



**DAW v EFNA & 2 others (Environment & Land Case 139 of 2014)
[2023] KEELC 16952 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16952 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 139 OF 2014**

**MAO ODENY, J
APRIL 24, 2023**

BETWEEN

DAW PLAINTIFF

AND

EFNA 1ST DEFENDANT

AFROZZE OSMAN ABDULREHMAN ADAM 2ND DEFENDANT

I & M BANK 3RD DEFENDANT

JUDGMENT

1. By a Plaint dated 17th July 2014 the plaintiff herein sued the defendants seeking the following prayers;
 - a. A declaration that the plaintiff is the beneficial owner of the suit property known as Kilifi/Kijipwa/2XX and that the sale by the 1st defendant to the 2nd defendant and subsequent charge/mortgage of the suit property to the 3rd defendant was unlawful, null and void ab initio and a permanent injunction restraining the defendants herein whether by themselves, their employees, servants and/or agents or assignees and/or any other person acting under them from selling, transferring or otherwise alienating or dealing in or disposing in exercising its statutory power of sale in relation to the plaintiff’s title and/or beneficial interest in the property known as Kilifi/Kijipwa/2XX or in any manner whatsoever.
 - b. An order that the registration of the 2nd defendant as the proprietor of the suit property and subsequent charge/mortgage by the 2nd defendant to the 3rd defendant of the suit property be cancelled and the title of the suit property be in the name of the 1st defendant.
2. The plaintiff’s case is that the 1st defendant and himself were husband and wife having lived as such since 1982. That sometime in 2014 she realized that the 1st defendant had sold the suit property to the 2nd defendant and the 2nd defendant charged/mortgaged the suit property to the 3rd defendant for a



sum of Kshs. 25,000,000. Upon carrying out a search, she noted that the 2nd defendant is the registered owner of the suit property and charged it to the 3rd defendant which land is matrimonial property.

3. The plaintiff averred that the transaction between the 1st and 2nd defendants as well as between the 2nd and 3rd defendants were not done pursuant to the mandatory provisions of the land laws thus the transactions are unlawful and void ab initio and that any monies due and payable by the 3rd defendant pursuant to the charge/mortgage be borne by the 2nd defendant.
4. The 1st defendant filed a defence dated 4th September 2014 and stated that she has never been married to the plaintiff at any time in her life. However, she had a sexual relationship with the plaintiff as girlfriend and boyfriend out of which they had an issue and therefore the plaintiff has never had any matrimonial, legal or equitable right of ownership over the suit property as alleged.
5. The 1st defendant averred that she was the legal owner of the suit property having all rights accruing thereto freehold hence she had all the rights and powers to deal in and with the suit property as she wished to wit selling and transferring to the 2nd defendant herein.
6. The 2nd defendant filed a defence dated 4th September 2014 and stated that he is an innocent purchaser for value without notice having purchased the suit property from the 1st defendant herein after appropriate due diligence, compliance with all applicable statutory requirements and payment of all applicable charges.
7. The 3rd defendant filed a defence dated 22nd August 2014 and averred that it only dealt with the 2nd defendant after he had been duly registered as proprietor of the suit property and has never dealt with the 1st defendant.

Plaintiff's Case

8. PW1 DAW adopted his witness statement dated 17th July 2014 and produced a bundle of documents as per the list of documents as exhibits 1 -15 and told the court that he was the one who bought the suit land though the sale agreement was in the name of the 1st Defendant in whose name the title deed for the suit land was issued.
9. It was PW1's evidence that the reason for allowing the 1st Defendant to be registered as the proprietor of the land was that he had another family upcountry and that he did not want the 1st defendant and her children to be dispossessed of the suit land in the event that they survived the Plaintiff.
10. PW1 further stated that the 1st Defendant did not have money to purchase the suit land hence there was no way she could have bought the land as claimed. PW1 testified that he built a matrimonial home and rental houses which are occupied by 5 tenants.
11. It was PW1's evidence that he married the 1st Defendant in 1987 whereby they were blessed with children and only PW3 survived. That the 1st Defendant deserted the matrimonial home situate on the suit plot on 19th August, 2010.
12. PW1 also stated that his son PW3 filed SRMCC NO 252 OF 2011 in Kilifi against the 1st Defendant and obtained orders barring the 1st Defendant from having any dealings with the suit property which order was served upon the 1st Defendant.
13. PW1 further stated that the 1st Defendant filed Mombasa HCCC NO. 54 OF 2012 against the Plaintiff which case PW1 told the court that it is still pending determination.



