



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELCA NO 56 OF 2019

SAMUEL TITI KIMANI.....APPELLANT

VERSUS

MICHAEL NDIRANGU NGUGI.....1ST RESPONDENT

JANE GATHONI NDIRANGU.....2ND RESPONDENT

(Being an appeal from the Judgement of the Hon. L M Wachira in Gatundu CMCC No. 1 of 2018 delivered on the 9/9/2019)

JUDGMENT

1. In the trial Court the Appellant (then Plaintiff) filed his suit against the Respondents/Defendants seeking inter alia the removal of the restriction lodged against the title being Ndarugu/Gakoe/828 (suit land) by the 2nd Respondent and that the 1st Respondent be ordered to give specific performance by way of a transfer of the suit land to his name.
2. While admitting the claim of the Appellant, 1st Respondent stated that he obtained land control board consent with respect to the agreement for sale.
3. Vide an amended defence filed on the 12/2/2019 the 2nd Respondent opposed the Plaintiffs claim and admitted that in resisting the sale of the suit land to the Appellant she lodged the restriction to protect her interest as a spouse of the 1st Respondent. Inter alia, she contended that the land was sold without her consent having been sought and given as a result of which she averred the sale was illegal and irregular and set out the particulars of such irregularities at para 7 of the statement of defence. That despite her lodging an objection against the issuance of the land control board consent, the same was issued illegally thus exposing her legitimate claim in the suit land. It is her case that the purported sale of the suit land to the Appellant was not only illegal but void ab initio.
4. In her counterclaim, she sought orders that the contract of sale dated the 24/9/2017 be declared illegal null and void; an order that the Appellant be evicted from the suit land and costs of the suit.
5. In reply to the 2nd Respondents statement of defence and counterclaim, the Appellant contended that the transaction of sale between him and the 1st Respondent was legal and denied any irregularities and or collusion on his part. Inter alia he argued that it is the 2nd Respondent that withdrew the caution on the suit land paving way for the transaction only to lodge the restriction later. That he is an innocent purchaser for value who enjoys the protection of the law.
6. In his evidence in chief the Appellant testified and informed the Court that he entered into an agreement for sale with the 1st Respondent on the 27/9/2017 for the sum of Kshs 2.9 million and paid the sum of Kshs 1.0 million on execution. Thereafter he paid another Kshs 1 .0 million leaving a balance of Kshs 900,000/-. That upon carrying out a search of the suit land he discovered that there was a caution lodged by the 2nd Respondent on the suit land. That later the caution was removed and he continued with the transaction. However, he could not register the transfer because the 2nd Respondent had placed a restriction on the land on the 30/10/2017
7. In further cross examination the witness informed the Court that he never attended the land control board to seek the land control board consent. That it was obtained by the 1st Respondent who informed him that the 2nd Respondent was present. He admitted knowing the 2nd Respondent as the spouse of the 1st Respondent and further that there was no spousal consent by the 2nd Respondent.
8. The 1st Respondent did not testify in Court having filed a defence admitting the Appellant's case.
9. The 2nd Respondent testified solely and relied entirely on her witness statement on record. She stated that she and the 1st Respondent got married in 1970, got 4 children but separated since 2009. That she lives in Thika while the 1st Respondent lives in Bungoma County. That she

lodged a caution on the land to protect her interest as a spouse when the 1st Respondent expressed interest in disposing the land. That on persuasion by the 1st Respondent she withdrew the caution on his intention to secure a loan with the suit land only to learn that he was in the process of selling the land to the Appellant. That despite her vehement objection to the issuance of the Land Control Board consent, the same was issued and that led to her lodging the restriction on the suit land. That the suit land is her matrimonial property and that her marriage still subsists despite the separation. That the aim of the restriction was to protect her interest in the suit land.

10. Upon hearing the parties, the trial Learned Magistrate delivered her judgement on the 9/9/2019, the subject of this appeal. She held as follows; the suit land is matrimonial property having been acquired during the subsistence of the union between the Respondents; in the absence of a spousal consent from the 2nd Respondent, the sale was illegal, null and void. In the end the prayers in the counterclaim were upheld and the Court ordered the transaction an illegality and the Appellant to vacate the suit land in default eviction to ensue.

