



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

E.L.C CASE NO. 69 OF 2012

ROSE NJOKI KAMAU.....PLAINTIFF

VERSUS

ARCHIBALD WAMBURU KAHORA.....1ST DEFENDANT

TITUS KINYUA KARANJA2ND DEFENDANT

JUDGMENT

ROSE NJOKI KAMAU the plaintiff herein is the wife to **ARCHIBALD WAMBURU KAHORA** the 1st defendant. It is her case that in the year 1998, land parcel No. LOC 2/KANGARI/2970 (the suit land) was being offered for sale by the then owner **PAUL MAINA DUNCAN** at a cost of Ksh. 540,000. However, she and the 1st defendant could only raise Ksh. 220,000 and so her father in law **SAMUEL KAMAU MWANGI** raised Ksh. 320,000 and it was agreed that the suit land be registered in the names of the 1st defendant to hold in trust for the plaintiff and the said **SAMUEL KAMAU MWANGI**. It was further agreed that the plaintiff would plant tea and **SAMUEL KAMAU MWANGI** trees on the lower part of the suit land. The plaintiff has therefore been in occupation of the suit land to-date where she picks tea and sells it to **IKUMBI** Tea Factory. However, the 1st defendant, without consulting her, fraudulently transferred the suit land to the 2nd defendant particulars of which are pleaded in paragraphs 8 and 9 of her plaint filed herein on 14th December 2012. The plaintiff therefore seeks judgment against the defendants jointly and severally in the following terms:

(a) An order for permanent injunction restraining the 1st and 2nd defendants, their servants, agents and/or persons claiming through them from continuing with or commencing construction, depositing building materials, cutting down any trees, picking tea leaves or committing any acts of waste or doing any acts directly or indirectly on land parcel No. LOC 2/KANGARI/2970.

(b) An order for declaration that land parcel No. LOC 2/KANGARI/2970 is matrimonial property.

(c) An order that the sale and registration of land parcel No. LOC 2/KANGARI/2970 be cancelled and the title for the suit land be registered jointly between the plaintiff and 1st defendant.

The 1st defendant filed a defence and denied those averments pleading that he personally purchased the suit land from **PAUL MAINA DUNCAN** and the plaintiff was only a witness to that transaction. The 1st defendant therefore became the sole and exclusive owner thereof and the plaintiff was only a licensee without any claim of proprietorship and this suit is therefore an abuse of the Court process as it lacks

merit and discloses no reasonable cause of action.

On his part, the 2nd defendant pleaded that before purchasing the suit land, the 1st defendant informed him that his (1st defendant's) wife one **ELIZABETH NJAMBI** had no objection to the transaction. That he is not party to the particulars of fraud but is a bona fide purchaser for value.

The trial commenced on 15th March 2016 and in her testimony, the plaintiff confirmed that she is the wife to the 1st defendant although they no longer live together. She told the Court that in 1998, her father **SAMUEL KAMAU MWANGI** (not father in law as per her plaint) who is now bed-ridden, told her and the 1st defendant that the suit land was available for sale at Ksh. 540,000. She and the 1st defendant could only raise Ksh. 220,000 and so her father raised 320,000 to enable the couple purchase the suit land which was registered in the names of the 1st defendant to hold in trust. She produced the Green Card (Plaintiff's Exhibit 1) and added that there was tea growing thereon which she continued to pick and sell to the Kenya Tea Development Authority as per the permits and certificates which she produced (Plaintiff's Exhibits 2 (a) and 2 (b)). Then in 2012, she discovered that the 1st defendant had sold the suit land behind her back to the 2nd defendant. She wrote to the Kigumo District Commissioner and received a response dated 12th November 2012 (Plaintiff's Exhibit 3) and also conducted a search (Plaintiff's Exhibit 4). She told the Court that she still occupies the suit land and sells tea to the **IKUMBI** Tea Factory.

In his defence, the 1st defendant acknowledged that the plaintiff is his wife and they have three children. He also confirmed that they jointly raised money to purchase the suit land and the plaintiff was the one managing the crop of tea thereon.

Then in 1998, he experienced some financial difficulties and sold the suit land to the 2nd defendant who however fraudulently had it transferred into his names before completion of payment of the purchase price. He said he is ready to refund the money paid to him by the 2nd defendant.

The 2nd defendant said he is a lecturer at the Technical University of Kenya and added that in February 2012, the 1st defendant approached him to buy the suit land and so he conducted a search and they agreed on a purchase price of Ksh. 1.1 million per acre. He attended the Land Control Board where the 1st defendant was accompanied by one **ELIZABETH NJAMBI** who was introduced to him as the 1st defendant's wife. Consent was granted for the transaction and he went into occupation of the suit land. He asked the Court to consider his statement and the list of documents filed herein.

At the end of the trial, it was agreed that counsel for the parties would file their respective submissions with the plaintiff having the first 30 days and the defendants 30 days after service upon them of the plaintiff's submissions. However, by 19th December 2016, only the 1st defendant had filed submissions.

I have considered the evidence by the parties and the submissions filed.