14. On cross examination, PW1 stated that the 1st defendant is his wife with whom they had 5 children with only one surviving. PW1 stated that he neither paid dowry nor had a church wedding or registration at the Attorney General's office. He also confirmed that the sale agreement dated 25th May 1992 indicates that the 1st defendant is the purchaser which agreement he was not a witness to.
15. PW2 Mweni Muramba also adopted his witness statement and testified that he knew the plaintiff and the 1st defendant who have been a couple for over 10 years PW2 also stated that the plaintiff who is the one in occupation of the suit plot.
16. PW3 AMA adopted his witness statement and told the court that he is the son to the plaintiff and the 1st defendant and that the suit plot is family property where he resides. It was his evidence that he filed a case against the mother to stop the sale of the suit plot and there was an order that stopped the sale.
17. On cross examination, he stated that the 1st defendant is the registered owner of the suit property. PW3 also stated that he was born in 1990 and the sale agreement for the suit plot is for 1992. He stated that it could be possible that the mother 1st defendant bought the plot.

Defendant's Case

18. DW1 EFM adopted her witness statement dated 12th September 2014 and produced a bundle of documents as per the list of documents as exhibits 1 to 3. She told the court that she knew the plaintiff as a friend with whom they have a child together. It was her testimony that she bought the plot in 1992 from Muramba Masha for a consideration of Kshs. 200,000/.
19. DW1 stated that she got a title deed after purchase and sold the suit plot to the 2nd defendant and that there was no encumbrance when she sold the suit plot.
20. On cross examination, she stated that the plaintiff was not part of the agreement when she bought the land, further that the plaintiff and PW3 were not staying on the suit land.
21. DW2 Abdulrahman Adam adopted his witness statement and produced a bundle of documents as per the list of documents as exhibits Dex No. 4 to 7 to 3 and stated that he is an innocent purchaser for value without notice having purchased the suit property from the 1st Defendant after appropriate due diligence, compliance with all applicable statutory requirements and payment of all applicable charges.
22. DW2 also testified that he was not aware of any previous engagements between the 1st Defendant and the Plaintiff and that the purchase and subsequent charging of the suit property was legally valid and cannot be impugned.
23. It was DW2's evidence that he had established prior to the transaction that there were no encumbrances noted in the register of the suit property therefore he entered into a legally binding agreement and paid the purchase price. Thereafter that the seller obtained the necessary consents for the transfer from the local authorities and executed the instrument of transfer and the same was duly registered.
24. On cross examination he stated that he carried out due diligence before purchasing the suit land and there were no people residing on the suit land when he bought it.

Plaintiff's Submissions

25. Counsel reiterated the evidence on record and submitted that the sale of the suit land was done illegally to defeat justice. Counsel further submitted that the plaintiff has proved that he was the husband of the 1st defendant and that the suit land was matrimonial home.



26. Mr. Odhiambo submitted that there was no evidence that the 1st defendant made an application for consent of the Land Control Board. as it was never produced and as such the consent was unprocedurally obtained.
27. It was counsel' submission that since the land was agricultural land the Plaintiff and PW3 should have been involved in the transaction as it was also a matrimonial home.
28. Counsel submitted that the plaintiff had proved his case against the defendants and urged the court to enter judgment as prayed in the plaint with costs.

