



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT BUSIA**

**CASE NO. 30 OF 2016**

**JENNIFER AKINYI OSODO.....PLAINTIFF**

**VERSUS**

**BONIFACE OKUMU OSODO.....1<sup>ST</sup> DEFENDANT**

**ALFRED JUMA.....2<sup>ND</sup> DEFENDANT**

**EDITH ATIENO KAGOMBA.....3<sup>RD</sup> DEFENDANT**

**THE LAND REGISTRAR-BUSIA.....4<sup>TH</sup> DEFENDANT**

**J U D G E M E N T**

1. By a Plaint dated 4<sup>th</sup> April 2016 and amended on 2<sup>nd</sup> August 2016 the Plaintiff instituted this suit against the Defendants seeking the following reliefs:

**(i) A declaration that land parcel No. BUNYALA/MUDEMBAI/2920 is matrimonial property.**

**(ii) An order restraining or barring the 1<sup>st</sup> Defendant by himself, employees or agents from dealing with and/or transferring the title of parcel no. BUNYALA/MUDEMBAI/2920 without obtaining prior consent from the Plaintiff.**

**(iii) An order of cancellation or revocation of the Title Deeds issued to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and reissuance of the Title Deed in the joint names of the Plaintiff and the 1<sup>st</sup> Defendant**

**(iv) An order of eviction of the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant by themselves, agents or employees from land parcel no. BUNYALA/MUDEMBAI/2920 and an order to demolish any and all constructions put up by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant son the suit property.**

**(v) Costs and interest.**

2. It is pleaded that the suit property, **BUNYALA/MUDEMBAI/2920** was gifted to the Plaintiff and 1<sup>st</sup> Defendant as a matrimonial gift from the 1<sup>st</sup> Defendant's father and they settled thereon. That the property was registered in the 1<sup>st</sup> Defendant's name in 1988. Later on the 1<sup>st</sup> Defendant purportedly sold the property to the 2<sup>nd</sup> Defendant without the Plaintiff's knowledge and the requisite spousal consent prompting her and her son, Christian Osodo to register a caution on it to prevent transfer and further action on the title.

3. The Plaintiff averred that the 1<sup>st</sup> Defendant as the registered owner of the suit property held the land in trust for her and their children. That he committed breach of trust in concert with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' by purporting to sell and transfer the property particularised as follows:

*(i) Secretly selling matrimonial land without obtaining the Plaintiff's consent as a spouse.*

*(ii) Forging and uttering false documents to effect the sale and conveyance of the matrimonial land*

*(iii) Dealing in and with matrimonial property contrary to the interests of the beneficiaries of the suit land*

*(iv) Illegally and fraudulently removing a caution lodged by the Plaintiff to effect the sale and transfer of the suit property.*

4. The Plaintiff pleaded further that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants committed fraud and illegality by conniving to secretly sell and transfer matrimonial property; forging and uttering false documents to effect the said sale; illegally, unprocedurally and fraudulently removing the caution placed upon the suit property to effect its sale and transfer; issuing a certificate of title based on an illegal conveyance; receiving and lodging documents known to be forgeries; failing to exercise due diligence and care when effecting the conveyance; breaching the State's guarantee of indefeasibility of title and failing to note the overriding interests on the suit property as well as failing to verify the execution of the conveyance documents to the suit property.

5. The Defendants jointly entered appearance on 25<sup>th</sup> April 2016 and filed a defence on 11<sup>th</sup> May 2016 which was later amended on 17<sup>th</sup> November 2016. The 1<sup>st</sup> Defendant admitted to marrying the Plaintiff which union was solemnized on 29<sup>th</sup> June 1985. He however denied that the suit property was a matrimonial gift. That he acquired proprietary rights to the mother title, parcel no. BUNYALA/MUDEMBI/1604 sometime in 1978 and later on BUNYALA/MUDEMBI/2920 as a resultant subdivision that he got from his father via ancestral transmission. Further, the rights acquired in the late 70s were not subject to spousal consent as it was not a property acquired during the subsistence of his marriage. He denied that he held the suit land in trust and stated that the transfer was not conducted fraudulently, in secrecy nor in collusion with any other party; which sentiments are echoed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

