



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC SUIT NO.622 OF 2017

J KN.....PLAINTIFF

VERSUS

JWN.....1ST DEFENDANT

GNN.....2ND DEFENDANT

SPRINGBOARD CAPITAL LIMITED.....3RD DEFENDANT

LAND REGISTRAR, KIAMBU.....4TH DEFENDANT

JUDGMENT

The Plaintiff initiated this suit vide a Plaint dated **21st June 2017**, against the Defendants and averred that the 1st Defendant and himself, are husband and wife; having been married from **3rd January 1976**. That they jointly purchased the parcel of land **L.R Karai/Gikambura/xxxx**, in **1990**, and the said land was registered in the name of the 1st Defendant, as the couple had obtained a loan from the 1st Defendant's then employer **Pan Africa Insurance Company Ltd**; That they built a matrimonial home on the suit property and they started occupying it in **1993**. That the 1st Defendant was retrenched from employment in **December 1993**, and the Plaintiff continued to service the loan with **Pan Africa Insurance Company Ltd**, until the loan was fully paid and the **title deed** released to their custody. That the Plaintiff is therefore the beneficial owner of the suit property, which is registered in the 1st Defendant's name, as the **trustee** and it is also their matrimonial home.

That they have lived on the suit property since **1993**, as their matrimonial home together with their **3 children**, and two of them are still living with their parents on the suit property.

That on **3rd May 2017**, the Plaintiff met two representatives of **Regent Auctioneers**, who indicated that they had gone to serve one **GNN**, with a **notice** to sell the suit property. Further, that the Plaintiff's efforts to trace his original title deed were futile. Upon enquiry from his wife on the whereabouts of the title deed, she informed him that she had given the said title deed, to the **2nd Defendant, in 2015** for purpose of getting funding for a **greenhouse**. However, she was not given the money. That the Plaintiff further learnt that the 2nd Defendant had transferred the suit property to himself on **5th June 2015**, and charged the same to the 3rd Defendant for a loan of **Kshs.3,000,000/=**. That the 2nd Defendant fraudulently registered the transfer in his name without his knowledge and without obtaining the requisite spousal consent from him

He particularized the 2nd Defendant's fraud as;

- **inducing the 1st Defendant to part with the original title deed on the pretext that he would fund her to purchase a greenhouse,**
- **inducing the 1st Defendant to sign the transfer,**
- **fraudulently transferring the title of the suit property on the pretext that he had purchased it,**
- **failing to obtain spousal consent from the Plaintiff,**
- **obtaining a loan from the 3rd Defendant whilst he had no intention of ever repaying the loan.**

Thus, it was the Plaintiff's contention that the transfer of the suit property is **null** and **void** for breaching the provisions of the **Land**

Registration Act No. 3 of 2012, and the **Matrimonial Property Act No. 49 of 2013**, and therefore the 2nd Defendant did not have any legal right to charge the property to the 3rd Defendant. Therefore, the Plaintiff sought for the following orders; -

- a. A declaration that the transfer of the parcel of land known as Title No. Karai/Gikambura/xxxx, to GNN, the 2nd Defendant was null and void ab initio.
- b. An order for the Discharge of the charge over Title No. Karai/Gikambura/xxxx, by the 3rd Defendant herein and release of the original title documents for the said suit property by the 3rd Defendant to the Plaintiff herein .
- c. An order directing the 4th Defendant to rectify the register in respect of Title No. Karai/Gikambura/1412, by cancelling the Title Deed issued to the 2nd Defendant, and the charge registered by the 3rd Defendant against the said Title and reverting the Title to the name of the 1st Defendant as a trustee for the Plaintiff , who is the beneficial owner
- d. An order of permanent injunction restraining the 2nd & 3rd Defendants jointly and severally by themselves and through their agents , servants and or employees or otherwise howsoever from trespassing on, selling , transferring , alienating and /or interfering with the parcel of land known as Title. No. Karai/Gikambura/1412.
- e. And further or other relief that this Honourable Court may deem fit to grant, including all further necessary or appropriate accounts inquiries and directions.
- f. Costs of the suit in favour of the Plaintiff.

