and inconsistent with consent implying that the 1st Respondent took the actions complained of at his own volition.
 - iii. On the issue of lack of spousal consent, the learned counsel submitted that at page 3 of the impugned judgment made reference to section 3 of the *Land Registration Act* which provides for spousal consent where a spouse obtains interest in the land during the subsistence of a marriage. However, the learned Magistrate failed to consider whether the said property was obtained in the course of marriage the same becoming matrimonial property or not. It was submitted that the title deed for the suit property shows the same was obtained on 6/8/1987 and in fact the same had been cautioned on 8/3/2004 yet the marriage between the Appellant and the 1st Respondent has been subsisting since 1960. He further submitted that the learned Magistrate rubbished the effect of section 93 of the *Land Registration Act* making it totally



in operational and almost declaring it inconsistent with Section 24 and 25 of same Act. He submitted that this position occasioned a miscarriage of justice as the trial court has no powers to declare a section of an Act of parliament to be in operational or unconstitutional. He stated that the court ought to have given meaning to the existing Act as indicated or appropriately referred the issue to the High court which has all authority.

- iv. It was also submitted that all evidence brought before the court indicate the Appellant to be a formal spouse to the 1st Respondent and that the effect of spousal consent of the Appellant was neither sought and neither was it obtained for use in this transaction and the same omission occasioned a miscarriage of justice. It was further submitted that the learned Magistrate absolutely ignored Appellants directions on this issue as pertains to Article 45(iii) of *the constitution* and section 10 sub-section 5 of the *Land Registration Act* and that these omissions are fatal to the ends of justice.

They submitted that the learned trial Magistrate erred in holding that the 1st Respondent as registered proprietor of the suit land is absolute to the exclusion of all his family members and spouse and was contradictory in reaching the finding that the 1st Respondent “had subdivided “ all his land to all his children yet he proceeded to sell a portion of the land of “one of the children without the child’s express consent”.

7. In conclusion, the Appellant posed a question whether the court would have looked aside if the 1st Respondent were to sell the entire remaining portion without consent or authority and without providing for the family members? She urged the court to allow this appeal and set aside the judgment of the court. No authority was cited.

Respondents Submissions

8. The Respondents did not file any submissions.
9. From the extract of the appeal, the hearing before the trial court commenced on 19/08/2021 where the plaintiff/appellant called two witnesses. The defence called one witness.

Plaintiff’s Case

10. The plaintiff testified before the trial court as PW1. She and was referred her witness statement dated 29th June, 2020 which she adopted as her testimony-in-chief. In her evidence, the plaintiff stated that the 1st defendant/Respondent is her husband having lived as husband and wife since 1961 while the 2nd defendant is her closest neighbour. She stated that their matrimonial home has been and is situate in land parcel No E.Bukusu/N.Kanduyi/395 since they got married with the 1st Respondent to date.
11. The Applicant stated that their marriage with the 1st defendant was blessed with 10 children, six girls and 4 boys. She stated that during their marriage which is still subsisting, they managed to purchase another piece of land measuring approximately 8 acres which they agreed that the 1st Respondent would settle his second wife and would thereafter belong to her and all her children to be born thereafter. The Appellant further testified that the 1st defendant’s second wife is in possession and occupation of the said land to date and that the suit land parcel No E.Bukusu/N.Kanduyi/395 should belong to her and her children as she has been living on the land all alone with her children since 1961.
12. She stated that she agreed with the 1st Respondent to show their sons a place to construct temporal houses awaiting permanent distribution where her husband and her were to allocate all their children including the six girls. She stated that in her absence and without her knowledge, the 1st defendant purported to distribute the whole land using the clan leaving her with nothing which action she



protested. She further stated that on 18/06/2020 while she was in her compound, she saw the 2nd Respondent busy with workers fencing part of her land within her compound and when she confronted him, he alleged that he had bought the same from the 1st Respondent. She stated that despite her protest, the 2nd Defendant/Respondent proceeded with the fencing, forcing her to make a complaint with the area chief who after summoning him, issued him a letter barring him from interfering with her land.

