

REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 35 OF 2012.

STEPHEN NJAU KAMAUPLAINTIFF

VERSUS

JACQUES JEAN MARIE GILES MODAVE1ST DEFENDANT

ANNE ADONGO OLEWE3RD DEFENDANT

NANCY WATHEKA 4TH DEFENDANT

JAMES KAMAU.....5TH DEFENDANT

J U D G M E N T.

STEPHEN NJAU KAMAU, hereinafter referred to as the Plaintiff, commenced this suit against the Defendants through the originating summons dated 1st December, 2012, filed through M/S. Gacheche Wa Miano advocate. The Originating summons has five Defendants but it has since been clarified that the names of the 1st and 2nd Defendants are actually names of the same person called Jacques Jean Marie Giles Modave. The persons sued are therefore Jacques Jean Marie Giles Modave, Anne Adongo Olewe, Nancy Watheka and James Kamau hereinafter referred to as 1st, 3rd, 4th and 5th Defendants respectively. The Defendants filed their replying affidavits through M/S. Kirundi & co. advocates.

The Plaintiff seeks the following eight determination as set out in the originating summons;

“ 1. Whether land parcel No. BUKHAYO/MUNDIKA /1537 lawfully belongs to STEPHEN NJAU KAMAU.

2. Whether the said STEPHEN NJAU KAMAU had the same registered and transferred to 4th and 5th Defendants to hold on Trust for the Plaintiff.

3. Whether the Defendant unlawfully sold the said Parcel of land to the 1st , 2nd and 3rd Defendant without the consent permission; authority and/or knowledge of the Plaintiff.

4. Whether the ever consulted and/or consented to the said sale.

5. Whether the said Parcel of land should revert back to the name of the Plaintiff and the Transfers to the 1st, 2nd and 3rd Defendants cancelled.

6. Whether the 1st, 2nd and 3rd Defendants should be evicted from land parcel No.BUKHAYO/MUNDIKA/1537.

7. Whether the Defendant should pay to the Plaintiffs damages for loss of user and trespass as well as costs of this suit.

8. Whether in addition to and/ or as an alternative to the contents of paragraph 6 above a permanent injunction should issue against the Defendant by themselves, their agents, employees occupants and/ or anyone else claiming and/ or occupying land Parcel No. Bukhayo/Mundika/1537 through under or by the Defendant’s authority, direction and /or assignment barring them from occupying, utilizing,

alienating, remaining on, transferring, leasing, subdividing building upon, putting structures and / or in any other manner whatsoever tampering and /or interfering with land parcel No. BUKHAYO/MUNDIKA/1537”

The originating summons is supported by the Plaintiff’s supporting and further supporting affidavits sworn on 1st December, 2012 and 27th November, 2013 in which the Plaintiff inter alia depones;

That sometime in the year 1985 his father, namely James Kamau Njau, transferred to him the suit land Bukhayo/Mundika/1537 as a gift inter vivos.

That on 4.6.2000 he transferred the suit land to the 4th and 5th Defendants who are his wife and son respectively.

That the 4th and 5th Defendants were to hold the suit land in his trust but sold and transferred it to 1st and 3rd Defendant without obtaining his consent.

That he had not consented to the sale agreement and disputed the claim of Patarick Muthiga Kinuthia to the contrary.

That had he consented to the transaction he would, at least have signed the sale agreement as a witness.

In reply to the Plaintiff’s suit, the 2nd Defendant deponed an affidavit on behalf of herself and the 1st defendant who is her husband. The affidavit was sworn on 11th January, 2013. The 4th Defendant also swore a replying affidavit on 9th January, 2013 on her own behalf and on behalf of the 5th Defendant. She annexed an affidavit sworn by one Patrick Muthiga Kinuthia on 11th January, 2013 to her affidavit. The four deponents in their replying affidavits inter alia depones to the following:-

That the suit land Bukhayo/Mundika/1537 was family land that had been transferred to 4th and 5th Defendants by the Plaintiff.