The suit is contested and the 3rd Defendant filed its statement of Defence dated **4th July 2017**, and denied all the allegations made in the Plaintiff's Statement of Claim, and averred that on **1st October 2015**, the **2nd Defendant** applied and obtained a loan of **Kshs.3,000,000/=** from the 3rd Defendant, which amount was secured through a legal charge dated **26th October 2015**, which was duly registered at the **Kiambu District Lands Registry** . That the charge was registered in accordance with the law, after the 3rd Defendant conducted **due diligence**, to confirm the registered owner, before issuance of the loan and it confirmed that the title document was valid and unchallenged. That at the time of the charge, the 2nd Defendant was the absolute registered owner and had the legal capacity to charge it. That the 2nd Defendant defaulted in making the payments and it issued to the 2nd Defendant demands that he pays the outstanding amount through a timely **Statutory Demand Notices**, to settle the outstanding amounts, which had been accumulated. That when the 2nd Defendant did not pay, the 3rd Defendant instructed **Regent Auctioneers** who issued a **Notification of Sale**, which was served on the 2nd Defendant on **3rd May 2017**.

Further, that the Plaintiff and the 1st Defendant are strangers to the transaction between the 2nd and 3rd Defendants and the **Charge** herein is an issue that does not concern them. That the Plaintiff is intent on defrauding the 3rd Defendant, since he alleges that he still lives on the suit property with his wife, the 1st Defendant amicably, which action is a clear indication of mischief, which the Court should disallow. That the Plaintiff's interests only subsisted while the same was in the name of the 1st Defendant, and the moment the property was transferred to a 3rd party, it ceased being a matrimonial property, and more so now that the 3rd Defendant has a registrable interest . That the Plaintiff has no legal recourse against the 3rd Defendant, who never transacted with him nor his wife and that the 3rd Defendant would suffer irreparably if the intended sale is stopped and the loan continues to outgrow the value of the property . The Court was urged to allow the 3rd Defendant, who is an innocent party to recover its monies as the balance of convenience lays in its favor . The Court was urged to dismiss the suit.

The 4th Defendant filed its Statement of Defence dated **4th August 2017**, and denied all the allegations in the Plaintiff's Statement of Claim and averred that the Plaintiff raised no allegations of wrongdoing by the 4th Defendant. That, since no substantive orders are sought against the 4th Defendant, the Court was urged to dismiss the suit against it.

Though being served with the suit papers, the 1st Defendant did not file a Defence, but filed a witness statement, the 2nd Defendant did not **Enter Appearance** and the suit proceeded without his participation. The 3rd Defendant and the 4th Defendant filed their Statements of Defence, but did not call any witnesses. The Plaintiff gave evidence for himself and closed his case.

PLAINTIFF'S CASE

PW1 JKN, adopted his witness statement dated **21st June 2017**, as part of his evidence. He produced the list of documents dated **1st October 2019**, in the name of **JWN – 1st Defendant** as Exhibits **1 to 6**. That Joyce Wanjiku and himself purchased the parcel of land in **1990**, and the land was registered in the name of the 1st Defendant and that he did not take a loan to buy the Land. That later they took a loan from **Pan Africa Insurance Co. Ltd. in 1993**, to put a permanent house, and the loan was issued in the name of his wife (1st Defendant), who worked with **Pan Africa Insurance Company Ltd.** That he had no evidence that he paid the loan. That the title later changed hands and the auctioneers were looking for **GNN**. That his wife told him that she had given the title in **2015 to GN**. That she was not coerced to give out the title, and she had lost her Identity Card. That he discovered after two years that the property was no longer his.

That the title was given by his wife without coercion. That he reported the matter to the Police, but no one has ever been charged. Further, that he did not issued any Notice to the **Kiambu Land Registrar**.

That he was referred to Court by the Police and the 2nd Defendant has not been traced. That his wife gave out the title so that the 2nd Defendant could assist her get a **green house** and it was a security for the money, but she was not given the **green house**. That the land was transferred without his consent.

After close of viva voce evidence, the parties filed written submissions which the Court has carefully read and considered. The Court has also read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law.

Although the 3rd & 4th Defendants filed their statements of Defence, they did not call any witness to support their case. Therefore, their Defences remained mere allegations and the Plaintiff's testimony was not rebutted. See the case of **Billiah Matiangi....Vs... Kisii Bottlers Limited & Another [2021] Eklr** where the Court held that ;

“11. where a Plaintiff gives evidence in support of her case, but the Defendant fails to call any witness in support of its allegations then the Plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In Janet Kaphiphe Ouma & Another Vs. Marie Stopes International (kenya) kisumu Hccc no. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga through Stanley Muriga Vs Nathaniel D. Schulter, Civil Appeal No. 23 Of 1997 held that:

“in this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...sections 107 and 108 of the evidence act are clear that he who asserts or pleads must support the same by way of evidence.”

