



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 64 OF 2019

CHRISTINE NEKESA WAFULA.....PLAINTIFF

VERSUS

JANEROSE SAKINA NDUGUYU.....DEFENDANT

JUDGMENT

INTRODUCTION

1. In a plaint dated **15/10/2019** and filed on the same date by the firm of Kidiavai & Co Advocates , the plaintiff sought the following orders against the defendant:-

(a) **An order of declaration that the purported transfer of land Title No. KITALE MUNICIPALITY BLOCK 17/BIDII/816 measuring approximately Three Decimal Four Six One (3.461) Hectares or thereabouts from the deceased to the defendant is null and void for lack of spousal consent.**

(b) **An order for cancellation of the Title Deed for land Title No. KITALE MUNICIPALITY BLOCK 17/BIDII/816 measuring approximately Three Decimal Four Six One (3.461) Hectares or thereabouts which is in the name of the defendant and the rectification of the Land Register by the Trans-Nzoia County Land Registrar to rectify the records being held at the Trans-Nzoia County Land Registry in respect of land Title No. KITALE MUNICIPALITY BLOCK 17/BIDII/816 measuring approximately Three Decimal Four Six One (3.461) Hectares or thereabouts so as to revert back into the names of its initial owner, HILLARY PIUS WAFULA KHAEMBA *aka* HILLARY W. LABAN KHAEMBA.**

(c) **An order of eviction against the defendant from that land known as land Title No. KITALE MUNICIPALITY BLOCK 17/BIDII/816 measuring approximately Three Decimal Four Six One (3.461) Hectares or thereabouts.**

(d) **Costs of the suit.**

(e) **Any other relief this honourable court may deem just and fit to grant.**

PLEADINGS

The Plaintiff

2. In the plaint, the plaintiff states that her late husband, **Hillary Pius Wafula Khaemba**, with whom he had two children who are now indisputably admitted to have attained the age of majority, was the registered owner of land reference **Kitale Municipality Block 17/Bidii/816** upon which land the deceased had constructed a matrimonial home and a residential house for the said children; that the couple had agreed that the said land would be strictly for the benefit of their two children, to be transferred to them upon the age of maturity; that on **25/3/2014** the defendant fraudulently caused the suit land to be transferred into her names, and by the time of the suit the defendant had initiated a process of subdivision of the suit land with a view to disposing of it to the plaintiff's detriment.

The Defendant's Defence

3. The defendant filed a defence dated **23/10/2019** on the same date. She denied the plaintiff's claims in the plaint and stated that the plaintiff is the estranged wife of the late Hillary and the two had separated **18** years before; that the land parcel was lawfully transferred to her after observance of all procedures and no spousal consent was required; that it is not true that the plaintiff and Hilary had agreed that the land was held in trust for their two children and that it would be transferred to them once they attained the age of majority; that it is not true that on the suit land stood a matrimonial home for the plaintiff and a house for the children; that the houses constructed on the suit land were specifically

for the defendant and the deceased Hillary whom she referred to as her husband; that she has not initiated the alleged subdivision and that this suit should be struck out on the basis that the children mentioned in the plaint are now adults and the plaintiff can not act as their next friend and that the plea for cancellation of the title has no basis. She also stated that the suit is tainted with malice as an earlier suit **Kitale ELC Case No 84 of 2017** had been withdrawn.

The Plaintiff's Reply to Defence

4. The plaintiff filed reply to defendant's defence on **8/11/2019** reiterating the contents of the plaint and denying the allegations in the defence.

EVIDENCE OF THE PARTIES.

The Plaintiff's Evidence

5. **PW1, Christine Nekesa Wafula**, the plaintiff, testified on **16/2/2021** and adopted her witness statement dated **15/10/2009**. She stated that she is a farmer cum businesswoman; she produced a certified copy of her marriage certificate (**P. Exhibit 3**) showing they were married on **14/1/1994** and an extract of the title showing that the deceased was the former registered owner of the suit land, having been so registered in **2009**; that the defendant was registered as proprietor on **25/3/2014**; that a magistrate's court had previously ordered that the plaintiff be recognized as the widow of the deceased in **2016**; that the defendant could not be the wife to the deceased while the marriage evidence by the marriage certificate was still subsisting.

6. On cross-examination by Ms. Arunga she admitted that the defendant still occupies a house on the suit land which the defendant and the deceased had earlier occupied before his demise; that there was a first wife to the deceased known by the name *Dorcas Njeri* and that the deceased died in **2016**. She admitted that she does not reside on the suit property.

7. The plaintiff's case was marked as closed at the end of **PW1's** evidence.

The Defendant's Evidence.

