



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 128 OF 2013**

**(FORMERLY HIGH COURT CIVIL CASE No. 353 OF 2012)**

**ELIZABETH MUTHONI KIRONGL.....PLAINTIFF**

**VERSUS**

**JOHN KARIUKI MAINA.....1<sup>ST</sup> DEFENDANT**

**DAVID NDERITU MUCHEMI.....2<sup>ND</sup> DEFENDANT**

**NAKURU DEPUTY LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Proceedings in this matter commenced through plaint filed on 14<sup>th</sup> September 2012. The plaintiff and the 1<sup>st</sup> defendant are husband and wife who have been blessed with children. The plaintiff averred that jointly with the 1<sup>st</sup> defendant, they purchased the parcel of land known as Bahati/Kabatini Block 1/11905 (the suit property), constructed a matrimonial home on it where they resided together with the children and agreed as a family that it be registered in the name of the 1<sup>st</sup> defendant. She further stated that she invested her money and resources in the suit property and that the 1<sup>st</sup> defendant left the matrimonial home on 15<sup>th</sup> February 2011. That he later appeared in the village on 5<sup>th</sup> April 2012 and said that the plaintiff should find an alternative residence since he had sold the suit property. A search at the land registry confirmed that the 2<sup>nd</sup> defendant became the registered owner of the suit property on 21<sup>st</sup> March 2012.

2. The plaintiff further averred that she and her children are beneficial owners of the suit property and that the defendants have no right to disinherit them. She therefore sought judgment against the defendants for:

*a) An order of permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from interfering with the plaintiff's quiet possession of the suit land.*

*b) A declaration that the registration of suit property (sic) by the 3<sup>rd</sup> defendant to the 2<sup>nd</sup> defendant is null and void and should be cancelled.*

*c) Deregistration of the 2<sup>nd</sup> defendant from title No. Bahati/Kabatini Block No.1/11905 and registration of the plaintiff and 1<sup>st</sup> defendant and rectification of the land's registrar, with the plaintiff and 1<sup>st</sup> defendant as joint owners (sic).*

*d) Costs of the suit.*

3. The 1<sup>st</sup> defendant filed defence and counterclaim in which he admitted that the plaintiff is his wife but added that they have been separated since the year 2009. He further admitted that the 2<sup>nd</sup> defendant is now the registered proprietor of the suit property and stated that the plaintiff is not entitled to the suit property since he bought it out of the proceeds of another plot which he had been given by his mother and that the plaintiff did not contribute anything towards acquisition of the suit property. He urged the court to dismiss the case.

4. On his part, the 2<sup>nd</sup> defendant filed defence and counterclaim in which he admitted being the registered proprietor of the suit property since 21<sup>st</sup> March 2012 and added that he bought it from one Hellen Waithira Kamau and not the 1<sup>st</sup> defendant. He prayed for dismissal of the plaintiff's suit and judgment against the plaintiff for vacant possession and eviction.

5. Although the Attorney General entered appearance for the 3<sup>rd</sup> and 4<sup>th</sup> defendants, he did not file any defence.

6. The plaintiff testified as PW1 and told the court that she got married to the 1<sup>st</sup> defendant in 1986 according to customary law. They initially resided at Ndundori for 7 years then moved to Gachura where they started a hotel business. In the year 2009 they bought a plot at Gachura being plot number Bahati/Kabatini Block 1/11905 using proceeds from the hotel business. The plot was sold to them by Helen Waithira and a sale agreement was signed by the 1<sup>st</sup> defendant. The purchase price was KShs 140, 000 which was paid in stages, leaving a balance of KShs 10, 000. She added that no transfer was effected since there was a balance outstanding and that they developed the plot and moved into it in December 2009. The family lived together until 2011 when a disagreement arose and the 1<sup>st</sup> defendant moved out, leaving a note dated 15<sup>th</sup> February 2011 (PExb 1) stating that he had gone on a long journey. She further stated that after two weeks, a group of people called Kinyukia Heshima Self Group went to the home to demand money which they said they had lent to the 1<sup>st</sup> defendant. The group produced to her a document signed by the 1<sup>st</sup> defendant and which showed that he had made payments leaving a balance of KShs 17,850. She added that she paid to them the amount and they gave her a letter dated 20<sup>th</sup> February 2012 (PExb 2) acknowledging the payment. After that, neighbours told her that they saw the 1<sup>st</sup> defendant with strangers in the compound while she was away at work and that they suspected that he was selling the plot. She reported to the area chief who summoned him but he refused to attend.