6. The main hearing of this suit kicked off on 17<sup>th</sup> July 2017. The Plaintiff as the sole witness in support of her case testified as **PW1**. She stated that she comes from Bunyala, Busia County and currently resides in the United Kingdom. She adopted her statement dated 13<sup>th</sup> July 2017 as her evidence chief. **PW1** narrated that she is the 1<sup>st</sup> Defendant's wife married in 1983 and the union solemnized in church in 1985. She continued that the suit land, BUNYALA/MUDEMBI/2920 was a wedding gift to them from her father-in-law. That they started residing thereon in 1983 and cultivated crops on the land until 2004 when she travelled to the United Kingdom. She produced the title deed and marriage certificate as P.Ex 1 and P.Ex2. Sometime in 2015, **PW1** and the 1<sup>st</sup> Defendant started making plans to develop the property as their retirement home. That was the time she discovered that the property had been sold to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants after the 3<sup>rd</sup> Defendant called her severally asking her to remove the caution she had lodged against the title which was still in force as per the search produced as **P.Ex3**.

7. **PW1** then took action to secure the property by writing to the 2<sup>nd</sup> Defendant protesting the alleged sale. The said letters dated 2<sup>nd</sup> October 2015 and 18<sup>th</sup> February 2016 and their postage receipts were produced as **P.Ex 4, 5, 6** and 7. She continued that titles to their marital properties inclusive of the suit property title were deposited at Equity Bank, Siaya Branch for safe keeping which titles could only be released upon presentation of the acknowledgement of receipt of security/parcel issued by Equity Bank which was produced as **P.Ex 8**. When shown a copy of the green card of the suit land, **PW1** observed that the caution she registered on 24<sup>th</sup> August 2015 was lifted on 22<sup>nd</sup> December 2015. She continued that it was removed without her knowledge and contrary to what was shown on the document, the search conducted by her son on 8<sup>th</sup> February 2016 (P.Ex 3) showed that the caution was still in force. Moreover, the green card shows an entry of 1<sup>st</sup> March 2016 to the effect that the 2<sup>nd</sup> Defendant transferred the property to the 3<sup>rd</sup> Defendant and title was issued to the 3<sup>rd</sup> Defendant on the same date.

8. On cross-examination **PW1** admitted that the green card states that the suit land was registered in the names of Luksus Hasala and Martin Okello on 22<sup>nd</sup> June 1988. The said persons were unknown to her and Peter Osodo's name was not indicated in the green card. Further, her husband Osodo Okumu became its registered owner on the same date and there is no indication that he held ownership in trust for any other party. She admitted that they had never constructed on the land. That the land was charged to AFC Busia in 1989 which loan was repaid by her husband. **PW1** further stated that her matrimonial home is in Siaya County but that she has two other matrimonial homes at her father-in-law's home. That when the titles were deposited at the bank, she signed as a witness. On removal of the caution **PW1** testified that the same was done by the land registrar. She did not know when the land was sold to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

9. **PW1** clarified that the 1<sup>st</sup> Defendant in his amended defence admitted that he got the suit land from his father; not through a purchase. Moreover, the entries in favour of Luksus Hasala and Martin Okello were made on 22<sup>nd</sup> June 2018 and there is no record on the green card of what transpired before then. That their matrimonial home was to be in Bunyala. Entry 4 on the green card shows that **PW1** and her son are claiming beneficial interest. She was adamant that the property was given to them.

10. The Defence case proceeded on 4<sup>th</sup> February 2020. The 1<sup>st</sup> Defendant, **DW1** stated that he lives in Karabuor, Siaya County and that the Plaintiff is his former wife. He adopted his statement filed on 4<sup>th</sup> July 2016 and the green card which he produced as **D.Ex1**. **DW1** gave evidence that he bought the suit land from one Elias Nangoni in 1981 long before adjudication was done. He was registered as the owner in 1988 after presenting his documents to the adjudication officers. Later on when he wanted to take a loan he discovered that the property was not in his name and processed a transfer to correct the anomaly which enabled him to take the loan with the title as security on 5<sup>th</sup> August 1989. He continued that he did not fully repay the loan until he sold the land to the 2<sup>nd</sup> Defendant after which the discharge was effected and the land consequently transferred to the 2<sup>nd</sup> defendant.