8. **DW1, Janerose Sakina Nduguyu**, the defendant, testified on **16/2/2021**. She stated that she is also a farmer-cum-business woman; that the plaintiff is her co-wife whom she came to know during the burial of her late husband; that she started living with the deceased in **2013**; that the deceased constructed a house for her on the suit land they set up a home thereon; that the deceased had two other wives known as *Dorcas Wafula* and *Ann Atieno*; that the deceased never informed her that she would hold the land in trust for the children; she stated that she did not want to stay on the land without a title in her name because she knew it was a polygamous home.

9. Upon cross-examination by Mr. Bisonga she stated that the suit land was a gift from her husband and she denied that she was holding the land in trust for anyone; she claimed that she had a marriage certificate at home evidencing her marriage to the deceased in a civil ceremony at the District Commissioner's office.

10. Upon examination by the court **DW1** stated that she had had no children with the deceased but she had her own **4** children.

11. At that point the defence case was marked as closed.

SUBMISSIONS

12. The parties were directed to file submissions on **16/2/2021**. The defendant's submissions was filed on **3/3/2021**. The plaintiff's submissions was filed on **16/3/2021**.

DETERMINATION

13. I have considered the pleadings, the evidence and the filed submissions. The issues that arise in this suit are: -

(a) Whether the transfer of the suit land to the defendant was fraudulent;

(b) Whether the title issued in the name of the defendant should be cancelled;

(c) What orders should issue as to costs?

14. The issues are discussed as hereinbelow:-

(a) Whether the transfer of the suit land to the defendant was fraudulent;

15. There is no doubt that the plaintiff is the wife of the deceased *Hillary Pius Laban Wafula*; **P. Exhibit 3** is sufficient evidence of that. Whether the deceased could contract another marriage after he had contracted the marriage with the plaintiff is not within the mandate of this court to determine; the only issue here for determination is the propriety of title in the name of the defendant and whether the same ought to be cancelled.

16. No evidence of the occurrence of a marriage between the defendant and the deceased was provided but it is evident that the defendant lived with the deceased in the same house before his demise in **2016**. By the time of his demise the couple had only lived together for **4** years. The court hence does not have any conclusive proof in this case that the deceased and the defendant were husband and wife.

17. The only person whom this court recognizes as the wife to the deceased and that is only on the basis of the evidence tendered in this case is the plaintiff who has a certificate of marriage to prove it. It is clear that the suit property was acquired during the subsistence of the marriage between the plaintiff and the deceased.

18. The plaintiff submits that though the suit land was registered in the name of the deceased he held title and legal estate in trust for both himself and the plaintiff because it was matrimonial property and the deceased was a trustee for the plaintiff to the extent that the plaintiff was entitled; that the plaintiff's interest in the suit land was an overriding and unregistered interest; that as the deceased did not hold all interest in the suit land he could not transfer good title to the defendant due to the trust in the plaintiff's favour; therefore, adds the plaintiff the transfer to the defendant is vitiated, null and void *ab initio* and must be cancelled. The plaintiff stressed that her marriage with the deceased was monogamous and was never dissolved; that the alleged marriage that took place between the defendant and the deceased in 2014 was not a marriage in the contemplation of the law because the deceased could not contract another marriage during the subsistence of his marriage with the plaintiff. She averred that she had her matrimonial home standing on the suit property and stated that although the law did not in the year 2009 when the land was registered in the deceased's name provide for the plaintiff's interest on the suit land, she still had an overriding interest in the suit land at common law, which was binding on any transferee. She cited the case of **Mugo Muiru Investments Ltd Vs EWB & 2 Others [2017] eKLR** and cited the following passage in aid of her claim:

“Even before the Land Registration Act Cap 300 came into force on 2nd May 2012, the equitable beneficial interest of a 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. It is immaterial that there was not at the time statutory provision expressly declaring it to be an 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.”

19. In the instant case however it is worth of note that the plaintiff claims no role in the acquisition of the suit property nor that she ever resided or is residing thereon and the issue of “*matrimonial home*”, which should not be confused with the term “*matrimonial property*”, does not arise. In the Land Act, “*matrimonial home*” is defined as “*any interest in land that is owned or leased by one or both spouses and occupied by the spouses as their family home.*” “*matrimonial property*” is defined in the same Act as “*any interest in land or lease that is acquired by a spouse or spouses during the subsistence of a marriage*”

