



**Azmon v Osiemo & another (Environment & Land Case 171 & 226 of 2014
(Consolidated)) [2023] KEELC 18572 (KLR) (4 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18572 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 171 & 226 OF 2014 (CONSOLIDATED)**

MAO ODENY, J

JULY 4, 2023

BETWEEN

SIMHI AZMON PLAINTIFF

AND

JAMES MAROKO OSIEMO 1ST DEFENDANT

MIRIAM MUKAMI NDIGA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff and 2nd Defendant filed separate suits which were then consolidated by an order of the court dated 27th October 2020. The first suit, ELC No 171 of 2014, was by an Amended Plaint dated 18th September 2014 claiming ownership over a parcel of land identified as LR No 1705/359 (Original No 1705/84/24) delineated on land survey plan number 278859 (hereinafter the suit property). The Plaintiff sought the following orders against the Defendant.:
 - a. An eviction order directing the Plaintiff to evict the Defendant from all that piece of land situated in the North of Kilifi Town in the Kilifi District being land reference number 1705/359 (Original Number 1705/84/24) delineated on land survey plan Number 278859.
 - b. An order directing the Kilifi County Commissioner and/or administrator assisted by the officer commanding Kilifi Police Station to supervise and provide security during the eviction.
 - c. Costs and interest of this suit.
 - d. Any other relief the Court may deem fit.
2. The second suit, ELC No 226 of 2014 the Plaintiff/Miriam Mukami Ndwiga commenced the suit through a plaint filed dated 2nd December, 2014 seeking the following orders



- a. Cancellation of title of Parcel No 1705/359 (Original number 1705/84/24) from the 1st Defendant's name and the same be jointly registered in the name of the Plaintiff and the 2nd Defendant.
 - b. Costs of this suit.
3. The Plaintiff's case was that the 1st Defendant sold and transferred to him the suit property in lieu of Kshs 400,000/-, that he owed him and the Defendant has refused to give vacant possession despite demand and notice of intention to sue.

Plaintiff's Case

4. PW1 Simhi Azmon adopted his written statement filed on 11th September 2014 and produced as PEXH 1-3 the documents in his list of documents. He told the court that the Sale Agreement was signed in Mr. Nyameta's office and not at the Police Station as claimed by the 1st Defendant. That a police officer was however present during the signing since it had been difficult to locate the 1st Defendant.
5. On cross-examination, the Plaintiff testified that he did not loan the 1st Defendant any money but that the said Kshs 400,000/- was for payment of the suit property in the year 2011. He later discovered that the land did not belong to the 1st Defendant and this prompted him to take the 1st Defendant to the Police Station in an effort to get his money back. PW1 stated that while at the Police Station, the 1st Defendant suggested that they go to Nyameta advocate's office where the documents were signed. He added that he first went to the suit property in 2014 where he found the 2nd Defendant and her children residing thereon.

Defendant's Case

6. DW1 James Maroko Osiemo adopted his written statement dated 12th November 2020 and produced DEXH 1-3 contained in his list of documents and testified that he had paid back the Plaintiff Kshs 100,000/- by a banker's cheque to his advocates, and a further Kshs 50,000/- to the Plaintiff himself. When he was unable to make further payments, the Plaintiff caused his arrest and later taken to Nyameta advocate's office where he was made to sign a repayment agreement and asked to deliver his title as security. He denied signing the transfer forms and confirmed that he never attended the Land Control Board. On cross examination DW1 stated that he bought the suit property sometime in 2006 before he married the 2nd Defendant.
7. DW2 Miriam Mukami Ndwiga the 2nd defendant also adopted her written statement dated 14th December 2020 and testified that she lives on the suit property with her children being her matrimonial home. She told the court on cross examination that the 1st Defendant had already paid Kshs 270,000/- to the Plaintiff being part of the debt.
8. Parties agreed to file written submissions, however the Plaintiff had not filed any as at the time of writing this Judgment and the 2nd Defendant indicated that she would rely on her evidence.

1st Defendant's Submissions

9. Counsel for the 1st Defendant submitted that acquisition of the suit property by the Plaintiff was marred with illegalities and fraud by duress and intimidation. Counsel relied on the cases of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR; and *Daudi Kiptugen v Commissioner of Lands and 4 others* [2015] eKLR.