11. Those are the orders that provoked the instant appeal premised on the following grounds;

a. The Learned Trial erred in Law by making judgment of dismissal of the Appellant's case on provisions of Law which had been repealed vide Land Law Miscellaneous Amendment Act No. 28 of 2016.

b. The Trial Magistrate erred in Law in entering judgment on the Respondents counterclaim when she had no jurisdiction to entertain a claim under Matrimonial Property Act No. 49 of 2013.

c. The Learned Trial Court erred in Law by upholding findings of precedent authorities of the High Court and Superior Court which had been made prior to amendment of the Land Laws by the Amendment Act No. 28 of 2016 thus rendering the entire judgment per incuriam.

d. The Learned Trial Court erred in Law and in fact for failing to appreciate that there did not exist a decree under Matrimonial Property Act to warrant her to conduct proceedings and even if there were to be a decree then the decree herein would be unexecutable under all circumstances for want of bonafides and speculation.

12. The Appellant prays as follows:-

a) THAT the Judgment of the trial Court be set aside in whole.

b) THAT the reliefs as sought by the Appellant in the suit vide Gatundu CMCC No. 1 of 2018 be allowed in their entirety.

13. When the appeal came up for hearing before the appellate Judge, the parties elected to canvass the appeal by way of written submissions which I have read and considered.

14. As to whether the laws relied on in the judgement have been repealed, the Appellant submitted that when Section 28 of the Land Registration Act (LRA) was repealed and replaced with Section 11 of the amendment Act 2016, spousal rights were no longer categorized as overriding interests but moved to the Matrimonial Property Act (MPA). He faulted the trial Court in relying on the LRA instead of the MPA in arriving at its decision. See **EKN Vs AS & 2 others (2019) EKLR**. Further that the trial Court was bereft of jurisdiction to deal with the matter. That the Respondents are spouses and the matter ought to have been dealt with under the MPA and not the laws repealed vide land laws miscellaneous amendment No 28 of 2016 and authorities made prior to the said amendments.

15. The 2nd Respondent on the other hand submitted that the property being matrimonial property, the sale having been conducted without spousal consent, the same is null and void. Relying on the case of **MWK Vs SKK and 5 Others**, the 2nd Respondent argued that the 2nd Respondent had proven a matrimonial overriding and beneficial interest in the suit land.

16. As to whether the Court lacked jurisdiction to hear the matter, the 2nd Respondent submitted that it is the Appellant who filed the suit in the Magistrates Court seeking removal of restriction. Relying on the case of **Joseph Mbaabu Mugambi Vs Loise Mwari M'Miriti & 5 others 2020 EKLR** the 2nd Respondent submitted that the Court had jurisdiction to hear and determine the matter.

17. This is a first appeal from a decision of the trial Court. This Court is required to re-appraise the evidence and reach its own conclusion bearing in mind that it did not see or hear the witnesses, an advantage that the trial Court had. It was held by this Court in **Peters v Sunday Post [1958] EA 424** of the duty of a first appellate Court:

"It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness."

18. I will proceed to determine the two issues raised by the Appellant as follows;

a. Whether the laws relied upon by the trial Court in the judgement had been repealed?

b. Whether the trial Court had jurisdiction to entertain the claim under the MPA.

19. I will answer the 2nd issue on jurisdiction because jurisdiction is everything. Once a Court of law determines that it has no jurisdiction to entertain a matter, it must down its tools at once. It is trite that a jurisdiction of a Court is the power and or mandate of the Court to hear and determine a dispute. Jurisdiction of a Court or a tribunal flows from the constitution or a legislation or both. It is trite that the issue of

jurisdiction must be raised at the earliest opportunity because without jurisdiction a Court's decision would be a nullity. See the holding of Madan J in **Motor Vehicle Lilian S vs. Caltex Kenya Ltd (1989)KLR**.

20. In this case the issue of jurisdiction was not raised in the trial Court.

21. That said I shall determine the issue. It is not in dispute that the Respondents are husband and wife though separated. Unchallenged evidence was led by way of certificate of marriage that they got married in 1970 and separated in 2009. The suit land became registered in the name of the 1st Respondent on the 20/4/1983. This shows that the suit land was acquired during the subsistence of the marriage. This marriage has not been dissolved and still subsists to date.

