



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1239 OF 2016

JANE MUTHONI MWANGI.....PLAINTIFF

=VERSUS=

ITRADE COMPANY LIMITED.....DEFENDANT

JUDGMENT

At all material times, all that parcel of land known as Ruiru East Block I/1490 (hereinafter referred to as “the suit property”) was registered in the name of one, David Mwangi Kibunja, deceased (hereinafter referred to only as “the deceased”). The plaintiff brought this suit against the defendant on 11th October, 2016. The Plaintiff amended the plaint on 20th February, 2018. The plaintiff averred that the deceased was her husband and that they had their matrimonial home on the suit property. The plaintiff averred that she had put considerable effort in improving the said matrimonial home.

The plaintiff averred that in 2011, she learnt that the deceased was planning to sell the suit property and in an attempt to stop that move, she registered a caution against the title of the suit property. The plaintiff averred that without her knowledge or consent, the deceased in collusion with the defendant unlawfully removed the said caution and transferred the suit property to the defendant in 2012. The plaintiff averred that the sale and transfer of the suit property by the deceased to the defendant was illegal, null and void for want of spousal consent.

The plaintiff averred that the defendant evicted her from the suit property which forced her to rent a house to stay. The plaintiff averred that the defendant proceeded to subdivide the suit property into several portions in respect of which portions it had obtained titles. The plaintiff averred that she filed a matrimonial cause against the deceased at the Family Division of the High Court in Nairobi namely, Nairobi HCCC No. 2 of 2012 in which the suit property was in issue and that the said matrimonial cause collapsed after the death of the deceased.

The plaintiff sought a permanent injunction restraining the defendant from transferring, charging, leasing, trespassing on, constructing on or in any way alienating or interfering with the title of the suit property and the subdivisions thereof. The plaintiff also sought an order for the cancellation of the title held by the defendant in respect of the suit property and the subsequent subdivisions thereof and the rectification of the register of the suit property so as to revert the proprietorship of the property to the deceased.

In its defence filed on 7th February, 2018, the defendant averred that the plaintiff’s suit was incompetent and should be struck out on the ground that no valid summons had been issued as required under Order 5 rules 1, 2 and 3 of the Civil Procedure Rules. The defendant averred further that the issue of spousal consent that had been raised by the plaintiff as the basis of her claim was *res judicata* since the same had been raised and determined in ELC Misc. Case No. 225 of 2014 between the parties. The defendant averred further that the plaintiff’s suit was incompetent because L.R No. Ruiru East Block I/1490 (“the suit property”) which was the subject of the plaintiff’s claim was nonexistent. The defendant averred further that the suit was incompetent for the plaintiff’s failure to join the estate of the deceased to the suit.

As concerns the merit of the claim, the defendant averred that it purchased the suit property from the deceased at a consideration of Kshs. 12,500,000/= which it paid in full. The defendant averred that before purchasing the suit property it conducted a search that revealed that the deceased was the absolute proprietor of the suit property and that the property had no encumbrance. The defendant averred that the search that it carried out on 5th December, 2012 did not reveal the existence of a caution that the plaintiff allegedly registered against the title of the suit property.

The defendant averred that during the completion of the agreement for sale between it and the deceased, the deceased furnished it with all the requisite documents including spousal consent. The defendant denied that it evicted the plaintiff from the suit property. The defendant averred that it was put in possession of the suit property by the deceased and that the property was vacant. The defendant denied that the plaintiff was a legal spouse of the deceased. The defendant averred that it had subdivided the suit property into several portions which it subsequently amalgamated into one parcel and subdivided again. The defendant averred that it had obtained titles for the new subdivisions on which it was constructing maisonettes for sale. The defendant averred that the plaintiff’s suit had been overtaken by events. The defendant averred that it had acquired a good title to the suit property for valuable consideration that should be protected by the court.

