



Kuchio v Kuchio (Sued as the Legal Representative of the Estate of Dennis Asonga Kuchio - Deceased) & 2 others (Civil Suit 17 of 2019) [2025] KEHC 9518 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9518 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 17 OF 2019
EN MAINA, J
JUNE 26, 2025**

BETWEEN

MARY WANGITHI KUCHIO PLAINTIFF

AND

ARNOLDA AMANYA KUCHIO (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DENNIS ASONGA KUCHIO - DECEASED) .. 1ST DEFENDANT

ROYAL CHRYSTO EVENTS (EA) LIMITED 2ND DEFENDANT

GROFIN SGB KENYA LIMITED 3RD DEFENDANT

JUDGMENT

1. By Plaint dated 12.04.2019 the Plaintiff herein seeks the following orders;
 - “a. A declaration that the charge registered over Title number Ngong/ Ngong/44750 is illegal null and void.
 - b. An order directing the 3rd Defendant to discharge the suit property forthwith
 - c. A permanent injunction do issue restraining the Defendants whether by themselves or through their directors, officers, employees, servants, workmen, disclosed and undisclosed agents or any other person from selling, charging, mortgaging , subdividing or dealing in whatsoever manner or interfering with Title number Ngong/ Ngong/44750.
 - d. Costs of this suit.
 - e. Any other relief that the court deems fit.”



2. The Plaintiff's case is that she is the wife to DENNIS ASONGA KUCHIO [Deceased] and they were blessed with three children. After the marriage, they purchased land in Ngong which was subdivided to give rise to title number Ngong/Ngong/44750 which is the matrimonial home and where she lived together with her children and grandchildren. It is here contention that The 1st Defendant as the chargor, and the 2nd Defendant as the Borrower, and the 3rd Defendant as the Chargee on 10th October 2016, secretly and fraudulently entered into a three -party charge for Kshs. 30,000,000/ = against the suit property without her consent and knowledge. That the 2nd Defendant has since defaulted in servicing the loan which led to the 3rd Defendant issuing the 3 months' statutory notice which lapsed on 5th March 2019 and she is at risk of being rendered homeless.
3. In its Statement of Defence dated 4.02.2020, the 3rd Defendant stated that through a facility agreement dated 23.09.2016, the 2nd Defendant obtained a loan facility of Kshs 50,000,000 from it that was to be repaid with interest of 20 % pa calculated daily and charged monthly. Kshs 30,000,000 of the facility was secured by a registered charge dated 7.10.2016 over LR No. 2019/2823, the loan was also secured by a debenture of Kshs 34,465,192 over the assets of the company. It was contended that a spousal consent was signed by Maryleila Kuchio before one S. Henia Ruara, Advocate and Commissioner for oaths on 28.09.2016. Both parties purportedly executed the statutory declaration before the said advocate wherein they declared that they got married in 1985. Further, that they had appointed the firm of Otieno and Amisi advocates to deal with perfection of the security, that is the charge, debenture, affidavits of consent of spouse and statutory declaration of customary marriage executed by both parties.
4. The 1st and 2nd Defendant did not enter appearance nor file a defence despite service of the pleadings through substituted service by way of advertisement in the Daily Nation Newspaper of 4.06.2019.
5. On 1.04.2025, the Plaintiff and the 3rd Defendant called one witness each. PW1, Mary Wangithi Kuchio adopted her statement and produced the bundle of documents both dated 12.04.2019. She testified that she was threatened with eviction as her late husband took out a loan with their home as collateral but she did not give her consent. She wanted the claim declared null and void as she would be rendered homeless if it was allowed. She testified that the property was registered in Dennis Kuchio's name, that she participated in purchase of the property by selling the property in Busia which she bought to acquire the suit property. She could not confirm that her husband received the money but that the property was charged. She denied being aware of her husband's dealings and averred that she only became aware of the same when the land was about to be auctioned.
6. DW1, Martha ESROMO, the credit administration manager for the 3rd Defendant testified that the signature on the charged document belongs to Dennis Asonga Kuchio, that the consent on page 90 was presented to the bank and was executed at the chambers of the appointed advocate on who the bank relied for veracity of the document. She contended that the signature on the consent was not that of the spouse of Dennis Kuchio. She was aware that Dennis Kuchio was charged in regard to the transaction. Lastly, she stated that it appears that the agreement was premised on falsified documents. She produced a bundle of documents dated 17.10.2022 which contained a copy of the facility document, charge document, debenture, affidavit of the 1st Defendant, statutory declaration by the 1st Defendant, Plaintiff's affidavit, statutory declaration of marriage and certificate of balance.
7. The Plaintiff filed written submissions dated 11th April, 2025 and submitted that her consent was not obtained prior to charging of the suit property and as per the marriage certificate, she has been married to the 1st Defendant since 30.11.1985. She contended that the charge was obtained fraudulently and was this invalid ad a nullity for failure to comply with the law. To support this point, reliance was placed