7. PW1 further testified that on 5<sup>th</sup> April 2012 the 1<sup>st</sup> defendant sent a neighbour known as Mama Maina to tell her that he had sold the plot and he was going to demolish the house since he had been given a 7 day notice. PW1 rushed to the suit accompanied by an assistant chief and four policemen. They found that the 1<sup>st</sup> defendant and some workmen had removed the roof of the house. They were arrested and the 1<sup>st</sup> defendant was charged with malicious damage to property in criminal case number 1304 of 2012 but she did not know the outcome of the case. She further testified that she conducted a search on the suit property on 3<sup>rd</sup> May 2012 (PExb 3) which showed that the property was now owned by David Nderitu Muchemi, the 2<sup>nd</sup> defendant. On 1<sup>st</sup> August 2012, her lawyers wrote a letter to the Land Registrar and to the 2<sup>nd</sup> defendant (PExb 4) but they did not respond. The lawyers also wrote another letter dated 1<sup>st</sup> August 2012 to the Attorney General (PExb 5) giving notice of intention to file suit. PW1 also obtained a letter dated 1<sup>st</sup> August 2012 from the chief of Kiamaina location stating that she was living on the plot with her family. She faulted the 2<sup>nd</sup> defendant for purchasing the suit property without talking to her or finding out whether the plot was occupied yet two houses were standing on it in which she resided with her children. She also faulted the Land Registrar and the Attorney General owing to what she termed an underhand transfer. She added that she has lived on the suit property with her children from 2009 to the date of her testimony. She produced photographs (PExb 6) which she stated depict the two houses on the suit property.

8. PW1 further produced a copy of a sale agreement dated 27<sup>th</sup> December 2008 (PExb 7) between Patrick Kamau Gichuru as vendor and John Kariuki Maina as purchaser. She added that Patrick Kamau Gichuru was the son of the owner of the land. The purchase price in the agreement was KShs 140, 000 out of which KShs 100, 000 was paid on the date of execution of the agreement. She further produced a copy of another sale agreement dated 26<sup>th</sup> February 2011 (PExb 8) between Patrick Kamau Gichuru as vendor and John Kariuki Maina as purchaser in respect of Bahati Kabatini Block 1/1011 (Ndefo). The said parcel was to be subdivided and the purchase price in the agreement was KShs 140, 000. The agreement was drafted by Ikua Mwangi & Co Advocates. Finally, PW1 produced a copy of a sale agreement dated 20<sup>th</sup> March 2012 (PExb 9) between John Kariuki Maina as vendor and David Nderitu Muchemi as purchaser. The plot being sold in the agreement was a portion excised from Bahati/Kabatini Block 1/1011 (Ndefo) and whose purchase price was KShs 300,000. The agreement was also drafted by Ikua Mwangi & Company.

9. Under cross examination and re-examination PW1 stated that she was running the hotel business with her children as at the date of her testimony and that she has nowhere else to reside besides the suit property since the 1<sup>st</sup> defendant had not bought any other plot for her or constructed for her elsewhere. She added that she did not have any document in court to show who paid for the plot since the 1<sup>st</sup> defendant was in -charge for everything to do with its acquisition or any document showing the income of the hotel business and how it was used to pay for the plot. She further stated that she was not present when the sale agreement was signed or prepared and that she did not remember the plot number of the suit property as at the time it was bought. That the 3<sup>rd</sup> and 4<sup>th</sup> defendants were at fault because when the suit property was sold they changed the title very fast within one day and that had it been delayed as usually happens she would have known what was going on. She also stated that Hellen Waithira Kamau was misled by the 1<sup>st</sup> and 2<sup>nd</sup> defendants into signing a transfer since she was an old woman and that she registered a restriction against the suit property after the 1<sup>st</sup> defendant left the family home.

10. PW1 further testified that the sale agreement dated 27<sup>th</sup> December 2008 (PExb 7) and the sale agreement dated 26<sup>th</sup> February 2011 (PExb 8) are in relation to one and the same plot being same subdivision being plot C which is the plot she is living on and whose new plot number after subdivision and issuance of title now reads Bahati/Kabatini Block 1/11905.