The suit was fixed for hearing on 16th December, 2019 by the court in the presence of the advocates for both parties. When the matter came up for hearing on 16th December, 2019, the defendant and its advocates did not turn up in court. In the absence of any reason to adjourn the matter, the court allowed the plaintiff to proceed with the hearing. The plaintiff gave evidence and closed her case. In her evidence, the plaintiff adopted her witness statement that was filed together with the plaint as her evidence in chief and produced as a bundle the documents attached to her list of documents filed in court on 11th October, 2016 as an exhibit.

The plaintiff told the court that she carried out a search on the suit property and discovered that the property was registered in the name of the defendant. She stated that the property was at all material times registered in the name of the deceased who was her husband. She stated that the deceased died in 2016. She told the court that she was not consulted before the suit property was sold to the defendant and that she did not consent to the transaction. She stated that she had a house on the suit property and that the deceased had evicted her therefrom. She stated further that she had registered a caution against the title of the suit property and that she did not know how the caution was removed to pave way for the transfer of the property to the defendant. The plaintiff urged the court to grant the reliefs sought in the plaint.

In examination by the court, she stated that she got married to the deceased in 1989 under Kikuyu customary law and that she stayed on the suit property together with the deceased as a husband and wife until 2010. She stated that their marriage was blessed with three (3) children. She stated further that her disagreement with the deceased arose in 2010 when she learnt that the deceased wanted to sell the suit property. She stated that she was against the intended sale of the suit property. She stated that when the deceased started the process of selling the suit property, he had started an illicit affair with a lady by the name Beatrice Wanjiru Wangui. She told the court that she vacated the suit property when the said Beatrice Wanjiru Wangui threatened her life. She stated that, that was the time when she moved to a rented house in Githurai. The plaintiff stated that Beatrice Wanjiru Wangui was not the deceased's wife and that it was her (the plaintiff) who buried the deceased upon his death in Muranga. After the close of her testimony, the plaintiff's advocate told the court that the plaintiff wished to rely entirely on the evidence on record and did not wish to make closing submissions.

From the pleadings, I am of the view that the following are the issues that arise for determination in this suit;

1. Whether the plaintiff's suit is competent.
2. Whether the consent of the plaintiff was required before the suit property was sold and transferred to the defendant by the deceased and if so, whether the consent was obtained.
3. Whether the plaintiff is entitled to the reliefs sought in the amended plaint.
4. Who is liable for the costs of the suit?

Whether the plaintiff's suit is competent:

The defendant attacked the competency of the plaintiff's suit on three (3) grounds. First, the defendant contended that the summons to enter appearance was not taken out as provided for in Order 5 of the Civil Procedure Rules. Secondly, the defendant contended that the suit was *res judicata* since the issue of spousal consent on which the suit was based had been raised in an earlier suit between the parties and conclusively determined. Finally, the defendant contended that failure by the plaintiff to join the estate of her deceased husband in the suit was fatal to the suit.

On the issue of summons, I am in agreement with the defendant that the summons was taken out by the plaintiff outside the time provided under Order 5 of the Civil Procedure Rules. Whereas the suit was filed on 11th October, 2016, it was not until 21st September, 2017 that the summons was taken out and served upon the defendant. I have perused the court file and noted that the delay in the taking out of summons was caused by the misplacement of the court file soon after the suit was filed. There are letters on record from the plaintiff's advocates complaining about the loss of the court file and their inability to take out court summons. I have noted that after the defendant was served with summons, it entered appearance under protest and thereafter filed a defence. While I agree that the summons was irregularly taken out, I am of the view that no prejudice was suffered by the defendant as a result of the irregularity. This issue of summons is a procedural technicality in my view which cannot defeat a suit. Pursuant to the provisions of Article 159 (2) (d) of the constitution, I will overlook the irregularity for the sake of substantive justice.