That Agnes Wangeci Njau, a daughter to Plaintiff and 4th Defendant, had been admitted for a masters course at Nottingham University, Business School as confirmed in the letter dated 18th April, 2012. That the family was facing some financial stress and Agnes requested 4th Defendant to agree to sell the suit land to raise the fees payable.

That one Leonida Ogutu, informed the 3rd Defendant that the Plaintiff was selling some land in her neighbourhood. That the 3rd Defendant shared this information with the 1st defendant who subsequently dispatched Patrick Muthiga Kinuthia to Busia to negotiate the sale on their behalf.

That Patrick Muthiga Kinuthia contacted Plaintiff who in turn introduced him to the 4th Defenant in August, 2012.

That on 1st September, 2012, the sale agreement over the suit land was executed by 4th and 5th Defendants as the vendors, and 1st and 3rd Defendants as purchasers and witnessed by G.C. Kirundi advocate.

That pursuant to the sale agreement, the 1st Defendant paid \$11,194 (equivalent to about Kshs.1.5 million to the University of Nothingham as MBA tuition fee deposit for Agnes Njau on 4th September, 2012.

That the 1st Defendant further transferred Kshs.900,000/= to Agne’s account with Barclays Bank Nairobi on 4th September,2012 for her maintenance and paid a further Kshs.200,000/= to M/S. Kirundi & co. Advocates as legal fees and disbursements.

That the 4th and 5th Defendant were not registered with the suit land in trust for the Plaintiff as there was no documentary evidence to that effect. That the decision to sell the suit land was made together by the family for the sake of their daughter’s college fees.

ISSUES

FOR

DETERMINATION.

Whether the 4th and 5th Defendants were registered with the suit land in trust for the Plaintiff.

Whether the suit land was matrimonial property.

If the answer to the above is in the affirmative whether the Plaintiff consented to the 4th and 5th Defendants selling the suit land to the 1st and 3rd Defendants.

Whether the 1st and 3rd Defendants were bona fide purchasers of the suit land for value.

Whether the sale of the suit land was null and void.

During the hearing, Mr. Onsongo and Mr. Mahen advocates appeared for the Plaintiff and Defendants respectively and each made submissions.

SUMMARY OF PLAINTIFF COUNSEL'S SUBMISSIONS:

That the Plaintiff had transferred the suit land to the 4th and 5th Defendants to hold as family land. That their subsequent act of selling and transferring the land to 1st and 3rd Defendant without obtaining the Plaintiff's consent made the sale null and void in view of the provisions of sections 28 and 93 of the Land Registration Act and section 7 of the matrimonial property Act 2013. That the sale should therefore be canceled and title to the suit land reverted back to 4th and 5th Defendants.

That the 4th and 5th Defendants had not contributed anything in the acquisition of the suit land.

That had Plaintiff consented to the sale of the suit land, he would have signed the sale agreement and Agnes, whose college fees was allegedly paid with the proceeds of the sale would have sworn an affidavit to that effect.

That paragraph 3 of the replying affidavit of 3rd Defendant contains hearsay as Leonida Ogutu, who allegedly informed 3rd Defendant that Plaintiff was selling the land, did not swear an affidavit to that effect.

That the Plaintiff never told Patrick Kinuthia that he was agreeable to the suit land being sold, otherwise he would have given his consent to the transaction in writing.

That the bus tickets attached to Patrick Kinuthia's replying affidavit includes the receipts with dates long after the date of the sale agreement.

That the documents attached to the replying affidavits to confirm payment of college fees and deposit in a bank account are computer generated copies without any certification and the Plaintiff's position is that no money was paid towards his daughter's education or maintenance.

That the decisions in SHALEIN MASOOD MUGHAL –VS- ATTORNEY General & 5 others [2014] eKLR and Vekariya Investments Limited –vs- Kenya Airports Authority & 2 others [2014] eKLR filed by the Defendants counsel actually supports the Plaintiff position in this case.

SUMMARY OF DEFENDANTS COUNSEL'S SUBMISSIONS.

That the suit land had been gifted to the 4th Defendant by the Plaintiff's family on her marriage.