11. Next on the witness stand was Moses Njoroge Kungu, the Chief of Kiamaina Location who testified as PW2. He stated that the plaintiff and the 1<sup>st</sup> defendant are both known to him as residents of his location who constructed a matrimonial home on the suit property and lived on it until February 2011 when the 1<sup>st</sup> defendant departed and left the plaintiff and the children behind. He added that on 1<sup>st</sup> August 2012 his office wrote a letter (PExb 10) in regard to the suit property and addressed 'to whom it may concern'. He added that in February 2012, he received a complaint from the plaintiff that her house was being demolished and that he personally went to the site with police officers arrested the 1<sup>st</sup> defendant. At that time he was still an Assistant Chief. He added that his office received a letter dated 5<sup>th</sup> May 2012 from Ikua Mwangi & Company Advocates (PExb 11) which was written after the 1<sup>st</sup> defendant had been arrested for demolishing the plaintiff's house. The letter stated that there was a sale agreement. Under cross-examination and re-examination he stated that he wrote PExb 10 on the basis of what he was told by the plaintiff and that he did not take any steps to verify the plaintiff's allegation of ownership. Nevertheless, he reiterated that the suit property belonged to the family of the plaintiff and 1<sup>st</sup> defendant since he had known them and they had been in occupation of it. The plaintiff's case was then closed.

12. Defence case was opened with the 1<sup>st</sup> defendant testifying as DW1. He stated that the plaintiff was his wife from 1995 to 2006 when they parted ways and he left everything to her. He added that he vacated the matrimonial home at Heshima Trading Centre in Engashura where they had a hotel business and where they lived in a rented house. He further stated that he purchased a plot together with the plaintiff on 17<sup>th</sup>

December 2005 and constructed a house on it. The plot was at Kaburini in Engashura. He stated that the plaintiff and the children were living on the plot and that when he departed, he left the plot, the house, the business and household items to the plaintiff. He further testified that the plot at Kaburini still exists and is not the same as the suit property in this case and that the house which was on it was demolished by the plaintiff with the assistance of the area chief, with a view to claiming in this case that she has no other plot. He further stated that on 27<sup>th</sup> December 2008 I entered into the sale agreement which the plaintiff had produced as PExb 7 with Patrick Kamau Gichuru in regard to parcel of land known as Bahati Kabatini Block 1/1011 (Ndefo). He later discovered that Patrick was not the owner of the plot and the transaction did not therefore proceed. Patrick refunded the entire purchase price. Prior to the refund, DW1 tried selling the plot to David Nderitu Muchemi (the 2<sup>nd</sup> defendant) through the agreement dated 20<sup>th</sup> March 2012 which the plaintiff had produced as PExb 9 but the 2<sup>nd</sup> defendant insisted that he could only proceed if there was title. That is when DW1 discovered that Patrick did not have a title and the agreement dated 20<sup>th</sup> March 2012 was not therefore completed. He added that they resolved the matter and that there is no outstanding claim between him and the 2<sup>nd</sup> defendant.

13. DW1 further stated that the money which he used as purchase price was from proceeds of another plot which he got from his mother and that the plaintiff did not contribute even a single cent towards purchase of plot No. 1011 and that the money for its purchase did not come from the hotel business. He added that instead, the plaintiff and he used proceeds of the hotel business to buy a different plot. He further stated that he does not know plot number Bahati/Kabatini Block 1/11905, the suit property in this case and that what he knows is plot 1011. He stated that he has never owned plot number Bahati/Kabatini Block 1/11905 or even sold it to the 2<sup>nd</sup> defendant or constructed on it and that his family has never owned it. He stated that he left his family at their plot in Kaburini and that he did not know where the plaintiff was living as at the date of his testimony.

14. Under cross-examination he stated that the Kaburini plot does not have a title and that its registered owner remains David Githinji. He added that as at 27<sup>th</sup> December 2008 which is the date of PExb 7, the plaintiff and he were living separately. He further stated that sometime after March 2012, he discovered that the vendor Patrick Kamau Gichuru had no plot to sell and as result they cancelled all previous agreements and the vendor refunded him in cash. He stated that he did not have any documentation evidence of the refund and also confirmed that he was arrested me on allegation that he demolished a house. He added that it was his own house which he had built on plot number 1011 using his own resources in the year 2009. According to him, no one was living in the house when he demolished it. The first defendant's case was closed at that point.