11. On cross-examination **DW1** confirmed that at the time of transfer the suit land had been charged to the Agricultural Finance Corporation and that the transfer to the 2<sup>nd</sup> Defendant was above board. Consent of the Land Control Board had been obtained. He however admitted that he did not have a copy of the sale agreement demonstrating that he bought the land in 1981. **DW1** also denounced paragraph 4(a) of his amended defence that states that he acquired the land from his father. The witness did not provide copies of the sale agreements between himself and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. That the 2<sup>nd</sup> Defendant paid Kshs.500,000, part of which was in cash but he did not have copies of the deposit slips nor did he have copies of the Land Control Board's consent. He insisted that the Plaintiff knew he was selling the property but he did not get her written consent. That he married the Plaintiff in 1983 and title to the suit property was issued in 1988 thereafter they got divorced in 2019.

12. The 2<sup>nd</sup> Defendant gave evidence as **DW2**. He testified that the Plaintiff and 1<sup>st</sup> Defendant are known to him. That the 1<sup>st</sup> Defendant had some financial challenges regarding a loan he had taken. He told **DW2** that if he helped him repay the loan, he would transfer the land to him. **DW2** inspected the land, liked its location and avers that it was fallow. He then sought legal advice and sent someone to conduct a

search in 2015 which revealed that the land was registered solely in the name of Dr. Osodo. **DW2** then paid for the property by a cheque of Kshs.350,000 and Kshs.250,000 in cash. He confirmed that the land was charged to Agricultural Finance Corporation during negotiations and that part of the funds he paid were used to offset the loan.

13. On cross-examination **DW2** stated that his search was conducted in 2016. The property was registered in his name on 1<sup>st</sup> March 2016. He continued that in the course of the transaction he saw an official search but it did not have a caution registered on it. When confronted with the Plaintiff's letters (P.Ex 4 and 6); he asserted that he never received them. Moreover, like **DW1** he did not have a copy of the sale agreement and the cheque in court. He insisted that he paid stamp duty through his advocate and attended the Land Control Board meeting for purposes of the consent but could not recall which date the meeting took place.

14. The hearing completed, parties filed their final submissions. The Plaintiff's were filed on 17<sup>th</sup> February 2020. Counsel for the Plaintiff opined that the sale and transfer of the suit land without consent of the Land Control Board pursuant to section 6 of the Land Control Act rendered it void. He relied on the case of **David Sironga Ole Tukai vs Francis Arap Muge & 2 Others (2014) eKLR** where the Court of Appeal had a similar finding. It was urged that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had recourse to section 7 of the Land Control Act for a refund of any consideration they may have paid the 1<sup>st</sup> Defendant.

15. On the issue of the caution placed on the property by the Plaintiff and her son it was submitted that its alleged removal was unprocedural as the Plaintiff was not given an opportunity to make representations before it was lifted. Counsel cited section 72(2) of the Land Registration Act that provide that *a disposition inconsistent with the caution shall not be registered while the caution is still in place except with the consent of the cautioner or by a court order*. Therefore any registration effected by the Registrar was illegal. He opined that D.Ex 1 indicating that the caution was lifted on 22<sup>nd</sup> December 2015 was a forgery and that the Plaintiff's search certificate of 8<sup>th</sup> February 2016 indicated that the caution was still in place.

16. The final main issue was that of spousal consent which is a prerequisite to alienation of land as stipulated in Section 12 of the Matrimonial Property Act. That the suit property was matrimonial property within the meaning of section 6 of the Matrimonial Property Act thus designated as an overriding interest in accordance with section 28 of the Land Registration Act. That the purported sale having been made on 1<sup>st</sup> March 2016 was during the subsistence of the marriage without the spousal consent sought made the sale invalid. Counsel cited the cases of **EKN vs AS & 2 Others (2019) eKLR** and **MWK vs SKK and 5 Others (2018) eKLR** in support. He also contended that the Defendants did not present credible evidence by contradicting themselves and failing to produce documents in support of their version. Firstly, the 1<sup>st</sup> Defendant denounced his averment in the Defence that he acquired the suit land from his father vide ancestral transmission and testified that he bought it yet parties are bound by their pleadings. Secondly, the 2<sup>nd</sup> Defendant did not produce a sale agreement, proof of payment, official search, stamp duty receipts and a copy of the Land Control Board consent to demonstrate that his purchase of the property was sound.