13. The Plaintiff/Appellant stated that being her closest neighbour, the 2nd Defendant/Respondent was aware that the suit land belongs to her and her children. She stated that the actions of the defendants purporting to transact in the sale and purchase of a matrimonial land without her consent was fraudulent and deceitful aimed at disinherit her of her interest in the suit land
14. On cross-examination, the plaintiff/Appellant confirmed that the suit land is ancestral land and that her husband comes from musambi clan where land is usually passed on to male dependants while daughters who are unmarried get a share of land at home. She stated that there was no distribution of the suit land in the year 2003 and that she was not consulted over any intended sell by Fred or any of her sons. She confirmed that the suit property was registered in her husband's name.
15. PW2 was Chrisantus Wanyonyi Kotiano who also referred to his witness statement dated 15th November, 2021 and stated that neither him nor his other siblings were consulted when their father sold a portion of the suit land to the 2nd Respondent. He stated that they have grown up with his siblings in the suit land and that the 1st defendant who is their biological father purported to sale a portion of the suit land on behalf of their younger brother yet in real sense, it was him who was selling for his own selfish interest as no consultation was made.

Defence Case

16. DW1 was Vincent Kotiano Sirengo who gave sworn testimony and referred to his witness testimony dated 3rd July, 2020. The defendant testified that the plaintiff is his wife and the suit land Parcel No E.Bukusu/N.Kanduyi/395 measuring approximately 7.5 is registered in his name. He stated that he consulted his family before he sold off the disputed portion of land. He further stated that the clan subdivided the suit land to be shared amongst his children including the girls and that he was left with some land after subdivision. He said that he allowed one of his sons namely Fredrick Mukhebi to dispose of his portion to Agrey Makali Nalianya, the 2nd defendant/Respondent herein and buy another land elsewhere. He stated that when he was selling the portion of the suit land to the 2nd defendant/Respondent, there was no inhibition but a caution was lodged by his eldest son thereafter.

Legal Analysis And Decision

17. I have considered the extract of the appeal, the testimony of the parties and their witnesses, the evidence adduced, their submissions and the applicable law. As the first appeal court, it is my duty and responsibility to re-evaluate, re-consider and re-analyse the evidence adduced and the judgment by the trial court and thereafter make my own conclusion, bearing in mind that I did not see nor hear the witnesses. The Appellant preferred this appeal on the following five grounds which can be merged/consolidated into three grounds as follows
 1. That the learned Magistrate erred in disregarding spousal consent as a requirement of the law.
 2. That the learned Magistrate erred in making findings against the weight of the evidence on record.



3. That the learned Magistrate erred in holding that the 1st Respondent had subdivided the suit land amongst all his children.
18. On the first issue, the trial Magistrate had also identified spousal consent as one of the issues for determination in his judgment delivered on 3rd February, 2023. In order to put everything into context, it is not in contention that the Appellant is married to the 1st Respondent as his first wife. Evidence has it that the two got married in 1961 or thereabouts and that the two cohabited on the suit property as husband and wife and were blessed with ten issues, 4 boys and 6 girls.
19. It is also not in dispute that the suit property land parcel No E.Bukusu/N.Kanduyi/395 is registered in the name of the 1st Respondent. It is not in contestation that the suit property is an ancestral land. It is not also in dispute that the Respondent subsequently married a second wife namely Agness Nakhumicha whom the two agreed would be settled with her children in another land which they bought jointly measuring approximately 8 acres which they also agreed was to belong to her and all her children that will be born thereafter. It is not in contention that the Appellant and her children are occupying the suit land parcel No E.Bukusu/N.Kanduyi/395 while the 2nd wife and her children occupy the land bought subsequently.
20. The *Matrimonial Property Act*, defines what a “Matrimonial home” is and 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 as their family home, and includes any other attached property;
21. Whereas “Matrimonial property” is defined in Section 6 of the Act as follows;
Meaning of matrimonial property;
 1. For the purpose of this Act, matrimonial property means-
 - a. The matrimonial home or homes;
 - b. Household goods and effects in the matrimonial home or homes; or
 - c. Any other immovable and moveable property jointly owned and acquired during the subsistence of the marriage
 2. Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
 3. Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
 4. A party to an agreement made under subsection (3) may apply to the court to set aside the agreement and the court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.
22. From the facts adduced in this case, it is apparent to me that the property in issue is an ancestral property which was given to the 1st Respondent to hold in trust for himself and his family and future generations to come. Since it is not in contention that the plaintiff and her children have lived on the suit land from 1961 to date, the suit property can therefore be defined as a matrimonial home, though not a matrimonial property.