15. Next to testify was David Nderitu Muchemi, the second defendant who testified as DW2. He stated that sometime around 1<sup>st</sup> January 2012, he learnt that plot No. Bahati Kabatini Block 1/11905 was on sale. He did a search which showed that the owner was Hellen Waithira Kamau. After viewing the plot he entered into a sale agreement dated 17<sup>th</sup> January 2012 (DExb 1) with Hellen Waithira Kamau and paid the purchase price. Transfer was effected in his favour on 21<sup>st</sup> March 2012. He produced a certificate of search dated 26<sup>th</sup> October 2012 (DExb 2) to support his claim of ownership. He added that there was a temporary house on the plot which he was to demolish. On 28<sup>th</sup> June 2012 we received a letter (DExb 3) from Land Registrar Nakuru summoning him and the vendor. He stated that although he and the vendor attended, the plaintiff did not show up thus leading to the registrar issuing another letter dated 17<sup>th</sup> July 2012 (DExb 4) but the plaintiff did not show up again. He then wrote a letter dated 17<sup>th</sup> July 2012 (DExb 5) to the registrar asking him to remove the restriction. Yet again, the registrar wrote another letter to the plaintiff on 17<sup>th</sup> September 2012 (DExb 6) and informed the plaintiff that the restriction would be removed and it was indeed ultimately removed. DW2 also produced a certified copy of green card (DExb 7) for plot number Bahati Kabatini Block 1/11905 the plot. He stated that it does not show plaintiff's or 1<sup>st</sup> defendant's name and that it shows that the plot he bought was a subdivision of Bahati Kabatini Block 1/10117. He acknowledged that he was buying plot No. 1011 from the 1<sup>st</sup> defendant through PExb 9 but added that since the 1<sup>st</sup> defendant did not have any documents for the property, the transaction was cancelled and the 1<sup>st</sup> defendant refunded the purchase price. He further stated that when he purchased plot 11905, he went to the ground and found an unoccupied house which he agreed with the vendor that it was to be demolished.

16. Under cross-examination by counsel for the 1<sup>st</sup> defendant, DW2 stated that he bought plot 11905 from Hellen Waithira Kamau and that it is not the same as plot No. 1011 which he bought from the 1<sup>st</sup> defendant. He added that the 1<sup>st</sup> defendant refunded his money and he has no claim against him.

17. In response to questions by counsel for the plaintiff DW2 stated that the agreement between him and Hellen Waithira came before the one of the 1<sup>st</sup> defendant and that since he was interested in buying a second plot, he entered into the agreement with the 1<sup>st</sup> defendant in respect of plot No. 1011. That he inspected plot 1011 and found a mud house on it. That when he entered into the agreement with Hellen Waithira, he also inspected the plot and found the same mud house on it. He further stated that the mud house is the same one that is depicted in plaintiff's PExb 6 but that the plot that he was shown by the 1<sup>st</sup> defendant and the one he was shown by Hellen Waithira is not same. He added that there was still some construction going on in the plot as at the date of his testimony and that he has never obtained any injunction to stop the construction. The 2<sup>nd</sup> defendant's case was closed at that point.

18. Thereafter, by consent of parties, a copy of application for consent (DExb 8), a copy of transfer dated 21<sup>st</sup> March 2012 (DExb 9) and a copy of letter of consent dated 9<sup>th</sup> February 2012 (DExb 10) all of which were filed by the 3<sup>rd</sup> and 4<sup>th</sup> defendants were produced as exhibits. Parties also filed and exchanged submissions, save for the 1<sup>st</sup> defendant and the 3<sup>rd</sup> and 4<sup>th</sup> defendants who did not file any.

19. For the plaintiff, it was argued that the suit property was acquired during subsistence of the marriage between the plaintiff and the 1<sup>st</sup> defendant and that it is therefore matrimonial property. Further, citing **Section 12 (1) (a)** of the **Matrimonial Property Act**, it was argued that the sale of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant without consent of the plaintiff was illegal thus rendering the transaction null and void. To buttress that argument, reliance was placed on the case of **M W K v S K K & 5 others [2018] eKLR**.