On the issue of *res judicata*, no material was placed before the court to support the plea. The defendant did not place before the court the pleadings that were filed in ELC Misc. Case No. 225 of 2014 to enable the court to appreciate the issues that were raised in that case. From the ruling that was made in that case that was produced in evidence by the plaintiff, I have noted that ELC Misc. Case No. 225 of 2014 was an application by the defendant for the removal of a caveat that had been registered by the Land Registrar against the title of the suit property at the instance of the plaintiff after the defendant had acquired the property. In the ruling, the court held that the Land Registrar erred in registering a caveat against the title of the suit property without notice to the defendant and made an order lifting the caveat. The issue as to whether spousal consent was required before the deceased sold the suit property to the defendant was not before the court and the court did not make any determination on the same. I therefore find no merit on the defendant's objection to the suit on the ground of *res judicata*.

On the issue of non-joinder of the estate of the deceased, Order 1 rule 9 of the Civil Procedure Rules provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties. The court is enjoined under that order to deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. For the foregoing reasons, the objection raised by the defendant regarding the competency of the suit herein based on non-joinder of the estate of the deceased to the suit is also overruled.

The upshot of the foregoing is that the plaintiff's suit is competent and properly before the court.

Whether the consent of the plaintiff was required before the suit property was sold and transferred to the defendant.

Prior to the amendment of the Land Registration Act, 2012 through the Land Laws Amendment Act, 2016, which among others deleted sections 28(a) and section 93 of that Act, the two provisions which were in force when the defendant acquired the suit property from the deceased on 27th December, 2012 provided as follows:

28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a) spousal rights over matrimonial property;

93. (1) Subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or, all the spouses—

(a) there shall be a presumption that the spouses shall hold the land as joint tenants unless—

(i) a provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in, his or her own name only, or that the spouses are taking the land as joint tenants; or

(ii) the presumption is rebutted in the manner stated in this subsection; and

(b) the Registrar shall register the spouses as joint tenants.

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

(3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house—

(a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or

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

(4) If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3)(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.

I am satisfied from the evidence on record that the plaintiff was the deceased's wife. The plaintiff produced a statutory declaration that was signed by the deceased in which he stated that he married the plaintiff under Kikuyu Customary Law. The plaintiff also produced evidence showing that she had children with the deceased. The plaintiff's evidence that they lived together with the deceased as husband and wife on the suit property until 2010 when they differed over the sale of the suit property was also not controverted. In his affidavit sworn on 19th January, 2018, in opposition to the plaintiff's application for interlocutory injunction, the defendant's managing director Samuel Gachomba Njenga annexed as exhibit "SGN1" a statutory declaration dated 24th May, 2011 by the deceased and Beatrice Wanjiru Wangui. In paragraph 3 of that statutory declaration, the deceased stated that his marriage to Beatrice Wanjiru Wangui was his second marriage. This meant that the deceased had a first wife. In the absence of evidence that the deceased divorced the plaintiff, the plaintiff remained his wife. As deceased's wife, the provisions of sections 28 and 93 of the Land Registration Act, 2012 reproduced above required that her consent be obtained before the suit property that was a matrimonial property was sold and transferred to the defendant. Section 28(a) of the Land Registration Act, 2012 provided that spousal rights over matrimonial property were among the overriding interests that encumbered registered land although not registered in the register. Section 93(3) of the Act on the other hand provided that where a matrimonial property was registered in the name of one spouse, a purchaser acquiring the property from that spouse was required to make inquiry whether the other spouse/s who was/were not registered as owner/s had consented to the transaction. There is no doubt from the material on record that both the deceased and the defendant were aware that the suit property was a matrimonial property and that spousal consent was required for its disposal.

The material before the court shows that the only consent that the deceased gave to the defendant was that of Beatrice Wanjiru Wangui. With information that the deceased had another wife, the defendant was under a duty as part of its due diligence to inquire of the deceased as to what became of his first wife. There is no evidence that such inquiry was made. The defendant was satisfied with the consent of Beatrice Wanjiru Wangui who was just one of the wives of the deceased assuming that she was one. Section 93(3) of the Land Registration Act, 2012 provided that where there was more than one spouse, the consent of all the spouses had to be obtained. It follows therefore that the consent that was obtained by the deceased fell short of the statutory requirement.