20. The plaintiff goes further to state that the impugned transfer was registered in **2014** way after the enactment and the commencement date of the **Land Registration Act 2012** and the **Matrimonial Property Act 2013** and that those legislations are applicable to the purported transfer to the defendant. Further, she states that **Section 28(a)** of the **Land Registration Act 2012** which was repealed later on **21/9/2016** was in force as at the time of the transfer to the defendant and reiterates the definition of matrimonial property in **Section 2** of the **Land Act** as set out in the foregoing paragraph. She goes further to cite **Section 6** of the **Matrimonial Property Act 2013** as stating that matrimonial property includes the matrimonial home and any other immovable property jointly owned and acquired during the subsistence of the marriage; that **Section 7** of the **Matrimonial Property Act 2013** provides that the ownership of matrimonial property vests in the spouses according to the contribution of each spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. She refers to **section 2** of the **Matrimonial Property Act 2013** and states that it defines contribution to include non-monetary contribution. She finally states that **Section 12(1)** of the **Matrimonial property Act** to state that matrimonial property shall not during the existence of a monogamous marriage and without the consent of both spouses be alienated in any form whether by way of gift or otherwise. After analyzing the above provisions her conclusion which she hopes to persuade this court to adopt is that the suit land is matrimonial property jointly owned by her and the deceased within the meaning of **Section 2** of the **Land Registration Act** and **Section 2** of the **Matrimonial Property Act 2013** since the land was registered in the name of the deceased during the subsistence of the marriage; that her matrimonial home stood thereon and that she contributed through *inter alia*, child care; that she had an overriding interest under **Section 28 (a)** now repealed of the **LRA**; and that the transfer to the defendant violated **Section 12(1)** of the **Matrimonial Property Act 2013**.

21. The requirement of spousal consent was introduced by the **Land Act 2012** and the **Land Registration 2012**. The transfer of the suit land from the name of the deceased to the name of the defendant occurred in **2014**.

22. The finale of the plaintiff's submission is that she is not calling on the court to determine the extent of her contribution in the matrimonial property but the nature of the plaintiff's interest in the suit land and the effect of the transfer to the defendant without her consent.

23. The defendant on the other hand submitted that the suit land was transferred to her during the lifetime of Hillary; that the defendant never transferred the suit land to herself as the deceased executed all the transfers; that if consent was to be procured it should have been sought by the deceased and not the defendant and if lack thereof forms the basis of the plaintiff's claim then she ought to have sued the deceased in his lifetime; she cited **Nakuru ELC No. 443 of 2016, E.K.N. Vs A.S. & 2 Others** as follows:

“28. I have set out the whole of Section 12, to put it into context, but it will be seen that only Section 12 (1) is relevant, in determining the question whether a spouse must give consent for the sale of matrimonial property. However, the same only makes provision for a monogamous union, and in such instance, there needs to be consent of both spouses for matrimonial property to be alienated including an alienation by way of sale. I have not seen any explicit provision in the Matrimonial Property Act that relates to the sale of matrimonial property in a polygamous union. Probably this is a lacuna that Parliament needs to address so that the issue is clear and not left in doubt.

29. If we were dealing with a case of a monogamous union, then I would not have hesitated to hold as a starting point, that consent of the spouse was needed before the sale could be completed. But I am dealing with a case of a polygamous marriage and the provisions of Section 12 (1) cannot apply. The defendant also relied on the cases of Kericho ELC No. 56 Of 2013 RCC Vs RKC and reiterates the content of the defence that a previous suit filed by the plaintiff's children was withdrawn before this suit was filed."

24. She also cited the case of Kericho ELC Case No 56 of 2013 RCC vs RKC [2018] eKLR as follows:

"18. Considering that the suit property is matrimonial property as between the plaintiff and the defendant as well as the defendant's 4th wife, L, I do not see how the issue of fraud arises. In any event fraud must not only be pleaded and particulars thereof set out in the Plaintiff, it must also be proved to a standard higher than on a balance of probabilities."

25. The defendant's only defence is that the land was given to her as a "gift" by the deceased. The land was acquired by the deceased in the year 2009, five years before the date on which the defendant claims that a marriage occurred between. Upon her marriage to the deceased in 2013, the suit land was transferred to her in 2014.

26. The deceased had acquired it during the subsistence of the deceased's marriage to the plaintiff.

27. Section 12(1) of the Matrimonial Property Act provides as follows:

"(1) 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."

28. It is obvious from Section 12(1) set out above that the conferment of a gift of land from one spouse to a third party would require consent from the other spouse if suit land was matrimonial property.

29. Was the suit land "matrimonial property" within the contemplation of the law?

30. It is correct that the impugned transfer was registered in 2014 way after the enactment and the commencement date of the Land Registration Act 2012 and the Matrimonial Property Act 2013. It had also been acquired during the subsistence of their marriage between the plaintiff and the deceased.