on the cases of Mugo Muiru Investments Limited v E W B & 2 Others [2017] KECA 179 [KLR], PA v Stima Sacco Limited & 2 others [2022] KEHS 294 [KLR] and MWK v SKK & 5 Others.

8. The 3rd Defendant relied on submissions dated 28.04.2025 wherein it was submitted that the 3rd Defendant equally made an enquiry on the marital status of the 1st Defendant and even stipulated under the charge documents that a spousal consent was required, that the 1st Defendant in turn made statements under oath declaring who his spouse was and the said spouse making a spousal consent. Further, that the absence of spousal consent is not synonymous to fraudulent spousal consent.
9. The 3rd Defendant contended that the recourse of the Plaintiff lies with her husband. It was alleged that allowing the claim in the imminent fraud would open a Pandora box where even spouses would collude, benefit from the said proceeds of fraud and run to Court for protection in a bid to defeat the very charge they were silently a party to. The court was urged to dismiss the claim with costs. Reliance was placed on the case of Muriungi v Mwebia & 2 others [Civil Appeal E086 of 2024] [2025] KEHC 1642 [KLR].

Analysis And Determination.

10. I have considered the pleadings, the evidence and submissions of the parties and find the following to be the issues for determination;
 - a. Whether the impugned charge was valid.
 - b. Whether the Plaintiff is entitled to the orders sought.
11. By the 3rd Defendant's own admission, it is not in dispute that the Plaintiff was married to one Denis Asonga Kuchio [deceased]. This has also been confirmed by the certified copy of an entry of marriage certificate no 069215 that confirms that the marriage was solemnized on 30.11.1985 at St. Paul's Catholic Chapel. The 3rd Defendant has also confirmed that the Plaintiff was not a party to the agreement between Royal Chrysto Events EA Limited and Grofin SGB Kenya Limited. It is also not disputed that the suit property was charged based on the alleged spousal consent and statutory declaration both dated 28.09.2016. From the evidence before the court, the Plaintiff lives on the suit property and this was not controverted. From the search, the property was registered on 30.09.2009 in the name of Denis Asonga Kuchio.
12. The law on disposition of matrimonial property is now set in several statutes. Section 12 of the [Matrimonial Property Act](#) provide that;

“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.”
13. This is to be read together with Section 2 of the [Land Registration Act](#) which defines a matrimonial property and matrimonial home as follows;

“matrimonial home” means any interest in land that is owned or leased by one or both spouses and occupied by the spouses as their family home;

“matrimonial property” means any interest in land or lease that is acquired by a spouse or spouses during the subsistence of a marriage”



14. Further, Section 79 [3] of the [Land Act](#),2012 provides as follows;

“A charge of a matrimonial home, shall be valid only if any document or form used in, applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.”

15. It is therefore clear that the suit property was matrimonial property as it was purchased during the subsistence of the marriage. Further, the facility agreement is dated 23.09.2016 and the registered charge was made on 7.10.2016 between Denis Asonga Kuchio, between Royal Chrysto Events EA Limited and Grofin SGB Kenya Limited for Kshs 30,000,000. As at the time of making the agreement and registration of the charge, the above named Acts were in force and therefore spousal consent was a key requirement.