20. Counsel for the 2<sup>nd</sup> defendant submitted that the property described in the agreements as Plot C Bahati/Kabatini Block 1/1011 (Ndefo) is not the same one as Bahati/Kabatini Block 1/11905 since the green card states that Bahati/Kabatini Block 1/11905 is a subdivision of plot number 10117. Consequently, the 2<sup>nd</sup> defendant argued that Bahati/Kabatini Block 1/11905 is not the matrimonial property of the plaintiff

and the 1<sup>st</sup> defendant. It was further argued that the 2<sup>nd</sup> defendant's rights as a registered proprietor are protected by **sections 25 and 26** of the **Land Registration Act**. Further, citing **section 80** of the **Land Registration Act** and the case of **Joseph Gitari v Muthui Chomba & 7 others [2018] eKLR**, it was argued that it has not been pleaded or even shown that the 2<sup>nd</sup> defendant's registration was tainted by any fraud or mistake.

21. I have carefully considered the pleadings, the evidence and the submissions. Only three issues emerge for determination: firstly, whether the property referred to in the agreement dated 27<sup>th</sup> December 2008 is the same one as the parcel of land known as Bahati/Kabatini Block 1/11905; secondly, whether Bahati/Kabatini Block 1/11905 is matrimonial property and lastly, whether the plaintiff and the 2<sup>nd</sup> defendant are entitled to the reliefs they have sought in the plaint and in the counterclaim.

22. There is no dispute that the plaintiff and the 1<sup>st</sup> defendant are husband and wife who have been blessed with children. It is further not disputed that the couple no longer live together. The plaintiff asserts that the 1<sup>st</sup> defendant deserted the matrimonial home on 15<sup>th</sup> February 2011 while the 1<sup>st</sup> defendant himself puts the date of departure much earlier: 2009. Similarly, there is no dispute that the plaintiff and the 1<sup>st</sup> defendant jointly operated a restaurant business while they lived together as husband and wife.

23. The plaintiff's contention that they acquired a plot with the 1<sup>st</sup> defendant in the year 2009 is consistent with the details in the rather faint copy of the sale agreement dated 27<sup>th</sup> December 2008 between Patrick Kamau Gichuru as vendor and the 1<sup>st</sup> defendant as purchaser. The property sold through that agreement is stated to be Plot C Bahati/Kabatini Block 1/1011 (Ndefo) and the purchase price is KShs 140,000. The 1<sup>st</sup> defendant confirmed in his testimony that he entered into the said agreement. According to the plaintiff, Patrick Kamau Gichuru was the son of Hellen Waithira Kamau, the owner of the land. Hellen's interest in the property is confirmed by the green card which the 2<sup>nd</sup> defendant produced. It is important to note that 1<sup>st</sup> defendant did not dispute the plaintiff's contention that Patrick Kamau Gichuru was the son of Hellen Waithira Kamau. If anything, the terms of the handwritten agreement dated 27<sup>th</sup> December 2008 were reduced into a more formal agreement whose date was initially indicated in typed form as 26<sup>th</sup> February 2009 but later changed by hand to the same day and month but in the year 2011. The 1<sup>st</sup> defendant not only acknowledged the existence of this second agreement but also admitted in his testimony that he attempted to sell the same property to the 2<sup>nd</sup> defendant through an agreement dated 20<sup>th</sup> March 2012. Thus, both the 2<sup>nd</sup> and 1<sup>st</sup> defendants were very clear in their testimonies that the property referred to in the agreement dated 27<sup>th</sup> December 2008 is the same one referred to in the agreement dated 20<sup>th</sup> March 2012. Since the 2<sup>nd</sup> defendant maintains that he ultimately bought the same property from Hellen Waithira Kamau through an agreement dated 12<sup>th</sup> January 2012, it is apparent that the parcel that was initially referred to by the parties as Plot C Bahati/Kabatini Block 1/1011 (Ndefo) is what after registration of subdivisions became known as Bahati/Kabatini Block 1/11905. Further, as will be clear later in this judgment, the plaintiff is in occupation of Bahati/Kabatini Block 1/11905 together with her children and was in such occupation long before the 2<sup>nd</sup> defendant started laying claim to the said property. That resolves issue number one.

