



**JMN & another v CNM (Environment and Land Appeal 10 of 2023)
[2024] KEELC 7355 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7355 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 10 OF 2023**

JM MUTUNGI, J

NOVEMBER 7, 2024

BETWEEN

JMN 1ST APPELLANT

MN 2ND APPELLANT

AND

CNM RESPONDENT

(Being an appeal from the Judgement of the Chief Magistrate Wang’uru Hon. A. Lorot H.R delivered on 28th April 2023 in Wang’uru E.L.C Case No. E002 of 2021)

JUDGMENT

1. The present appeal is against the Judgment of Hon. A. Lorot H. R. (C.M) delivered on 28th April 2023 in Wang’uru ELC Case No. E002 of 2021. By the Judgment, the Learned Trial Magistrate upheld the Respondent’s (Plaintiff before the subordinate Court) claim that land parcel Number Mutithi/ Strip/853 was matrimonial property and declared the sale of the same by her husband the 1st Appellant herein, and who was the 1st Defendant in the Lower Court to the 2nd Appellant (2nd Defendant in the Lower Court) to have been fraudulent and null and void. The Learned Trial Magistrate further ordered the title over the suit property issued to the 2nd Respondent to be cancelled and the land to be reverted to the status before the caution registered by the Respondent was removed. The Appellants were condemned to pay the Respondent’s costs in the Lower Court.
2. The Appellants were dissatisfied and aggrieved by the Judgment and have appealed to this Court and by their Memorandum of Appeal dated 10th May 2023 have set out grounds of Appeal as hereunder:-
 1. The Learned Magistrate erred in fact and in law in failing to appreciate that inherited land/ proceeds of inherited land of one spouse does not form part of Matrimonial property.



2. The Learned Magistrate erred in fact and in law in holding that land parcel No. Mutithi/Strip/854 and Mutithi/Strip/853 are matrimonial properties against the weight of evidence.
 3. The Learned Magistrate erred in fact and in law in failing to appreciate that the 1st Defendant's ancestral land which existed even before the parties married against the weight of evidence.
 4. The Learned Magistrate erred in fact and in law in failing to uphold that during the pendency of the marriage the parties each inherited ancestral land yet the Respondents sold her portion without requirement of consent of the Appellant and there was double standards.
 5. The Learned Magistrate erred in fact and in law in failing to appreciate the land Parcel No. Kiine/Kibingoti/Nguguine/xxxx was transferred to the 1st Appellant by his brother NN who held the land in trust for him and he sold the same and bought the land parcel No. Mutithi/Strip/xxx and Mutithi/Strip/xxx when the fact was no disputed.
 6. The Learned Magistrate erred in fact and in law in failing to hold that the 2nd Appellant herein was an innocent purchaser for value and in cancelling his title deed when there was no evidence of fraud and wrong doing on his part.
 7. The Learned Magistrate erred in fact and in law in failing to look into surrounding circumstances and failed to hold that if spousal consent can be dispensed because it is being unreasonably withheld.
 8. The Learned Magistrate erred in fact and in law in failing shifting the burden of proof from the Plaintiff to the 2nd Defendant who was not able to prove any fraud committed by the 2nd Defendant or that he participated in any fraud.
 9. The Learned Magistrate erred in fact and in law in failing to appreciate that the 2nd Appellant bought land that was vacant and paid for the land and the land was free from any encumbrances and followed due process and did due diligence and the Court wrongly cancelled his title deed.
 10. The Learned Magistrate erred in fact and in law in dismissing the Defendants Counterclaims and allowing the Plaintiffs case against the weight of evidence.
 11. The Learned Magistrate erred in fact and in law in holding that there is Law requiring spousal consent of the 1st wife where the seller of land is polygamous.
 12. The Learned Magistrate erred in fact and in law in holding that the 2 cases between the 1st Appellant and the Respondent herein were withdrawn because consent of the Respondent was mandatory yet there was no evidence to that effect and the cases did not deal with land Parcel No. Mutithi/Strip/xxx.
 13. The Learned Magistrate erred in fact and in law in ordering the Defendants to pay costs of the suit and the Counterclaim.
3. The Appellants thus prayed that the appeal be allowed and the decision of the Chief Magistrate Wang'uru Hon. A. Lorot H. R delivered on 28th April 2023 in Wang'uru ELC Case No. E002 of 2021 be set aside and substituted with an order allowing the Defendants Counterclaim and dismissing the Plaintiff's suit with costs.
 4. The brief facts and background in this matter is that the Respondent filed the suit in the Lower Court vide a Plaint dated 15th January 2021 seeking the following orders;
 - a. A declaration be issued that the land L.R Mutithi/Strip/xxx is a matrimonial property.