31. The Matrimonial Property Act 2015 is described in its preamble as "*an Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes*"

32. Section 6 of the Matrimonial Property Act No. 49 of 2013 provides as follows:

(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.

(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

33. "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."

34. Section 14 (a) of the MPA 2013 provides as follows:

"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;

...

35. Section 2 of the Land Registration Act defines matrimonial property as follows:

36. In this case the plaintiff altruistically states that the suit land was held by the deceased in trust for their two children and I find that to be in order as they are children of their marriage.

37. However, the orders sought by the plaintiff would only be available to her if she establishes that she has standing, and that is by demonstrating that the suit property is matrimonial property within the contemplation of the law.
38. The plaintiff merely terms the suit property as “*matrimonial*” without any intimation as to how it was acquired.
39. The mere fact that the land was registered in the deceased’s name during the subsistence of their marriage *per se* does not render the house built thereon a matrimonial home.
40. The plaintiff has acknowledged that she does not live in the house on the suit land. Indeed the evidence available shows that she has never been on the suit land and the submission that the plaintiff had her matrimonial home on the suit land in **paragraph 13** of her submissions is misplaced. The suit land does not fall within the category of “*matrimonial home*” under **Section 6(1)** of the **MPA 2013** or **under section (2)** of the **Land Act 2012**.
41. To find out whether the suit land may fall under the category in **section 6(c)**, that is, “*any other immovable and movable property jointly owned and acquired during the subsistence of the marriage,*” a closer scrutiny of the pleadings facts in this case is needed as this provision implies that for it to be matrimonial, property has to be (a) jointly owned and acquired, and (b) during the subsistence of the marriage.
42. It is not denied that the plaintiff is the estranged wife of the deceased and the marriage between them has not been dissolved.
43. Proceeding further from that fact, it is clear that the suit property was registered in the name of the deceased in the year **2009** before the deceased “*married*” the defendant. However the land is not registered in the joint names of the plaintiff and the deceased and the plaintiff has not demonstrated that it was jointly acquired by her and the deceased; therefore, in this court’s view, the land does not fit in the category set out in **Section 6(c)** of the **MPA 2013**.
44. The plaintiff strongly urges that **section 28(a)** of the **LRA** (later repealed) was in force at the time the defendant was registered as proprietor and so there existed an overriding interest under the **LRA** in that that Act defined matrimonial property as “*any interest in land that is acquired by a spouse during the subsistence of a marriage*” and cites the case of **Mugo Muiru (supra)** to support the claim. In this court’s view parliament is deemed to have been aware of the existence of the law in **Section 28 (a)** of the **LRA 2012** while enacting **Section 6** of the **Matrimonial Property Act 2013** the latter Act which in any event is deemed the act specifically governing matrimonial property issues in contrast to the other Acts governing land matters generally. The quoted provisions of the said **LRA 2012** must be deemed to be subservient to the provisions of the **MPA 2013**. In any event counsel has pointed out that the said provision (**Section 28 LRA 2012**) was repealed in **2016**.
45. The plaintiff’s submissions also dwell on the issue of contribution, though at their end she submits that the court is not being called upon “*to determine the extent of the plaintiff’s contribution in the matrimonial property*” but rather “*the nature of the plaintiff’s interest in the suit land.*” Before this final submission was made, her position was that **Section 7** of the **Matrimonial Property Act 2013** vests ownership of matrimonial property in the spouses according to contribution of either spouse towards its contribution, and the property shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.
46. She sums up by citing **Section 12(1)** of the **MPA 2013** to the effect 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 and that therefore the transfer to the defendant without her consent was illegal. On her part, the defendant did not attempt to show that there was spousal consent for the transferee of the land to her as she maintained that such consent was not required. The defendant merely asserted that she was the deceased’s wife and that the land was a gift to her from the deceased.
47. The plaintiff’s status as the widow of the deceased is not in doubt. The issue of whether the deceased could contract another marriage or not with the defendant is not pivotal to the determination of the instant suit. What is vital is whether the suit land is matrimonial property or not, for as has been stated earlier, the law does not deem every property acquired during marriage as matrimonial property.
48. In this case there were pointers that the property was not matrimonial: the undisputed absence of the plaintiff during its acquisition; the inability of the plaintiff to justify the claim of contribution, and the registration of the suit land in the deceased’s sole name. Even the most mundane in terms of contribution, that is, the care and nurturing of the children by the plaintiff was not proved. This was not surprising because the court has perused **Kitale ELC No. 84 of 2017** and found that indeed it was filed in the names of the issues of the marriage between the plaintiff and the deceased and was withdrawn prior to the filing of this case. In the defence in that case the defendant stated that she had resided with the plaintiffs peacefully and supported them until the demise of their father, and that in the year **2014** when the suit property herein was registered in her name, they had already attained the age of majority. The defence also stated that the deceased had already given land to all his children including the children of his marriage with the plaintiff whom he gave **5 acres** and **8 acres** respectively. Though the suit was not tried on its merits, it is clear that it raised serious issues to be considered by the court, and one can observe that there is more than meets the eye in the plaintiff’s current claim.
49. It is not curious therefore that the plaintiff has not sought in her prayers that the land do vest in the children who are said to be of age at the moment. She has instead sought it to revert to the estate of the deceased.
50. Though failure to obtain spousal consent was one of the alleged elements of fraud which has been dismissed above the other grounds on which the plaintiff sought the title to revert to the name of the deceased were: transferring the suit land to herself and initiation of subdivision of the land with a view to a sale. The defendant’s evidence to encounter these allegations was that a house was constructed for her by the deceased on the suit land and subsequently they went to the Land Control Board where they signed all relevant forms to facilitate the transfer of the suit land to her.
51. The plaintiff needed adduce evidence to prove her assertions in default of which her claim would fail. The burden of proof therefore lay