16. Section 28 [1] of the [Land Registration Act](#) provides that spousal rights over matrimonial property are overriding interests which subsist without their being noted in the register. The said section states as follows-;

“Unless the contrary is expressed in the register, all registered land shall be subject of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

[a] Spousal rights over matrimonial property,

[b]”

17. In *Kadzo Mkutano v Mukutano Mwamboje Kadosho & 2 others* [2016] eKLR, it was held that;-

“Section 28 of the [Land Registration Act](#) recognizes spousal rights over matrimonial property as an overriding interest. Spousal consent, is therefore required before a spouse can sell matrimonial property. In the absence of such a consent, the sale becomes null and void”.

18. Section 93 of the [Land Registration Act](#) provides as follows;

“Subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or, all the spouses –

[a] There shall be a presumption that the spouses shall hold the land as joint tenants unless –

[i] A provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in his or her own name only, or that the spouses are taking the land as joint tenants, or

[ii] the presumption is rebutted in the manner stated in this subsection, and

[b] The registrar shall register the spouses as joint tenants.

[2] If land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by



virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered.

- [3] Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house-
 - [a] the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge, or
 - [b] The assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.
- [4] If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with section 3[a] or 3[b], the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.” [Emphasis mine].

19. The suit property was registered in the name of the 1st Defendant. However, it was conceded even by the charger to be matrimonial property hence the requirement for spousal consent. In the case of Mugo Muiro Investment Limited Supra that;

“The appellant did not regard the issue of trust imposed on the charger, S.B and its effect on the sale and transfer by HCFK as significant. As stated above, even though the matrimonial property was registered in the name of S.B alone he held the title and legal estate in trust for both himself and Elizabeth jointly. This proposition is buttressed by the decision in *Gissing v Gissing* [1970] 2 All E.R 780. [1971] AC 886. See also *Falconer v Falconer* [1970] 3 All E.R 449 [1970] 1WLR 1333; and *Hazell v Hazel* [1972] 1 All ER 923; 1 WLR 301. Lord Diplock in *Gissing v Gissing* [supra] at Pg 906 in [1971] AC 886 held that-;“In nearly all these cases, the inexorable inference is that the husband is to hold the legal estate in the house in trust for them both, for both to live in for the foreseeable future. The couple does not have in mind a sale, nor division of proceeds of sale, except in the far distance.”

20. In the case of *PA v Stima Sacco Society Limited & 2 Others* [supra] where the court found that the 3rd Defendant did not involve his wife in the loan transaction thus contravening the law with the net effect of making the said charge defective/null and void and therefore incapable of enforcement.

21. I have also considered the case of *Muriungi v Mwebia & 2 others* Supra where the court when dealing with an issue of fraud stated as follows;

“As I stated earlier, it has become common for spouses and alleged spouses to run to court to seek injunctive orders on account of lack of spousal consent. The situation was well expressed by the court in *Eljoy Kageni v Bank of Africa Kenya Ltd* [2018] eKLR where it was stated as follows;

“Without insinuating that this is the case in this matter, I opine that the existence of multiple spouses, real or contrived, is an area that can be misused by unscrupulous people to defraud



financial institutions. This is why it is necessary for courts to obtain prove that multiple spouses are real spouses. It is also necessary for such spouses to prove that there existed a matrimonial house on the suit land.

in the instant case, the 2nd Respondent states that it carried out due diligence by having a valuer visit the suit land and the 3rd Respondent making a statutory declaration that he was not married and so did not require spousal consent.

From the lower court record, it is also clear that the property in question does not hold any development in the form of a home, which would fall under the definition of matrimonial home, under Section 2 of the *Land Act*.” [emphasis added].