Whether the plaintiff is entitled to the reliefs sought in the amended plaint:

I have held that the consent of the plaintiff was required for the sale and transfer of the suit property to the defendant and that the same was not given. The law provides that in the absence of such consent, the transfer becomes null and void at the instance of the spouse whose consent was not obtained. See, section 93(4) of the Land Registration Act, 2012. I therefore find that the sale and transfer of the suit property by the deceased to the defendant was null and void. With that finding, the plaintiff would be entitled to all the reliefs sought in the amended

plaint. However, from the material before me, I have noted that the suit property has been put beyond the reach of the plaintiff by the defendant. The suit property is no longer in existence. From the material placed before the court by the defendant, in order to put the suit property beyond the reach of the plaintiff, the defendant first subdivided the suit property into twelve (12) portions (Ruiru/Ruiru East Block 1/5020-5031) in 2015 thereby closing the register for the suit property, Ruiru/Ruiru East Block 1/1490. In the same year, the defendant amalgamated the twelve (12) parcels of land again into one parcel, Ruiru/Ruiru East Block 1/5758. The defendant's next move was to subdivide this amalgamated plot again in 2017 while this suit was pending into sixteen (16) new plots, Ruiru/Ruiru East Block 1/6257 – 6272. According to the defendant, it has developed these new plots and sold the same third parties. I am of the view that granting the reliefs sought by the plaintiff would interfere with vested interests of third parties who are not parties to this suit. I do not think however that the plaintiff is not entitled to any relief having established that a matrimonial property in which she had an interest was sold without her consent.

In my view, it would be a height of injustice for this court to tell the plaintiff “we are sorry, although you came to court on time, the defendant outsmarted you and the court and managed to put the suit property out of your reach, we cannot help.” I am of the view that this is one of those cases in which the court should go out of its way to do the best it can for justice to be seen to be done. From my findings above, the plaintiff is entitled to the cancellation of the title for the suit property that was held by the defendant and all subsequent titles that emanated from the suit property following the subdivisions and amalgamations I have mentioned above. This would revert the suit property to the name of the deceased from whose estate the plaintiff would be entitled to a share of the property.

The property as I have stated above is now beyond the reach of the plaintiff but it had a value that is ascertainable. From the material before the court, the defendant purchased the suit property at Kshs. 12,500,000/= from the deceased. I would take this as the market value of the property as at 27th December, 2012 when it was transferred to the defendant. Being a matrimonial property that was acquired by the deceased during his marriage to the defendant and in respect of which the defendant testified that she had spent enormous resources developing, she had acquired an interest in the same.

Doing the best that I can for the plaintiff, I would award her a sum of Kshs. 3,125,000/= being 25% of the value of the suit property as at the time it was illegally sold to the defendant. The alternative would be to nullify the sale, the initial subdivision, the amalgamation that followed, the subsequent subdivision and sale of resultant plots to third parties. I have taken a route that I think is less disruptive but fair for the purposes of bringing a closure to the dispute between the parties.

Who is liable to the costs of the suit?

As a general rule, costs follow the event. The plaintiff has succeeded in her claim against the defendant. No reason has been put forward that would justify denying her the cost of the suit. The plaintiff shall have the costs of the suit.

Conclusion:

In conclusion I hereby enter judgment for the plaintiff against the defendant on the following terms;

1. The plaintiff is entitled to the reliefs sought in prayers (a), (b) and (c) of the amended plaint dated 19th February, 2018.
2. In lieu of granting the said prayers (a), (b) and (c) of the amended plaint dated 19th February, 2018, I award the plaintiff Kshs. 3,125,000/= as damages for illegal sale of L.R. No. Ruiru/Ruiru East Block 1/1490.
3. Interest shall accrue on (2) above at court rates from the date hereof until payment in full.
4. Costs of the suit.

Delivered and Dated at Nairobi this 25th Day of June 2020

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams video conferencing platform in in the presence of;

Mr. Juma for the Plaintiff

Mr. Koyokko for the Defendant

Ms. C. Nyokabi-Court Assistant