However, uncontroverted evidence is not automatic evidence and the Plaintiff still has an obligation to prove his case to the required standard of balance of probabilities.

It is the Plaintiff's contention that the suit property is a matrimonial property. That though, the suit property was initially registered in the name of his wife, the 1st Defendant, his wife held the suit property in **trust** for him and that the suit property is their matrimonial home. Further, that the 2nd Defendant did not acquire a good title as the suit property was matrimonial home and **his consent** was not sought, before the suit property was transferred to the 2nd Defendant, who later charged it to the 3rd Defendant.

The 3rd Defendant has contended that it is a third party and is not privy to the sale agreement between the 1st Defendant and the 2nd Defendant. That it did its due diligence before it charged the suit property and since the Plaintiff and the 1st Defendant are still living together, there is a ploy to defraud them. In their submissions, the 3rd Defendant has sought to rely on some documents in their list of documents, However the said documents were not produced in evidence as the 3rd Defendant did not call any witness. Submissions cannot be used to produce any form of evidence. See the case of **Daniel Toroitich Arap Moi....Vs...Mwangi Stephen Muriithi & Another [2014] eKLR**: where the Court held that

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the Court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

The Court therefore finds that the issues for determination are;

- 1. Whether the 1st Defendant was holding the suit in trust for the Plaintiff**
- 2. Whether there was need for spousal consent before the suit property was transferred to the 2nd Defendant**
- 3. Whether the 2nd Defendant acquired a good title**
- 4. Whether the Plaintiff is entitled to the prayers sought.**
- 5. Who should bear the cost of the suit**

1. Whether the 1st Defendant was holding the suit in trust for the Plaintiff

The Plaintiff testified that he got married to the 1st Defendant on **3rd January 1976**, and he produced a Marriage Certificate. He further testified that jointly, they bought the suit property in **1990**, which property was registered in the name of the 1st Defendant as his **trustee**. That they have occupied the suit property as their matrimonial home since **1993** and up to date, they still reside thereon. The Plaintiff's evidence that they have been living on the suit property and that the same has been their matrimonial home has not been controverted by either of the Defendants. Further, the Plaintiff's contention that the Auctioneers found him on the suit property when they came to serve the Notice has also not been controverted, In the absence of any evidence to the contrary, the Court finds no reasons to dispute that allegation. Therefore, this Court finds and holds that the suit property is a matrimonial property, wherein the Plaintiff and the 1st Defendant have set up their matrimonial home as per the definition given in **Section 2 of the Matrimonial Property Act 2013**, which provides that;-

“matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;

The meaning of what a **Matrimonial Property** is has been defined under **Section 6** of the said Act, which provides that;

“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.**

As to whether the 1st Defendant held the suit property in trust for the Plaintiff, **Section 14 (a)** of the **Matrimonial Property Act** provides that;

“where Matrimonial Property is acquired during marriage;

- a. in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse and**
- b.**

The Court has held and found that the suit property is matrimonial property. From the evidence adduced, the said matrimonial property was acquired during the subsistence of the marriage, the property having been acquired in **1993**, while the marriage was contracted in **1976**. There has been no rebuttable to the presumption of **trust**, and the Court finds and holds that the 1st Defendant held the suit property in trust for the Plaintiff and therefore the Plaintiff acquired beneficial interest over the same . See the case of **Mugo Muiru Investments LimitedVs...E W B & 2 Others (2017) EKLR**, where the Court of Appeal held that ;

“The Appellant did not regard the issue of trust imposed on the chargor, 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.”

2. Whether there was need for spousal consent before the suit property was transferred to the 2nd Defendant

From the evidence adduced in Court, the alleged sale and transfer of the suit property to the 2nd Defendant was effected in **2015**. Therefore, the sale and transfer was subject to the **Matrimonial Property Act 2013**, which came into force on **16th January 2014**, and the **Land Registration Act No. 3 of 2012**, since the suit property is a matrimonial property.

Section 12 of the Matrimonial Property Act provides 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.”