17. The 1<sup>st</sup> Defendant's submissions were filed on 14<sup>th</sup> May 2020. Counsel for the 1<sup>st</sup> Defendant began by raising a jurisdictional issue subject to the provisions of section 13(2) of the Environment and Land Court Act. He contended that this suit was wrongly filed before this Court as it lacks powers to declare that there was a marriage between the parties and that the suit land was matrimonial property. That the Plaintiff ought to have filed a petition in accordance with section 17 of the Matrimonial Property Act for a declaration of rights to the suit property. Counsel opined that the Plaintiff failed to prove that the suit land was matrimonial property thus making her entitled to a beneficial interest in it. Alternatively, she did not prove her contribution in its acquisition. It was further submitted that upon the charging of the property, it ceased to being a matrimonial property. That this was the Court's holding in **ENW vs PWM & 3 Others supra**. The 2<sup>nd</sup> defendant submitted that from the point the property was mortgaged to AFC, it became commercial property.

18. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' submissions were filed on 17<sup>th</sup> July 2020. Apart from a brief synopsis of their version of facts they submitted that the suit land was not matrimonial property within the meaning of section 6 of the Matrimonial Property Act no 49 of 2013. That section 6 defines matrimonial property to mean (a) *the matrimonial property home or homes, (b) household goods and effects in the matrimonial home(s) (c) any other immovable and movable property jointly owned or acquired during the subsistence of the marriage*. That the suit property is distinct from the Plaintiff and 1<sup>st</sup> Defendant's Siaya home. They further contended that it also was not an ancestral property hence the notion of breach of trust was inapplicable. That even if it was ancestral land, it does not fall under the definition given in section 6 above.

19. The 2<sup>nd</sup> & 3<sup>rd</sup> defendants added that the plaintiff alluded to the subject of trust based on the plea that the same is matrimonial property. That this court lacks jurisdiction to make a declaration that the suit property is matrimonial property hence the issue of trust cannot be determined. They urged the court to dismiss the suit with costs to them.

20. Having taken into account the pleadings and the submissions rendered, two questions arise for determination;

i) *Whether or not this court has jurisdiction to entertain this suit.*

ii) *Whether or not the orders sought can be granted.*

iii) *Who bears costs of the suit.*

21. The first prayer in the plaint asked this court to make a declaration that land parcel no Bunyala/Mudembi/2920 is matrimonial property. The plaintiff proceeded to adduce evidence that she was legally married to the plaintiff before they got divorced last year 2019. The defendants have taken issue that this court lacks jurisdiction to make such an order. This Court's jurisdiction is set out under article 162(2) (b) of the Constitution and section 13 of the Environment and Land Act. Section 13 states thus;

**“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes -**

**(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**(b) relating to compulsory acquisition of land;**

**(c) relating to land administration and management;**

**(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**

**(e) any other dispute relating to environment and land.**

**(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.**

22. Similarly section 17(1)(b) & (c) of the Matrimonial Act No. 49 of 2013 states that, **“(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.**

**(b) may be made as part of a petition in a matrimonial cause; and**

**(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”**

Although the Environment & Land Court is equal in status to the High Court, their jurisdictions have been clearly distinguished and as such a matrimonial cause falls within the ambit of the High Court. The plaintiff submitted that it is not in dispute that the suit property was acquired during the subsistence of their marriage. The two parties were not living on the suit property so the court is being invited to make a determination that although it was not the matrimonial home (which is stated to be in Siaya), the same still falls under the category of matrimonial property. I am inclined to go by the defendants' argument which is anchored in law that the court is not clothed with jurisdiction to make such a declaration *per se*.

23. The plaintiff argued that the transfer from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> & 3<sup>rd</sup> defendants was null and void for lack of land control board consent. In support of this allegation, the plaintiff produced a copy of title deed to the suit property and search certificate. The 1<sup>st</sup> to 3<sup>rd</sup> defendants pleaded that indeed they appeared before the land control board and obtained the requisite consent. The plaintiff is the one who made the allegation of absence of consent therefore she had the burden to prove that indeed none was obtained. The plaintiff called the evidence of a single witness. Unfortunately she was not a party to the transaction between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> & 3<sup>rd</sup> defendants. She also did not take out witness summons to issue to the 4<sup>th</sup> defendant or any person from the lands office and or the Kenya Commercial Bank office to produce the parcel file of the suit title to corroborate her averments. Thus her allegations remain mere allegations.