- b. That the sale of the land to the 2nd Defendant and/or any other 3rd parties is fraudulent, null and void.
 - c. That an order be issued reverting the land in the names of the 1st Defendant or in the alternative;
 - d. That the land Mutithi/Strip/xxx be registered in the joint names of the Plaintiff and the 1st Defendant.
 - e. Costs of the suit.
5. The Respondent in the Plaint pleaded that she and the 1st Appellant were married in a Christian Ceremony on 18th April 1984 and that around 2003, they jointly acquired Land Parcel Mutithi/Strip/xxx and xxx, where they established a matrimonial home and engaged in farming and other activities. The Respondent averred that in 2019, the 1st Appellant fraudulently sold Land Parcel Mutithi/Strip/xxx to the 2nd Appellant without consulting her and/or obtaining her approval or consent.
 6. On 11th March 2021, the 1st Appellant filed a Statement of Defense and a counterclaim, asserting that the suit land was acquired using proceeds from the sale of his ancestral property and was, therefore, not matrimonial property. He contended that at the time of the sale of the land he and the Respondent had separated and that the Respondent did not contribute towards the purchase and/or development of the suit land and the Respondent was therefore not entitled to a share of the suit land. The 1st Appellant averred that he sold the suit land with the consent of his wife, RM who he took on after he separated with the Respondent.
 7. The 1st Appellant further pleaded a counterclaim and sought the following orders in his Counterclaim;
 - a. The Plaintiff, her family, agents, servants and anyone claiming under her be evicted from the suit land Mutithi/Strip/xxx.
 - b. A permanent injunction do issue restraining the Plaintiff, her family, agents, servants and anyone claiming under her from interfering with the suit land.
 - c. This Court to lift the caution registered over land parcel No. Mutithi/Strip/xxx.
 - d. That the Plaintiff's suit be dismissed with costs.
 8. The 2nd Appellant filled a Statement of Defence on 11th March 2021, where he asserted he was an innocent purchaser of Land Parcel Mutithi/Strip/xxx. He stated he carried out due diligence before purchasing the land and it had no encumbrances and he denied the allegations of fraud in the Plaint against him. He asserted all due process was adhered to in acquiring the land from the 1st Appellant.
 9. The 2nd Appellant also pleaded a counterclaim where he averred that he had been unable to take possession of the suit land during to the Respondent's interference and activities on the land with her children. He prayed for reliefs similar to those sought by the 1st Appellant.
 10. The suit was heard before the Subordinate Court where the Respondent (Plaintiff) testified and called one witness JWG (PW2) in support of her case. The Respondent's evidence basically was that she and the 1st Appellant married in 1969 under the customary Law and in 1984 they solemnized their marriage in Church as attested by the Marriage Certificate produced as an exhibit. The Respondent stated she and her husband (1st Appellant) purchased land parcels Mutithi/Strip/853 and 854 about the year 2000 though the titles were processed in 2003. The Respondent testified she contributed to the purchase of the land. For land parcel Mutithi/Strip/xxx, she stated she paid Kshs 180,000/- while she paid Kshs 50,000/- for land parcel Mutithi/Strip/854. It was the Respondent evidence that she was



carrying on business of supplying rice to various establishments and that the money she contributed was from that business.