22. The sale of the land took place on 27/9/17 between the 1st Respondent and the Appellant. It is the evidence of the 2nd Respondent that she resisted the sale because it is their matrimonial property and inter alia she is obligated under the law to give spousal consent which she did not. According to the 2nd Respondent the 1st Respondent had showed interest to dispose the property earlier on and to protect her interest she lodged a caution on the 27/3/2017. That later he convinced her to remove the caution to allow him to secure a loan only to learn that the suit land was being sold to the Appellant. This was confirmed by the Appellant when he stated that he carried out a search and found that there existed a caution by the 2nd Respondent whom he knew was the spouse of the Appellant. That when he reported the outcome of the search to the 1st Respondent, the same was removed on the 6/9/17. What followed was a tug of war between the 2nd Respondent and the LCB board objecting the issuance of the LCB consent. It is her evidence that the same was issued on the 19/10/17 despite her written protest to the Chairman of the Land Control Board and without her consent and knowledge. The Appellant stated in evidence that he did not attend the land control board and that it is the 1st Respondent that brought him the LCB and informed him that the 2nd Respondent was present. The green card shows that the 2nd Respondent lodged a restriction on the 30/10/2017 which as admitted by the Appellant stopped the registration of the suit land in his name. The evidence of the 2nd Respondent is consistent and believable on that account.

23. Back to the issue of jurisdiction, Section 17 of the MPA provides as follows;

“Action for declaration of rights to property

(1) A person may apply to a Court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a Petition has not been filed under any law relating to matrimonial causes.”

24. In this case the 2nd Respondent sought orders that the sale was null and void on account that her spousal consent was not sought and obtained. Inter alia that the suit land being matrimonial property the law required that her consent be sought and obtained and to the extent that it was not sought the same is null and void.

25. The MPA came into being in 2014 and the transaction occurred in 2017. My reading of the above Section is that the trial Court was possessed with jurisdiction to hear and determine the matter. I find that the trial learned magistrate heavily relied on the provisions of MPA and not the LRA as averred by the Appellant. I find no grounds to fault the Magistrate in that respect.

26. As to whether the laws relied upon by the trial Court in the judgement had been repealed? The issue as I understand in this case is whether or not the absence of spousal consent invalidated the transaction. This issue was answered in the positive by the trial Court and the Appellants fault the trial Court in relying on the laws in LRA that in their opinion had been repealed. It is on record that the trial magistrate made reference to the LRA and the MPA in her decision.

27. There is abound a string of cases that have been decided by our Courts with respect to beneficial and equitable interest of a spouse in landed property. Even before the enactment of the LRA and MPA, Courts held that property held in the name of one spouse was held in trust for the other spouse. This was the holding in the case of **Mugo Muiru Investments Limited v E W B & 2 Others (2017) eKLR**, where the Court held as follows at paragraph 50-51;

“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) 1 WLR 1333; and Hazell v. Hazell (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.”

28. Further in the **Mugo Muriu** case aforestated the Court went on to state 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 a matrimonial home occupied by such 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.”

29. Juxtaposing the decision of the Court as above to this matter, it is clear that though the land had been registered in the name of 1st Respondent in 1983 during the substance of the marriage, the same was held in trust for the 2nd Respondent.

30. Fast forward and the LRA enacted the provisions of Section 28 (a) provided that spousal rights over matrimonial property were overriding interests. Section 2 of the said Act provided that matrimonial property means any interest in land or lease that is acquired by a spouse or spouses during the subsistence of the marriage.

31. The LRA was repealed in 2016 and the provisions of the then Section 93 were re-enacted in the MPA which the learned trial magistrate relied in her decision. Section 6 of the MPA states as follows;

“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.

32. In the end the appeal has no merit and I dismiss it with costs to the 2nd Respondent.

DELIVERED, SIGNED & DATED AT THIKA ON THE 24TH DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Ms. Mwangi holding brief for Muturi for the Appellant

Ms. Kanja holding brief for Mr. Kanja for 2nd Respondent

Ms. Phyllis – Court Assistant