24. The third issue raised by the plaintiff is whether the transaction could go on without spousal consent contrary to the provisions of section 28 of the Land Registration Act. The plaintiff referred to the provisions of section 6 and 12 of the Matrimonial Property Act which although this court is aware it lacks jurisdiction to enforce but will consider in so far as it gives meaning to the spousal consent provided for in section 28(a) of the Land Registration Act.

25. The green card does show the 1<sup>st</sup> defendant became the registered owner of the suit property on 22<sup>nd</sup> June 1988 which date is after the celebration of their marriage with the plaintiff. The plaintiff in explaining how the property was acquired averred that they were gifted the suit property by their father in law during their wedding. According to the marriage certificate produced as pex 2, the father in-law's name is given as Peter Osodo. The plaintiff however did not produce any document to show that Peter Osodo was at one time the owner of the suit land. The 1<sup>st</sup> defendant on his part averred that he purchased the suit property before his marriage to the plaintiff. That the land was never owned by his father and he produced a green card showing that the land was irregularly registered in the names of Luksus & Martin during adjudication and he applied for the irregularity to be rectified immediately.

26. The burden cannot be shifted on the 1<sup>st</sup> defendant to prove the suit property was ancestral land by the plaintiff requiring the 1<sup>st</sup> defendant to produce the sale agreement. The 1<sup>st</sup> defendant was answering to the case brought against him by the plaintiff therefore production of a green card to demonstrate that the land was not owned by his father was indeed sufficient. Consequently, the plaintiff having failed to show that the acquisition of the property was joint cannot enjoy the provisions of section 28(a) of the Land Registration Act on the requirement of spousal consent.

27. Lastly, the plaintiff challenged the sale to the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants because of a caution she had placed on the title. The plaintiff admits that the suit title was charged to Agricultural Finance Corporation (AFC) Ltd. The green card shows the charge was registered on the title on 5<sup>th</sup> August 1989 for a sum of Kenya Shillings Forty Five Thousand (Kshs.45,000) only. The discharge took place on 1/3/2016. The

plaintiff's caution was placed on 24/8/2015 during the subsistence of the charge and it was removed on 22<sup>nd</sup> December 2015. Was it irregular for the Land Registrar to remove it? In my opinion and I so hold, that the caution could only be said to have been irregularly removed if the plaintiff had succeeded in proving two things. First that she paid the debt owed to AFC before the sale to the 2<sup>nd</sup> & 3<sup>rd</sup> defendants. Secondly, proof of her beneficial interest in the suit land which she has not done.

28. The 1<sup>st</sup> defendant stated that part of the money paid by the 2<sup>nd</sup> & 3<sup>rd</sup> defendants was used to clear the debt owed to AFC Limited. The property was discharged by AFC Limited on 1/3/2016, the same date the 2<sup>nd</sup> & 3<sup>rd</sup> defendants were registered as owners thereof. Section 73(5) of the Land Registration Act provides thus;

**“(5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee’s power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.”**

29. The other issues taken up by the plaintiff on non-production of sale agreement between the three defendants was immaterial to the plaintiff's case. This is because the 1<sup>st</sup> defendant has not denied selling the land to the 2<sup>nd</sup> & 3<sup>rd</sup> defendants neither is there a dispute in respect of payment of the purchase price. It is trite law that terms of contracts are binding as between parties to it. The plaintiff is asking the court to make her a party to that contract which powers the law has not bestowed upon this court. In any event, the court can only interfere in contracts entered between parties if a basis is laid that the contract/agreement was unlawful, illegal or is meant to conceal fraudulent activities. In this case, the 1<sup>st</sup> defendant was the registered owner of the suit land which land was charged to AFC Limited. He executed the transfer after settling the debt owed to AFC Limited. Nothing has been shown to this court that besides the charge to AFC Limited, there was anything barring the 1<sup>st</sup> defendant from disposing off the property.

30. The sum total of my finding is that the plaintiff's case has not been proved. Accordingly, it is dismissed with costs to the defendants.

**Judgement dated, signed & delivered at BUSIA this 30<sup>th</sup> day of July 2020.**

**A.OMOLLO**

**JUDGE**