24. The next issue for determination is whether Bahati/Kabatini Block 1/11905 is matrimonial property.

25. The 1<sup>st</sup> defendant stated at paragraph 3 of his statement of defence that he separated from the plaintiff since the year 2009, a date which is after the sale agreement dated 27<sup>th</sup> December 2008. That alone would mean that the agreement to purchase Plot C Bahati/Kabatini Block 1/1011 (Ndefo) which after registration of subdivisions became known as Bahati/Kabatini Block 1/11905 was entered into during the marriage and while the 1<sup>st</sup> defendant and plaintiff resided together. Although separated, the 1<sup>st</sup> defendant and the plaintiff remain married. If we go by the plaintiff's version of events which is that the 1<sup>st</sup> defendant left the matrimonial home on 15<sup>th</sup> February 2011 then the purchase of the property took place much earlier before the separation.

26. There is no dispute that the plaintiff is in occupation of Bahati/Kabatini Block 1/11905, the suit property. She resides therein with her children. The fact that the 2<sup>nd</sup> defendant is seeking judgment against her for vacant possession and eviction from the property is confirmation that she is indeed in occupation. It is not clear when she moved into the property. According to her, the 1<sup>st</sup> defendant and her constructed a matrimonial home on the plot and moved into it after they bought it. She was in occupation as at 15<sup>th</sup> February 2011 when the 1<sup>st</sup> defendant departed. His said date of departure is well documented in a note that the 1<sup>st</sup> defendant himself wrote. I am persuaded that the suit property was the matrimonial home of the plaintiff and the 1<sup>st</sup> defendant. "Matrimonial home" is defined at **Section 2** of the **Land Registration Act, 2012** to mean "**any interest in land that is owned or leased by one or both spouses and occupied by the spouses as their family home**"

27. Neither the 2<sup>nd</sup> defendant nor the 1<sup>st</sup> defendant have offered any contrary explanation as to how and when the plaintiff moved into the property. There is no evidence that Hellen Waithira Kamau or even her son Patrick Kamau Gichuru ever protested about her presence on the property or even tried to remove her. Even the 2<sup>nd</sup> defendant who now claims the suit property never made any effort to remove her until the plaintiff herself filed this suit. It seems to me that the agreements dated 27<sup>th</sup> December 2008 and 26<sup>th</sup> February 2011 were entered into by Patrick Kamau Gichuru with the knowledge of her mother. It also seems to me that the 2<sup>nd</sup> defendant has not been forthright about his involvement in the whole dispute as well as his knowledge of the plaintiff's interest in the suit property. For example, he claims that he initially attempted to buy the suit property from the 1<sup>st</sup> defendant through agreement dated 20<sup>th</sup> March 2012 then he changed his mind and decided to buy it directly from Hellen Waithira Kamau on realising that the 1<sup>st</sup> defendant didn't have a title. That doesn't make sense since the agreement between the 2<sup>nd</sup> defendant and Hellen Waithira Kamau is in fact dated 17<sup>th</sup> January 2012, much earlier than the one he entered into with the 1<sup>st</sup> defendant. The dates simply do not add up. I am persuaded that the agreement dated 17<sup>th</sup> January 2012 is an afterthought which was fabricated to defeat the plaintiff's claim. I am persuaded that the 1<sup>st</sup> defendant and the plaintiff acquired the suit property as their matrimonial home from Hellen Waithira Kamau through her son Patrick Kamau Gichuru pursuant to the agreements dated 27<sup>th</sup> December 2008 and 26<sup>th</sup> February 2011. The 1<sup>st</sup> defendant later purported to sell the suit property to the 2<sup>nd</sup> defendant through agreement dated 20<sup>th</sup> March 2012. Clearly, the 1<sup>st</sup> and 2<sup>nd</sup> defendants willingly dealt with each other behind the plaintiff's back and scrambled all sorts of documents and explanations to justify their actions. I further note that the plaintiff's claims as to the suit property being a matrimonial home were corroborated by PW2 who was the area chief.

28. **Section 93** of the **Land Registration Act, 2012** provides:

***Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.***

29. Thus for property to be deemed matrimonial property, it is enough that one of the spouse obtained an interest in it during the subsistence of the marriage for the co-ownership and use of both spouses. As we have already noted, the suit property herein was used by both spouses as family residence. Under **Section 6 (1) (a)** of the **Matrimonial Property Act**, matrimonial property includes the matrimonial home. I am therefore persuaded and I hereby find that Bahati/Kabatini Block 1/11905 was and remains matrimonial property of the plaintiff and the 1<sup>st</sup> defendant.