1ST AND 2ND DEFENDANTS'SUBMISSIONS

29. Counsel for the 1st and 2nd defendants listed the following issues for determination
 - a. Whether the Plaintiff has demonstrated a cause of action against the 1st and 2nd Defendant.
 - b. Whether the Plaintiff has proved his case against the 1st and 2nd Defendants on a balance of probabilities.
 - c. Whether the Plaintiff is entitled to the reliefs sought in the Plaint.
30. On the first issue counsel submitted that the plaintiff has not demonstrated a cause of action against the 1st defendant as the plaintiff and the 1st defendant were never married at any time and if the plaintiff alleges that they were indeed married the burden of proof was on him to demonstrate.
31. Counsel further submitted that the suit plot was not matrimonial property as there was no marriage between the plaintiff and the 1st defendant. Counsel further submitted that it is irrefutable that the suit property was registered in the 1st defendant's name upon purchase and later registered in the 2nd defendant's upon sale.
32. Counsel submitted elaborately on what constitutes marriage and presumption of marriage. Counsel submitted there was no evidence of marriage and that the relationship between the Plaintiff and the 1st Defendant was merely a sexual relationship, a result of which they sired one issue.
33. Ms Gitari relied on the case of K.O & Another -vs- J.O [2018]eKLR, where the court held that:

“Marriage must be distinguished from a sexual relationship which results into siring of Children. Whereas such sexual relationship raises fundamental legal issues, the presumption of Marriage transcends such boundaries”
34. Counsel submitted that spousal consent was not a prerequisite to the disposition of the suit property having established that the same was not matrimonial property and therefore the 2nd defendant is a bonafide purchaser for value without notice.
35. Counsel relied on the case of cases of Katende V Haridar & Company Limited [2008] 2 E.A 173 and Lawrence Mukiri V Attorney General & 4 Others [2013 eKLR.
36. Ms Gitari further submitted that the plaintiff has not proved his case on a balance of probabilities as per the case of Kanyungu Njogu V Daniel Kimani Maingi [2000] eKLR and thus not entitled to the reliefs sought.



Analysis and Determination

37. The issues for determination are who between the 1st defendant purchased the suit land, whether the plaintiff has proved his case against the defendant that the suit land was matrimonial home and whether he is entitled to the reliefs sought.
38. It is incumbent upon the plaintiff who claims that he purchased the suit land to prove the same on a balance probability.
39. Sections 107 and 108 of the *Evidence Act* provide as follows:
- 107 “(1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
40. The Plaintiff’s claim is pegged on the fact that he was married to the 1st defendant in 1987 and had 5 children with only one child surviving. The plaintiff admitted that he neither paid dowry nor had a church wedding or registration of their marriage. I will not go into the details of what constitutes a marriage as we are not dealing with division of matrimonial property of which this court does not have jurisdiction to deal with.
41. However, for purposes of this case the evidence on record does not show that there was a marriage between the plaintiff and the 1st defendant as admitted by the plaintiff that he neither paid dowry nor wedded in church or registered the marriage. The production of a birth certificate for PW3 is not proof of a marriage. If there is no marriage, then the issue of matrimonial home does not arise.
42. I agree with the submissions by counsel for the 1st and 2nd defendant that the relationship of the plaintiff and the 1st defendant was merely a sexual one which resulted in siring of PW3 as was held in the case of K.O & Another -vs- J.O [2018] eKLR, (supra)
43. On the issue of matrimonial home, in the case of Stella Mokeira Matara -v- Thadeus Mose Mangenya & Another [2014] eKLR Okon’go J where the held as follows:
- “The plaintiff placed no evidence before the court to prove that her matrimonial home is situated on the suit property. I do not think that the mere fact that one is married to a registered owner of a property qualifies such property to be a matrimonial home.
- Matrimonial home is defined in the *Land Act*, 2012 as "any property that is owned or leased by one or both spouses and occupied by the spouses as their family home". A reading of section 79 (3) of the *Land Act*, 2012 gives me the impression that a home only qualifies to be termed a matrimonial home if the same is occupied by the spouses as such. The plaintiff had a duty therefore to demonstrate that the plaintiff and the 1st defendant occupied the suit properties as their family home. The plaintiff failed first, to show that there is a home on the suit properties and, secondly, that the plaintiff and the 1st defendant were occupying the alleged home on the suit properties as their family home.”