Section 93 of the Land Registration Act 2012, was Amended in **2016**, but in this instance, at the time the alleged transfer to the 2nd Defendant was taking place, **spousal consent** was a necessity. **Section 93(3) (b)** provided that;

“where a spouse who holds land or a dwelling in his or her name individually undertakes disposition of land or dwelling house;

- a).....**
- b) the assignee or transferee shall if the disposition is an assignment or transfer of land be under a duty to inquire of the assignor on whether the spouse or spouses have consented to the assignment.**

Therefore, this Court finds and holds that before the suit property could be transferred to the 2nd Defendant, the same being a matrimonial home, even with the Amendment of Section 93 of the **Land Registration Act**, the Plaintiff's consent ought to have been sought and there

was indeed need for **spousal consent** before transfer . None has been produced in evidence

3. Whether the 2nd Defendant acquired a good title

The suit property was **matrimonial land**, and as already held above, the Plaintiff's consent was required before the suit property could be transferred. The Plaintiff having acquired spousal rights under the **Land Registration Act 2012**, it is not in doubt that the said interests were overriding interests and thus, the 1st Defendant could not sell the suit property without the **Plaintiff's** consent and any sale in the absence of the **spousal consent** is **null** and **void**.

The Plaintiff's testimony that he did not know and or even consent to the sale of the suit property would only mean that there is no way that the 2nd Defendant could have acquired a **good title** in the absence of the Plaintiff's consent. See the case of *Mugo Muiru Investments Limited ...Vs... E W B & 2 Others (supra) where the Court held that;*

“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”.

Further in the case of *Kadzo Mkutano ...Vs... Mukutano Mwamboje Kadosho & 2 others [2016] eKLR, the Court 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”.

Taking into account the above findings and the fact that **spousal consent** was not obtained, the Court and holds that the 2nd Defendant did not acquire a good title.

4. Whether the Plaintiff is entitled to the prayers sought.

The Plaintiff has sought for various orders amongst them a Declaration that the transfer of the suit property to the 2nd Defendant was **null** and **void**; an order for discharge of the charge, an order directing the rectification of the register and Permanent injunction.

The Court has already held and found that the transfer to the 2nd Defendant lacked spousal consent and therefore was **null** and **void** . On discharge of the charge, the 3rd Defendant has contended in their submissions and Defence that they are innocent transactors or Chargee and that they did their due diligence and therefore they are not part of the mess between the Plaintiff and the 1st & 2nd Defendants. The 3rd Defendant did not call any witness to substantiate their allegations in its statement of Defence. Neither did it produce any documents in evidence to confirm that there was **due diligence** conducted before a Charge was registered.

The Plaintiff testified that he had lived on the suit property since **1993**, and **due diligence** from the 3rd Defendant would have included that they visit the suit property to ascertain the correct position. In the case of *Samuel Kamere ...Vs... Land Registrar (2015) EKL*R the Court of Appeal held that;

“ in order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.”

In the absence of any evidence to confirm that the charge was proper one, and having found that the 2nd Defendant having not acquired any legitimate title, the Court finds and holds that it would only be prudent that the Charge herein is **discharged** and a permanent injunction be issued in favour of the Plaintiff, so that he can enjoy all the rights and interests that appertain to the suit property.

Section 80 of the **Land Registration Act** empowers the Court to order for rectification of the Register, where it finds that any registration was obtained by **fraud** or **mistake** . The 2nd Defendant's registration having been obtained in the absence of a **spousal consent**, the Court finds that the said registration was obtained by **mistake** and/or **fraudulently** and it is therefore, due for rectification.

This Court finds and holds that the Plaintiff is entitled to the prayers sought in his Plaintiff.

5. Who should bear the cost of the suit

Section 27 of the Civil Procedure Act gives the Court the discretion to grant costs, and ordinarily costs do follow the event.

In this instant case, no special circumstances having been presented, and therefore the Court finds and holds that the Plaintiff is entitled to the costs of the suit against the 1st to 3rd Defendants.

Having carefully considered the available evidence and the rival submissions herein, the Court finds and holds that the Plaintiff has proved his case on the required standard of balance of probabilities. Consequently, the Court enters judgment for the Plaintiff against the Defendants herein jointly and severally as prayed in the Plaint dated **21st July 2017**, in terms of prayers No. **(a) (b) (c) (d) and (f)**.

The Plaintiff is entitled to costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 17TH DAY OF FEBRUARY, 2022

L. GACHERU

JUDGE

Delivered online

In the presence of;

Mr. Thuo for the Plaintiff

Absent - 1st Defendant

Absent - 2nd Defendant

Absent - 3rd Defendant

Absent - 4th Defendant

Kuiyaki - Court Assistant

L. GACHERU

JUDGE