



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.173 of 2014

**ANTONY ISAAC MWARO (suing as the Legal Administrator of the Estate of
FERDINAND KAHINDI MWARO (DECEASED)).....PLAINTIFF**

=VERSUS=

- 1. DIAMOND TRUST BANK KENYA LIMITED**
- 2. SWALEH MOHAMED HEMED**
- 3. REGISTRAR OF TITLES, MOMBASA.....DEFENDANTS**

R U L I N G

Introduction:

1. On 26th June 2015, this court dismissed the Plaintiff's Application dated 23rd September 2014.
2. An Application dated 10th September 2015 has been filed in which the widow of the late Ferdinand K. Mwaro has sought to be enjoined in those proceedings as a co-Plaintiff. The proposed co-Plaintiff is also seeking for an order of inhibition pending the hearing of the amended suit.
3. The prayer to enjoin the co Plaintiff/Applicant in this suit was allowed by consent of the parties. However, the prayer for inhibition was strenuously opposed by the 1st Defendant.

The Co-Plaintiff's/Applicant's case:

4. In her Affidavit, the Applicant has deponed that the late Ferdinand Kahindi Mwaro was her husband; that the family's matrimonial home is situated at Kilifi/Ngerenyi/909, the suit property and that she has come to learn that the 2nd Defendant purported to have bought her matrimonial home and charged it to the 1st Defendant.
5. According to the Applicant, she was never consulted as a spouse before the sale and the subsequent charging of the suit property was done; that it was the duty of the Bank to have inquired the position on the ground before charging the suit property and that she has now discovered that her late husband never signed any transfer in favor of Swaleh Mohamed Hemed, the 2nd Defendant.
6. The Applicant has deponed that the alleged land control board meeting purporting to sanction the sale

of the suit property are not available; that the charge was made on 19th August 2008 but the consent of the Board was issued on 29th September 2008 and that the fraud in the transaction invalidates all the sale and the charge of the suit property.

7. The Applicant finally deponed that had the 1st Defendant carried out investigations or inquiries at the earliest opportunity, it would have discovered that the dealings in the suit property was tainted with illegality.

The 1st Defendant's/Respondent's case:

8. The 1st Defendant's Company Secretary deponed that the current Application is an abuse of the process of the court since a similar Application dated 23rd September 2014 was made by the Plaintiff and dismissed; that in the said Ruling, the court held that the Plaintiff had failed to produce any evidence of fraud and that the Applicant has now purported to remedy the deficiencies pointed out by the court in its Ruling.

9. The 1st Respondent's Company Secretary deponed that if the Applicant had any objection to her husband disposing of the suit property, she should have raised her objections with the Land Control Board and that the charge was registered on 14th October 2008 after the consent of the Land Control Board was obtained.

Submissions:

10. The Applicant's counsel submitted that spousal rights are overriding interests on land; that under Section 30 (g) of the Registered Land Act, possessory rights were recognised as an overriding interest and that the deceased never sold the suit property to the 2nd Defendant.

11. Counsel submitted that the bank was under a duty to inquire on the people who were in possession of the suit property before charging it; that the 2nd Defendant transferred the land fraudulently and he is now on the run and that there are no minutes showing that the Board approved the sale of the suit property to the 2nd Defendant.

12. In response, the 1st Defendant's counsel submitted that the Plaintiff filed the initial Application for injunction which was dismissed; that the Plaintiff has filed an Appeal against the said decision and that the current Application is an effort to remedy the first Application.

13. The 1st Defendant's advocate submitted that the overriding interest are extinguished once the property is registered under the Registered Land Act (RLA); that the registered owner is deemed to be the absolute owner and that the Plaintiff admitted in the Plaintiff that the deceased had dealings with the 2nd Defendant in respect to the suit property.

Analysis and findings:

14. The Co-Plaintiff's Application is premised on the grounds that she was in physical possession of the suit land, before and after it was purportedly sold and subsequently charged by the 1st Defendant and that she has spousal rights over the suit property.

15. The other ground on which the Application is premised on is that there is now evidence from the document examiner showing that the purported sale of the suit property by the deceased to the 2nd Defendant was fraudulent and that in any event, there are no Minutes of the Land Control Board authorising the said sale.

16. It is also not in dispute that the suit property was initially registered in favour of the Applicant's late

husband.