10. Ms Chepkwony submitted that the suit property fit the description of matrimonial property under Section 93 of the [Land Registration Act](#), and Sections 2 and 6 of the [Matrimonial Property Act](#) No 49 of 2013. It was counsel's further submission that the suit property was acquired by the Defendants on 14th July 2008 during the subsistence of their marriage and together built their family home thereon.
11. Counsel further submitted that the 1st Defendant held the suit property in trust for his spouse, the 2nd Defendant as was the presumption then. To highlight this point, counsel relied on the case of [Mugo Muiru Investments Limited v EWB and 2 others](#) [2017] eKLR and the provisions of section 28 (a) of the [Land Registration Act](#).
12. Ms Chepkwony relied on Section 12 of the [Matrimonial Property Act](#), and submitted that the 2nd Defendant's consent was necessary to effect the alleged transfer to the Plaintiff and urged the court to dismiss the Plaintiff's case and order that the title revert back in the name of the Defendants.

Analysis and Determination

13. Having considered the pleadings, evidence and submissions filed in this case, I find that the following issues arise for determination :-
 - a. Whether the 2nd Defendant has proven a matrimonial or overriding interest over the suit property.
 - b. Whether transfer of the suit property was illegal.
 - c. Whether the Plaintiff is entitled to the orders sought.
14. Before the enactment of the [Matrimonial Properties Act](#), the [Land Registration Act](#) 2012 under 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. Section 93 (3) (b) further provides that: -

“Where a spouse who holds land or a dwelling house in his name undertakes individually a disposition in that land the transferee shall if that disposition is a transfer of land be under a duty to inquire of the transferor of whether the spouse(s) has consented to that transfer...”
15. The question that follows therefore is whether the suit property was matrimonial property. Matrimonial home is defined by the [Land Act](#), 2012 to mean “any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.”
16. Section 93 (2) of the [Land Registration Act](#) No 3 of 2012 provides: -

If land is held in the name of one spouse only but the other spouse(s) contributes by their labour or other means to the productivity, upkeep and improvement of the land, that spouse (s) shall be deemed by virtue of that labour (s) to have acquired an interest in that land in the nature of an ownership in common with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by spouse(s) shall be recognized in all cases as if they were registered.



17. The transfer in issue was done on 18th June 2014 after the enactment of the *Matrimonial Property Act* in January 2014. Section 2 of the *Matrimonial Property Act* defines Matrimonial home as follows;
- “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;”.
18. Section 6 (1) thereon further provides as follows;
- 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.
19. Further Section 9 of the said Act provides as follows;
- Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.
20. Going back to Section 2 of the same Act, contribution is defined as;
- “contribution” means monetary and non-monetary contribution and includes—
1. domestic work and management of the matrimonial home;
 2. child care;
 3. companionship;
 4. management of family business or property; and
 5. farm work;
21. In the present case, it is not in dispute that the suit property was initially transferred to the 1st Defendant on 14th July 2008. The 2nd Defendant’s evidence was that they bought the suit property in 2006. As at that time they were living in a rented house in Mtwapa area. That they moved into the suit property with their children in April 2014 upon constructing a house thereon.
22. She stated that sometime later that year the Plaintiff visited the suit property claiming the 1st Defendant owed him Kshs 400,000/-. This evidence read against Section 2 of the *Matrimonial Property Act* is a clear testament of the contribution of the 2nd Defendant in the suit property. Indeed, the Plaintiff admitted that he found the 2nd Defendant and her children living on the suit property when he first visited. In the circumstances, I find that the 2nd Defendant has firmly established her overriding interest on the suit property. The 1st Defendant held the suit property in trust for both himself and the 2nd Defendant.
23. It therefore follows that the 2nd Defendant’s consent was crucial in any transaction involving the suit property. This is envisaged under Section 93 (2) and (3) aforesaid. It was undisputed in this case that



spousal consent was absent. In the case of *Kadzo Mkutano v Mukutano Mwamboje Kadoshu & 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”.

24. From the evidence from both parties it shows that the transfer to the Plaintiff was marred with illegalities and unprocedurally acquired. The plaintiff’s evidence was contradictory in one breath saying that the agreement was signed at the Police station and another that it was signed in Mr. Nyameta’s office in the presence of the Police, what the Police doing in an advocates office while parties were entering into a voluntary agreement. Was there a form of duress or coercion and what was the agreement all about. Was it a commitment to refund a loan or a sale agreement to transfer.
25. While the law is extremely protective of titles, Section 26(1) of the *Land Registration Act* provides for instances where a certificate of title may be challenged. That section reads;

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.

26. I find that the Plaintiff’s title was acquired unprocedurally and order that the same be cancelled and rectified. The court is empowered under Section 80 of the *Land Registration Act*, 2012 which provides;

Rectification by order of Court.

80.

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

27. The upshot is that this being a consolidated matter, the Amended Plaintiff dated 18th September 2014 is hereby dismissed with costs and the one dated 2nd December 2014 is allowed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF JULY 2023.

M.A. ODENY



JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