11. The Respondent further testified that they constructed their matrimonial home in land parcel No. Mutithi/Strip/854 and were carrying out farming activities in land parcel Mutithi/Strip/853 with the children. The Respondent explained she and the 1st Appellant had nine children but only four (4) were alive. She stated that she and the 1st Appellant separated in 2006 and the 1st Appellant went to live with another woman, RM with whom the 1st Appellant colluded to sell off land parcel Mutithi/Strip/853 to the 2nd Appellant without the Respondent's knowledge and/or consent. The Respondent stated her problems with her husband started in 2005 when they built the house. She stated when she learnt her husband had another woman and he wanted to sell the land she and her children placed a restriction on the land. She stated the 2nd Appellant had never been to the land and only came to the land after the land was sold to him. The Respondent insisted that the sale of the land to the 2nd Appellant was fraudulent as she ought to have been involved in the transaction as the 1st Appellant's wife and as one who had an interest in the property.
12. PW2JWG testified she knew the Respondent and the 1st Appellant as husband and wife. She stated the Respondent was her neighbor and that the Respondent was carrying on business of buying and selling rice in 2003. She affirmed that she was present when the Respondent purchased the land in dispute from one CG. In Cross-examination the witness stated the 1st Appellant abandoned the Respondent and her children and went to live with another woman in Wamumu.
13. The 1st Appellant testified as DWI before the Subordinate Court and admitted he married the Respondent in 1969 and solemnized their wedding in 1984 under the African Christian Marriage and Divorce Act, Cap 151 Laws of Kenya. He denied the land parcels Mutithi/Strip/853 and 854 were matrimonial property. He stated he purchased the properties after he sold land parcel Kiine/Kibingoti/Nguguine/xxxx which he had been given by the Clan. He stated he paid Kshs 300,000/- for the plots and denied that the Respondent made any contribution towards the purchase. He stated that the Respondent was doing her own business and had moved to Nairobi leaving him with the children. He stated he decided to move out of their matrimonial home at Ciagiine in 2006 and that was when he met RM with whom they started living together.
14. The 1st Appellant stated he wanted to get a share of land parcel No. Mutithi/Strip/xxx and he and the Respondent went before the Chief over the issue but the Respondent refused and was when he decided to sell the land. He stated he attended meeting before the Land Control Board with his wife, R. In Cross examination the 1st Appellant admitted that he was not legally separated and/or divorced from the Respondent. He stated land parcels Nos. Mutithi/Strip/xxx and xxx are not fenced and that the Respondent and her daughters live and work on the land. The Appellant further affirmed he sold the Clan land in Nguguine in 2007 and the same was transferred to PWN on 5th September 2007 as per the abstract of title (green card). The 1st Appellant further confirmed that at the time he sold the land to the 2nd Appellant there was a house on the land and he had not disclosed to the 2nd Appellant that he had a wife and children who were living on the land.
15. The 2nd Appellant (DW2) in his evidence stated he had given the 1st Appellant work on his farm when the 1st Appellant informed him he had land that he wanted to sell. The land was Mutithi/Strip/xxx and he stated he carried out a search and verified the land was in the 1st Appellant's name and it had no encumbrances. He stated they agreed the price and they went to the Land Board with the 1st Appellant and his wife, RM. He stated the Land Board gave consent and he was subsequently issued with a title to the land.



16. The 2nd Appellant stated the 1st Appellant had not informed him he had another wife and that he only discovered that when he had gone to till the land and found the Respondent and her children clearing the land and warned him not to return to the land. He stated he reported the matter to the Police. In Cross-examination the 2nd Appellant stated the 1st Appellant never informed him whether there was anybody occupying or utilizing the land. The 1st Appellant also never disclosed he had another wife other than RM.
17. The appeal was canvassed by way of written submissions. The Appellants filed their submissions on 25th June 2024. On behalf of the 2nd Appellant it was submitted that he was a bonafide purchaser for value and that he was not party to any alleged fraudulent dealings and there was no proof of any fraud as against him. As relates to the 1st Appellant it was submitted that land parcel Mutithi/Strip/xxx did not constitute matrimonial property and was the absolute property of the 1st Appellant which he could deal with as the sole registered owner. The Appellants argued the Respondent did not offer any proof of any contribution towards the purchase of the property.
18. The Respondent for her part submitted that the 2nd Appellant was not a bonafide purchaser for value without notice and could not in the circumstances have acquired a good title. The Respondent submitted that the two parcels of land were purchased during the subsistence of the marriage between the 1st Appellant and the Respondent and hence the consent of the Respondent was a pre requisite before any valid sale of the property could be undertaken.
19. In a first appeal such as this, the Court is called upon to subject the whole of the evidence to fresh scrutiny and to make its own conclusions on the facts, bearing in mind that it did not have the benefit of hearing the witnesses firsthand and observing their demeanor.
20. This duty was well articulated in the Case *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 where the Court of Appeal stated thus:-

An appeal to this Court from a Trial by the High Court is by way of retrial 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 if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)."

21. The Learned Trial Magistrate made a finding that the disputed property constituted matrimonial property. Section 6 of the *Matrimonial Property Act* defines 'matrimonial property' as follows:

"6. Meaning of matrimonial property:

1. 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; or (c) any other immovable and movable 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. It was not disputed that the 1st Appellant and the Respondent were married and that the marriage has not been dissolved up to date. It was also not in dispute that the suit parcel was acquired during the subsistence of the marriage between 2001 and 2003. The title of the parcel of land was issued to the 1st Appellant in 2003.
23. The 1st Appellant’s submission was that the suit property was acquired from proceeds of sale of an ancestral land. On the other hand the Respondent submitted that there was no evidence adduced to show how the alleged ancestral land parcel Number Kiine/Kibingoti/Nguguine/xxxx was sold and how the proceeds of sale were applied. The Respondent’s position was that the sale of the clan land had no bearing in the instant matter.
24. The record shows that land parcel Kiine/Kibingoti/Nguguine/xxxx was transferred to PWN in 2007 whereas the suit property herein was purchased in 2003. There was no evidence adduced to show when the alleged ancestral land was sold by the 1st Appellant and for how much. The Respondent asserted that she contributed to the purchase of the suit property. That assertion cannot be discounted considering it is acknowledged the Respondent was doing business of buying and selling rice at the time the purchase transaction occurred. On the evidence it is my finding that the Learned Trial Magistrate was justified in holding that the property qualified to be classified as matrimonial property as it was acquired during the subsistence of the marriage between the Respondent and the 1st Appellant. Indeed the Trial Court was not called upon to make a determination whether or not the spouses contributed to the purchase and development of the property. It was sufficient that the property was acquired during the subsistence of the marriage between the 1st Appellant and the Respondent.
25. Having held the property constituted matrimonial property it follows it was incumbent for the 1st Appellant to obtain the consent of the Respondent for the sale. The 1st Appellant acknowledged spousal consent was necessary as he actually presented before the 2nd Appellant and before the Land Control Board one RM who he introduced as his wife. The 1st Appellant’s legal wife was the Respondent and the property was acquired before he took on the “2nd wife”. It was the Respondent who needed to give her spousal consent.

Whether the 2nd Appellant was a bonafide purchaser for value without notice?

26. Black’s law Dictionary 8th Edition defines “bona fide purchaser” as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities



against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

27. In the Ugandan Case of *Katende v. Haridar & Company Limited* [2008] 2 E.A.173, referred to by the Appellants, the court defined a bona fide purchaser as someone who genuinely intends to buy property offered for sale without any intention of wrongdoing. To successfully invoke the bona fide purchaser doctrine, the purchaser must demonstrate the following:
1. Possession of a Certificate of Title: The purchaser must hold a valid title for the property.
 2. Good Faith Purchase: The purchase must be made in good faith, without any ulterior motive.
 3. Lack of Fraud Knowledge: The purchaser must not be aware of any fraudulent activities related to the transaction.
 4. Valuable Consideration: The property must be acquired in exchange for valuable consideration.
 5. Apparent Valid Title: The vendors must appear to have a valid title to the property.
 6. No Notice of Fraud: The purchaser must not have received notice of any fraud connected to the sale.
 7. No Participation in Fraud: The purchaser must not be complicit in any fraudulent actions.
28. The 2nd Appellant in his evidence admitted that he had no knowledge that the 1st Appellant had any other wife other than RM who the 1st Appellant introduced to him as his wife. The 1st Appellant, the 2nd Appellant and the said RM attended the Land Control Board for purposes of obtaining consent for the transfer of the suit land. Though the 2nd Appellant stated in his evidence that he obtained a certificate of official search that revealed the land was registered in the name of the 1st Appellant, he does not appear to have visited the suit land before it was transferred to him. He never knew it was occupied and under the use of the 1st Appellant's actual wife and children as he stated he only came to learn of the occupancy after the land had been transferred to him when he and his workmen went to prepare the land for cultivation and were confronted by the 1st Appellant's wife and children and 'chased away'.
29. The evidence is clear that the Respondent and her children were living on land parcel Mutithi/Strip/xxx where she and the 1st Appellant had built a matrimonial house and were utilizing land parcel Mutithi/Strip/xxx for cultivation. They had been on the land since 2003. The 2nd Appellant as per the exhibited copy of the title deed purchased the land in 2019. Had the 2nd Appellant carried out proper due diligence he would have discovered the land was in occupation by the 1st Appellant's family and the same having been matrimonial property required spousal consent. The person who purported to be the wife of the 1st Appellant for the purposes of obtaining the Land Control Board consent was not the wife who was married to the 1st Appellant at the time the property was acquired in 2003. Even though the 1st Appellant lacked the capacity to marry another wife during the subsistence of the Monogamous Marriage he contracted in 1984, he admitted he took RM as a wife in 2006. She could not thus be the wife who would have been required to accord consent to the transaction before the Land Control Board.
30. The 2nd Appellant was duped by the 1st Appellant to purchase the suit property when the 1st Appellant knew his wife and children were in occupation of the land and had even refused to give him a share of the land to utilize with his 'new wife'. To the extent that the 1st Appellant did not involve his legal wife and his children in the sale and secretly went to the Land Board with the new wife, the sale was



fraudulent and was intended to defraud the Respondent and her children. The sale was subject to the occupation rights and interests of the Respondent and her children and that the 2nd Appellant never acquired a good title.

31. Upon evaluation and consideration of the evidence adduced before the Lower Court, I find no basis on which I could fault the Learned Trial Magistrate's decision. The appeal is without any merit and is accordingly dismissed. The costs of the appeal are awarded to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 7TH DAY OF NOVEMBER 2024.

J. M. MUTUNGI

ELC - JUDGE