22. From the Plaintiffs evidence, her home is on the suit land. The 3rd Defendant submitted that it could not go beyond what it did to reveal that there was another spouse claiming under the 1st Defendant. That explanation is not plausible. Like was stated in the case of *Muriungi v Mwebia & 2 others* [Supra], it would have gone a step further to confirm that indeed Maryleila Kuchio was the spouse of the deceased. There were no identity cards of the said Maryleila Kuchio nor the 1st Defendant and if the 3rd Defendant believed all that the firm of Otieno and Amisi Advocates had undertaken on their behalf was true, then the said firm and one S. Henia Ruara should have been called as witnesses to tell the court the steps they took to verify that this was indeed the spouse. As at 2012, it was a requirement that customary marriages be registered, and if that was the allegation the marriage between the two should have been registered.

23. My so saying finds support in the case of *Daniel Kipruto Metto v Chase Bank [Kenya] Limited* [2018] KEELC 616 [KLR] where the court stated;

“The defendant should have done due diligence and get the history of the land not just from the lands registry but also from the neighbours. The plaintiff and his witnesses indicated that they have mud structures and not permanent structures as was put in the valuation report by Metro Cosmo Valuers. The parties who engaged in this act must have been a cartel that has been fleecing people of their hard earned money or property. The defendant should therefore be held vicariously liable for the wrongful acts of its agents.

With the digital age, where people are developing software day in day out, banks should be ahead in innovative ways to curb any unforeseen and foreseeable compromise to their systems. Banks must be extra diligent when dealing with properties to be charged or mortgaged.”

24. In the *Muriungi v Mwebia* [supra] case that was relied upon by the 3rd Defendant the lender took a step further to visit the home to establish that there was no house or home and that led to the court finding as it did. I acknowledge that the parties were made to depone an affidavit of spousal consent and the Plaintiff's appeared to have done so intentionally in order to defraud the 3rd Defendant as well as the Plaintiff of her proprietary interest. From the certificate of balance of 14.02.2018, the deceased had only paid Kshs 200,000 leaving a balance of Kshs 67,142,228. However, the disposition of the land without a valid consent by the Plaintiff is voidable at her option the balance of the loan notwithstanding.

25. As I pen off, I wish to state that the highest duty of due diligence lay on the 3rd Defendant as a financial institution. It ought to have gone an extra mile to confirm the identity of the said charge and the alleged



spouse in line with the Central Bank Prudential Guidelines which I borrow from with regard to face to face customers clause 5.6.5.1;

“An institution shall take measures to satisfy itself as to the true identity of any applicant seeking to enter into a business relationship with it, or to carry out a transaction or series of transactions with it, by requiring the applicant to produce an official record for the purposes of establishing the true identity of the applicant. At a minimum the mandatory requirements;

- i. In the case of an individual, a birth certificate; or Passport; or National identity card; or Drivers licence.”

26. This read together with the Risk Management guidelines which state that;

“3. 3.5 Institutions use various techniques of mitigating credit risk. The most common are collateral, guarantees and netting off of loans against deposits of the same counter-party. While the use of these techniques will reduce or transfer credit risk, other risks may arise which include legal, operational, liquidity and market risks. Therefore there is a need for a bank to have stringent procedures and processes to control these risks and have them well documented in the policies.”

27. In my considered view, and going by the provisions of law referred to in this judgment, no valid sale and transfer could be done by the deceased without spousal consent. Therefore, I find that the charge was invalid for having been done in contravention of express provisions of the law.

28. In the end, the suit succeeds and judgment is entered for the Plaintiff against the Defendants as follows:

- a. A declaration be and is hereby entered that the charge registered over Title number Ngong/Ngong/44750 is illegal null and void.
- b. An order be and is hereby issued directing the 3rd Defendant to discharge the suit property forthwith.
- c. Costs of the suit are hereby awarded to the Plaintiff.

Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 26TH JUNE 2025.

E. N. MAINA

JUDGE

In The Presence Of:

Mr. Lundi Advocate for the Plaintiff.

Mr. Kofuna Advocate for the 3rd Defendant.

No appearance for the 1st and 2nd Defendants.

Geoffrey Court Assistant.