44. The plaintiff produced photographs to show that there were houses which he claimed to be matrimonial home and rental houses on the suit plot. The photographs were undated, and the court could not tell when they were taken, by who and on which plot.

45. In the case of Daniel Katumo Nyamai v Gilbert Kanungu Mwanganda & 6 others [2014] eKLR the court held as follows in relation to photograph evidence:

“There are other undated photographs which are not of any evidential value because it is unknown as to when they were taken. This court cannot determine whether those photographs were taken before or after the order of 17th October 2013.

It is also not clear to this court the person who took the photographs in question and under what circumstances he took the photographs. The person taking the photographs should have filed an affidavit deponing on what was happening in the captured photos.

In the circumstances, the Plaintiff has not proved to the required standard that the Defendants are in contempt of the order of the court dated 17th October 2013.”

46. The plaintiff further stated that he purchased the suit land in the 1st defendant’s name as he had another family upcountry and did not want the 1st defendant to be dispossessed in case he preceded them. If that was the case which has been denied, then it should be assumed that the plaintiff bought the same for the 1st defendant.

47. The documents relied on by the plaintiff are a sale agreement in the 1st defendant’s name, LCB consent, title deeds in the name of the 1st defendant and the one in the 2nd defendant’s name, All the documents are in support of the fact that the 1st defendant’s case that she was the registered owner of the suit land.

48. There is no evidence that the 1st defendant was to hold the land in trust for the plaintiff and PW3 who is her son or that the plaintiff had a beneficial interest in the land. The plaintiff was also not a witness in any of the transactions from the beginning. Similarly, there was no evidence to show that it is the plaintiff who facilitated the 1st defendant with the purchase price.

49. The plaintiff had an uphill task to explain the above issues which would assist him in discharging the burden of proof. In the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M’warabua [2015] eKLR the court held as follows in respect of burden of proof:

“....As I have already stated, in law, the burden of proving the claim was the appellant’s including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant.....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.”

50. The Plaintiff having failed to prove that he is the one who purchased the suit land for the 1st defendant and that he had a beneficial interest on the suit land, it follows that the provisions of sections 24 25 and 26 of the [Land Registration Act](#) on ownership of land sets in.



51. Section 24(a) of the *Land Registration Act* provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

52. Section 26 (1) of the *Land Registration Act* states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

53. There was no evidence that the title to the suit land was acquired fraudulently or through misrepresentation. It is trite that a Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

54. In the case of *Elijah Makeri Nyangw’ra v Stephen Mungai Njuguna & Another* (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme.

55. PW3 the 1st defendant’s son who is an adult gave evidence that he had sued the mother in respect of the suit land. In the case of *Oganga & another v Orangi & 3 others* (Environment & Land Case 466 of 2015) [2023] KEELC 16348 (KLR) (22 March 2023) (Judgment) the court held that “

“The 2nd and 3rd defendants of course complain that they were not involved in the sale. Was the 1st defendant under any legal obligation to involve them in such a sale? I do not think so, and Mr. Nyamurongi did not refer me to any law or any authority which asserts that a parent must consult and obtain consent of his children before disposing of his/her free land. In fact it is despicable, if not outrageous, for a child to assert that his father or mother, must subdivide his land in a particular way, and proceed to sue his parent because he/she does not wish to deal with the land in the way proposed by the child.”

56. The Judge further went ahead and stated as follows:

“..... It is time that children stopped having a notion, that what belongs to their parents also belongs to them in equal measure, and that their parents must subdivide and distribute land to them in a particular manner”

57. The 1st defendant had capacity to deal with the land as she so wished as she was the absolute proprietor of the suit land. Therefore, she also had a good title to pass to the 2nd defendant. I have considered



the evidence, the documents produced, the submissions by counsel and find that the plaintiff has not proved his case on a balance of probabilities and the same is dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 24TH DAY OF APRIL, 2023.

M.A. ODENY

JUDGE