The plaintiff's case is that the suit land was purchased jointly by herself and the defendant with the help of her father. This has been corroborated by none other than the 1st defendant himself who said the following in his evidence in chief:

"It is true that we combined our money together with the help of her father's contribution to raise the money to purchase this property".

The 1st defendant also said in his testimony that:

"The plaintiff's father agreed that the land be registered in my names. He also allowed the plaintiff to add some tea bushes to the land. We did all this as a man and wife"

Most significantly, the 1st defendant went on to testify and said that:

"However, the 2nd defendant fraudulently went to the Land Board and transferred the land into

his names without consulting me yet he had not finished paying me the purchase price”.

The significance of the above statement becomes clearer taken in the context that when the plaintiff discovered about the transfer of the suit land, she wrote to the District Commissioner Kigumo District to make enquiries. The response that she received is contained in a letter addressed to her by the Secretary to the Land Control Board one L.W. MUIRURI and which is plaintiff’s Exhibit 3. It is dated 12th November 2012 and reads:

“RE: LOC 2/KANGARI/2970

Your letter dated 9th November 2012 concerning the above piece of land refers.

This is to confirm that we have no recorded transaction in our Land Control Board register as from January 2012 to date regarding the above parcel of land.

L.W. MUIRURI

SECRETARY L.C.B

KIGUMO DISTRICT”

It is clear from the above that there was no Land Control Board consent given for the transfer of the suit land to the 2nd defendant and further, that the 2nd defendant cannot be an innocent purchaser for value with no knowledge of the fraudulent transfer of the suit land as he alleges both in his oral evidence and in his pleadings. The allegations of fraud pleaded by the plaintiff in her plaint have therefore been proved to the required standard. In view of that letter from the Secretary to the Kigumo Land Control Board, who must be the custodian of all the records of that Board, this Court can only conclude that whatever consent the 2nd defendant obtained for this transaction must have been a forgery. It is also clear from the ***Law of Contract Act Chapter 23 Laws of Kenya*** that an agreement for purchase of land must be in writing. ***Section 3 (3)*** of that Act provides that a contract for disposition in land shall be in writing, signed by the parties thereto and attested to by a witness. The 2nd defendant confirmed that there was really no written agreement between him and the 1st defendant for the sale of the suit land. It is strange that the 2nd defendant could have parted with 1 million shillings for a transaction that was not reduced in writing as required by law. No proprietary rights therefore passed to the 2nd defendant with respect to the suit land. Therefore, the plaintiff’s pleading in paragraph 9 of her plaint where she has pleaded that:

“The plaintiff further avers that the whole sale transaction between the 1st and 2nd defendant was very irregular and lacked bonafides”

must be treated by this Court as correct. I must therefore find, which I hereby do, that the transfer of the suit land to the 2nd defendant was done fraudulently.

I now turn to consider if the suit property is matrimonial property.

The 1st defendant has conceded that the plaintiff is his wife and that they acquired the suit land through their joint efforts with the help of her father although it was registered in the 1st defendant’s names. It is well settled that property acquired during coverture is matrimonial property and where it is registered in the name of one spouse, there is a presumption that it is held in trust for both spouses. In this case, the plaintiff’s claim that the suit land be registered in the joint names of herself and the 1st defendant has not been rebutted and the Court is obliged to grant her that prayer which has infact been supported by the 1st defendant himself.

This Court has been asked to cancel the registration of the suit land in the names of the 2nd defendant and register it in the joint names of the plaintiff and 1st defendant. Under ***Section 26 (1) of the Land Registration Act***, a certificate of title is conclusive evidence that the person named therein is the absolute and indefeasible owner of the land. Such a title cannot be challenged except on grounds of fraud or

misrepresentation to which he is proved to be a party or where it has been acquired illegally, unprocedurally or through a corrupt scheme. I have already found that the transfer of the suit land to the 2nd defendant was fraudulent and it is also clear that it was un-procedural as it contravened the **Law of Contract Act**. This Court therefore has no option but to cancel the registration of the suit land in the names of the 2nd defendant and have it registered in the joint names of the plaintiff and the 1st defendant as sought in the plaint.

Ultimately therefore and upon considering the evidence by all the parties herein, I enter judgment for the plaintiff against the 2nd defendant in the following terms:

(a) An order of permanent injunction restraining the 2nd defendant, his servants, agents and/or any person claiming through him from continuing with or commencing construction, depositing building materials, cutting down trees, picking tea leaves or committing any acts of waste or doing any acts directly or indirectly on land parcel No. LOC 2/KANGARI/2970.

(b) An order of declaration that the land parcel No. LOC 2/KANGARI/2970 is matrimonial property.

(c) An order that the sale and registration of land parcel No. LOC 2/KANGARI/2970 be cancelled and that the title thereof be registered in the joint names of the plaintiff and 1st defendant.

(d) The 2nd defendant shall meet the plaintiff's costs.

B. N. OLAO

JUDGE

5TH MAY, 2017

Judgment dated, signed and delivered in open Court this 5th day of May 2017

Mr. Njoroge for Plaintiff absent

Mr. Kamiro for 2nd Defendant absent but the 2nd Defendant is personally present

Right of appeal explained.

B. N. OLAO

JUDGE

5TH MAY, 2017