23. Section 12(5) of the *Matrimonial Property Act* provides as follows;
- “The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.”
24. Having found that the suit property is an ancestral land held by the 1st Respondent on his behalf and that of this family and future generations, he had no power or authority to dispose of the same or at all. I also find that the suit property is a matrimonial home of the Appellant and the 1st Respondent therefore had no power or authority to sale, lease or mortgage the same without the informed consent of the Appellant.
25. Having found and held that the 1st Respondent holds the suit land parcel No E.Bukusu/N.Kanduyi/395 in trust and that consent of the Appellant was not sought and obtained (see Section 93(4) of the *Land Registration Act*, 2012), the purported sale and transfer of the suit property to the 2nd Respondent which is also a matrimonial home is rendered null and void and therefore liable to be cancelled.
26. Before the *Matrimonial Property Act* and the *Land Registration Act* were enacted, It has been held by our courts that a spouse has both beneficial and equitable interest in landed property, including an ancestral land. In the case of; *Mugo Muiru Investment Limited v EWB & 2 others* (2017) eKLR, the court held thus;
- “--Elizabeth’s interest in the matrimonial home was an overriding, equitable and unregistered interest. Such interest entitled her to remain in the property. It was an interest in the property. It follows that a purchaser of the matrimonial property even without notice that Elizabeth was in possession would take the property subject to Elizabeth’s interest. The evidence in this appeal shows that the Appellant either did not do due diligence, or was unconcerned with the occupation of the property by Elizabeth and her interest in it. The Appellant took the property subject to Elizabeth’s overriding interest in it and Elizabeth being a part owner could not be removed from the property. Even before the *Land Registration Act* came into force on 2nd May 2012, the equitable beneficial interest of spouse in matrimonial home occupied by spouse was an overriding interest and therefore transfer of the title to the matrimonial home was subject to such 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. In this appeal, the Appellant acquired the title registered in the name of S.B subject to the interest of Elizabeth. In effect, the Appellant neither obtained legal title of the property as notionally it was overridden by Elizabeth’s overriding interest nor was the Appellant entitled to possession. The transfer to the Appellant was subject to Elizabeth’s unregistered overriding encumbrance.”
27. I agree with the principles espoused in that decision which I apply to this case mutatis mutandis.
28. The second issue is whether the learned Magistrate erred in making findings against the weight of the evidence on record. From the evidence on record and the submissions, it is clear that the plaintiff/Appellant contested the purported sale and transfer of the suit land by the 1st Defendant/Respondent to the 2nd defendant/Respondent for want of spousal consent which the trial Magistrate also framed as one of the issues for determination. However, the trial magistrate did not make any determination on the issue but only looked at the provisions of Section 93 of the *Land Registration Act*, 2012 and not the *Matrimonial Property Act* and precedents by superior courts on the issue and the evidence



by the plaintiff and the submissions on record. Even literal interpretation of Section 93(1)(a) of the [Land Registration Act](#) clearly stipulates that if a spouse obtains land for co-ownership and use of both spouses, it is presumed that the spouses shall hold the land as joint tenants. I find that the trial Magistrate erred by holding that the registration of a person as proprietor of land shall vest in that person the absolute ownership of land while ignoring the express provisions of the law which states that where a spouse obtains land in his/her name for co-ownership and use of both spouses is deemed to hold such property as joint tenants.

29. The upshot of my finding is that this Appeal is merited and the same is hereby allowed in the following terms;
1. The Judgment of the trial court delivered on 3rd day of February, 2022 be and is hereby set aside.
 2. In the alternative, the plaintiff/Appellant's suit contained in the plaint dated 29th June, 2020 is hereby allowed as prayed.
 3. The costs of this appeal and the lower court case shall be borne by the Respondents jointly and severally.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 14TH DAY OF NOVEMBER, 2024.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Wanjala for the Respondent.

Appellant/Advocate-absent

Bett C/A.