17. It is not in dispute that the 2nd Defendant was subsequently registered as the proprietor of the suit property on 17th July 2008 under the Registered Land Act (repealed). The 2nd Defendant then charged the suit property to the 1st Defendant on 14th October 2008 and charged it further on 5th August 2011.

18. The 1st Defendant therefore did not deal with the Plaintiff's late husband at all while charging the suit property.

19. The Plaintiff herein raised the issue of the 2nd Defendant having acquired the suit property fraudulently in his Plaintiff and Application dated 23rd September 2014, in which he sought for an injunctive order. In my Ruling of 26th June 2015, I held as follows:

“Indeed, considering that no evidence has been placed before me to show that the suit property was fraudulently transferred to the 2nd Defendant who then charged it to the 1st Defendant, and in the absence of privity of contract between the 1st Defendant and the Plaintiff, I find and hold that the Plaintiff cannot, prima facie, challenge the 1st Defendant's statutory power of sale conferred to it by the charge documents and the Land Act.”

20. The Applicant now says she has evidence from a document examiner showing that it is not her late husband who signed the transfer documents transferring the suit property to the 2nd Defendant.

21. The Applicant's position basically is that she has now come across new evidence on the issue of fraud.

22. If that is the position, then the Application that the Applicant should have filed is for review of the Ruling of this court and not an Application seeking for injunctive orders.

23. The court cannot sit on its own appeal by way of an Application an issue it has already determined.

24. Consequently, I shall not delve into the merit or otherwise of the document examiner's report or whether the absence of the Minutes of the Land Control Board authorising the transfer of the suit premises to the 2nd Defendant should be a basis for granting injunctive orders. These are issues that should have been argued when the first Application was filed.

25. In the Ruling of this court, the court observed that as at the time of charging the suit property in the year 2008, there was no privity of contract between the 1st Defendant and the Plaintiff (deceased).

26. Having made that finding, this court cannot turn around and say that the Applicant had spousal rights over the suit property.

27. In any event, the issue of spousal rights over matrimonial property is recognised by the Land Registration Act which came into force in the year 2012 and not Registered Land Act (repealed).

28. The spousal rights over the suit property right cannot operate retrospectively to defeat the charge which was registered by the 1st Defendant in 2008, by which time the suit property had been transferred to the 2nd Defendant.

29. In arguing that the Applicant had an overriding interest on the suit property pursuant to the provisions of Section 30(g) of the RLA (repealed), the Applicant's counsel placed much emphasis on the case of **William & Glyn's Bank Vs Boland (C.A) (1979) 2 WLR 550** where it was held that since the wives had contributed to the purchase of the matrimonial homes, they were equitable tenants in common of the properties under trusts for sale, the legal estates being vested in their husbands as sole trustees.

30. In the Williams case (Supra), Lord Denning M.R stated as follows:

“ I come therefore to the conclusion that a wife, who has a share in the house, has an equitable interest in land. It follows, in the case of unregistered land, that, if her husband sells or charges it over her head, to a purchaser or lender, who has knowledge or notice of her interest,he takes it subject to her interest.”

31. The court in the Williams case went further and analysed the provisions of Section 70(1) (g) of the Land registration Act, 1925 which is similar to the provisions of Section 30 (g) of the Registered Land Act (repealed). Lord Denning M. R. held as follows about the provision;

“Once it is found that a wife is in actual occupation, then it is clear that in the case of registered land, a purchaser or lender would be well advised to make inquiry of the wife.....we should not give monied might priority over social justice. We should protect the position of a wife who has a share. In my opinion each of the wifes is entitled to be protected in her occupation of the matrimonial home. The bank is not entitled to throw those families out into the street- simply to get the last penny of the husband's debt.”

32. I agree with the above holding. Indeed, the holding in the above case epitomises the provisions of Section 30 (g) of the RLA and Section 28 of the Land Registration Act.

33. However, it is not the Applicant's late husband who charged the suit property.

34. By the time the 2nd Defendant charged the suit property, the same had already been transferred to the 2nd Defendant.

35. Until the Transfer of the suit property to the 2nd Defendant is successfully set aside on the ground of fraud or mistake the Applicant cannot, prima faice bring into operation the provisions of section 30 (g) of the RLA (repealed) to defeat the chargees statutory right to sale the suit property.

36. In the circumstances, and for the reasons I have given, I dismiss the Applicant's Application dated 10th September 2015 with costs.

Dated and delivered in Malindi this 20th day of **November** 2015.

O. A. Angote

Judge