on her shoulders to establish to the required standard that the suit property lies in the matrimonial category and that defendant was guilty of fraud. The provisions of **Section 108** and **109** of the **Evidence Act** are as follows:

“108. Incidence of burden

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.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

52. The plaintiff never availed evidence that the transaction was not taken to the Land Control Board, that the deceased did not voluntarily execute the land board applications and the requisite transfer forms or at all, or that the defendant forged the documents that were used in registration of the land in her name.

53. In this court’s view, there was nothing to bar the deceased from giving the land to the defendant as a gift as, between him and the plaintiff, it was not matrimonial property. I find the defendant’s explanation for the transfer to be plausible when she says:

“After the transfer that is when we built the house. I did not want to stay on land without a title since it was a polygamous home.”

54. In the case of **Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed T/A A. S. Mohammed Investments [2014] eKLR** it was stated by the Court Of Appeal as follows:

“Having independently reviewed the evidence we are satisfied that the learned judge properly believed the respondent and disbelieved the appellants. Her determination was not based merely on the impression, demeanor and credibility of the witnesses without consideration of the impressions against the entire evidence. There were other circumstances, noted above, which confirmed the unreliability of the appellants. As was stated in R. G. Patel Vs Lalji Makanji (Supra), while allegations of fraud must be strictly proved, the standard of proof may not be so heavy as to require proof beyond reasonable doubt; what is required is something more than a mere balance of probabilities. In Patel’s case, the findings of the trial judge that were decried by the Court of Appeal were based on mere impression of witnesses without testing the impressions against the adduced evidence. In our view, in the present case there was sufficient evidence on record to justify the conclusion arrived at by the learned trial judge.”

55. This Court Of Appeal holding coupled with the persuasive decision in **Kericho ELC Case No 56 of 2013 RCC vs RKC [2018] eKLR** demonstrate the herculean task the plaintiff faced in establishing, inter alia, fraud.

56. From the analysis of the evidence earlier set out in this judgment this court does not deem the evidence of the plaintiff as capable of establishing fraud or that the suit property is matrimonial. I would not agree with the plaintiff, without her giving particulars, that the defendant transferred the suit land to herself while evidence shows that the transaction happened during the deceased’s lifetime, and that there was a probability that the plaintiff being absent, the deceased considered the person taking care of him and his children as deserving of a gift.

57. The backbone of the plaintiff’s suit being that the suit land is matrimonial property and that the transfer to the defendant is illegal for want of consent from her, the finding that the suit land is not matrimonial property and the attendant implication that her consent was not required for the impugned transfer as well as lack of proof of fraud has drawn the plaintiff’s claim to its Waterloo and it must fail.

(b) Whether the title issued in the name of the defendant should be cancelled:

58. As I have found that the plaintiff has not proved any illegality in the transfer from the deceased to the defendant, the same should not be cancelled or the land title made to revert to the name of the deceased. The title must remain in the name of the defendant who is the true registered owner with all the legal rights thereto.

(c) What Orders should issue as to costs?

59. As all the parties appear to have had some ties to the deceased and for the purpose of enhancing amity among the parties and family members there shall be no orders as to costs of this suit.

CONCLUSION

60. The upshot of the foregoing is that the plaintiff has failed to establish her claim against the defendant on a balance of probabilities in the present suit. For that reason, I hereby dismiss the instant suit with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 8TH DAY OF JUNE, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.