30. The last issue for determination is whether the plaintiff and the 2<sup>nd</sup> defendant are entitled to the reliefs they have sought in the plaint and in the counterclaim.

31. Although the 2<sup>nd</sup> defendant has argued that he is the registered proprietor of the suit property and that his rights are protected by **sections 25 and 26** of the **Land Registration Act**, it must be remembered that such protection only extends to lawfully acquired property. **Article 40 (6)** of the **Constitution** is emphatic that protection of right to property does not extend to any property found to have been unlawfully acquired. Pursuant to **section 28** of the Act, the rights of the registered proprietor are subject to overriding interests as trusts and other rights provided under any written law. The 2<sup>nd</sup> defendant conceded in his submissions that the plaintiff would have an interest in the suit property if she successfully shows her husband's (1<sup>st</sup> defendant's) proprietary interest in the property. Both the plaintiff's and the 1<sup>st</sup> defendant's proprietary interest in the property have previously been demonstrated in this judgment. Even if one were to look at the matter from the perspective of the **Registered Land Act** (repealed), **section 30 (g)** of the said Act subjected the rights of the registered proprietor to the overriding interest of:

***the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.***

32. The plaintiff was in possession and actual occupation of the suit property when the 2<sup>nd</sup> defendant purported to acquire it. The 2<sup>nd</sup> defendant acknowledged in his testimony that the house whose photograph the plaintiff produced is the same one he saw when he went to inspect the plot. Further confirmation that the plaintiff was in occupation is seen from the fact that the 1<sup>st</sup> defendant was arrested for attempting to demolish the said house.

33. Regarding the 2<sup>nd</sup> defendant's argument that it has not been pleaded or even shown that his registration as proprietor was tainted by any fraud or mistake, suffice it to state that it is enough to show, as the plaintiff has done, that the 2<sup>nd</sup> defendant's title has been acquired illegally and unprocedurally. Fraud or mistake are other factors that can invalidate title but they are not the only factors.

34. To validly alienate matrimonial property during the subsistence of a marriage, consent of the other spouse must be obtained. **Section 12** of the **Matrimonial Property Act** provides in part:

***12. Special provisions relating to matrimonial property***

***(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.***

***(2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.***

***(3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.*** [Emphasis supplied]

35. In this case, the 1<sup>st</sup> defendant did not seek or even obtain the consent of the plaintiff prior to purporting to sell the suit property to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant himself has not shown that any such consent was obtained.

36. In view of the foregoing, I am persuaded that the 2<sup>nd</sup> defendant's title to Bahati/Kabatini Block 1/11905 is invalid since it was acquired in total disregard of the plaintiff's rights both as a spouse and as a person in possession and actual occupation together with her children. That being the case, the 2<sup>nd</sup> defendant is not entitled to the reliefs he has sought in the counterclaim. I am further persuaded that the plaintiff has established her case and is therefore entitled to the reliefs she sought.

37. One may ask: what then becomes of the 2<sup>nd</sup> defendant's investment, if any, in the suit property? The court can only determine such cases as are pleaded. The 2<sup>nd</sup> defendant focused exclusively on fending off the plaintiff's claim and did not make any claim against the 1<sup>st</sup> defendant. This I believe is due in part to the fact that the 1<sup>st</sup> and 2<sup>nd</sup> defendant were in cahoots against the plaintiff. He will have to seek legal advice on how next to proceed.

38. I therefore make the following orders:

**i. The 2<sup>nd</sup> defendant's counterclaim is dismissed with costs to the plaintiff.**

**ii. A permanent injunction is granted restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from interfering with the plaintiff's quiet possession of the parcel of land known as Bahati/Kabatini Block 1/11905.**

**iii. The registration of the 2<sup>nd</sup> defendant as proprietor of the parcel of land known as Bahati/Kabatini Block 1/11905 is hereby cancelled.**

**iv. The Land Registrar Nakuru is hereby ordered to issue a title deed for the parcel of land known as Bahati/Kabatini Block 1/11905 in the joint names of the plaintiff and the 1<sup>st</sup> defendant.**

**v. Costs of the suit are awarded to the plaintiff and shall be paid jointly and severally by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.**

39. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17<sup>th</sup> April, 2020).

**Dated, signed and delivered at Nakuru this 30<sup>th</sup> day of April 2020.**

**D. O. OHUNGO**

**JUDGE**