That when a daughter to Plaintiff and 4th Defendant was admitted for a masters course in the United Kingdom in 2012, the parents decided to sell the suit land.

That the Plaintiff was to look for a buyer and in the meantime one Leonida got to know that the land was on sale and notified 1st and 3rd Defendants.

That 1st and 3rd Defendants sent one Patrick Muthiga Kinuthia to travel to Busia and assist in negotiations.

That Patrick met the Plaintiff who introduced him to 4th and 5th Defendants and confirmed they wanted to sell the land to raise money to pay for their daughter's fees.

That the negotiations culminated with the sale agreement signed by the then registered owners and the buyers. The purchase price was then paid by depositing Kshs.1.5 million with their daughter's college, Kshs.900,000/= in their daughter's account and Kshs.200,000/= with their advocates for legal fees.

That the Plaintiff was involved in the transaction from the start and the parties could not have known that the Plaintiff would later claim that he was not involved.

That spousal consent need not be in writing but can be implied from the Plaintiff's conduct.

That the suit land was not matrimonial property as it was not in the names of 4th Defendant only but those of 4th Defendant and her son the 5th Defendant.

10. That Plaintiff has not alleged fraud in the transaction involving the suit land and therefore has no locus standi to interfere with the transactions involving the suit land.

11. That 1st and 3rd Defendants were bona fide purchasers and under section 26 of the Land Registration Act their title to the suit land is indefeasible unless proved to be fraudulently obtained.

12. That Plaintiff has not proved that the 4th and 5th Defendants had been restricted from transferring it. That even if the Plaintiff had shown that such a restriction existed, his claim could only be against 4th and 5th Defendant plus possibly the daughter for whose benefit the purchase price was used.

13. That the finding in Shalen Masood Mughal –vs- Attorney General & 5 others [2014] eKLR at paragraph 33 and Vekariya Investments Limited –vs- Kenya Airports Authority & 2 others [2014] eKLR at paragraph 27 and 28 supports the case of the 4th and 5th Defendants that their title to the suit land is indefeasible.

14. That 4th and 5th Defendant would not have lied that Plaintiff had consented to the sale of the suit land while they did not benefit with the proceeds of the sale as individuals.

Having considered the prayers set out in the originating summons, counsel submissions, supporting and the replying affidavits filed herein, the court finds as follows;

That the suit property, Bukhayo/Mundika/1537, came into the family of the Plaintiff, 4th and 5th Defendants on 5th September, 1984 when the Plaintiff got registered as its proprietor. This is confirmed by the copy of the Land register attached to the Plaintiff further supporting affidavit sworn on 27th November, 2013.

That the suit land had, been gifted to the Plaintiff's family by James Kamau Njau, who is the father to the Plaintiff. Both the Plaintiff and 4th Defendant treated the suit property as a gift to the family as confirmed in paragraph 3 of the Plaintiff's further supporting affidavit and paragraph 6 of the replying affidavit by the 4th Defendant.

That the Legal regime on land registration in force at the time Plaintiff got registered as proprietor of the suit land was the Registered Land Act Cap. 300 of Laws of Kenya which was later repealed under section 109 of Land Registration Act No.3 of 2012 which came into operation on 2nd May, 2012. The Plaintiff had therefore the powers conferred under section 27 and 28 of the Registered Land Act

(Repealed) to deal with the suit land. The power included that of transferring the suit land as he did on 4th June, 2000 to the 4th and 5th Defendants.

That the Plaintiff and 4th Defendant are husband and wife since September, 1979. This is apparent from the replying affidavit of 4th Defendant which was not controverted and the further supporting affidavit of the Plaintiff. The two affidavits also confirm that the 5th Defendant is the first born child of the Plaintiff and 4th Defendant.

That upon the 4th and 5th Defendant being registered with the suit land on 4th June, 2000, they acquired the rights and privileges of a registered proprietor even though they had not paid any valuable consideration section 29 of the Registered Land Act (Repealed) stated:

“ Every proprietor who had acquired land.....by transfer without valuable consideration shall hold it subject to any unregistered rights or interests subject to which the transferor held it and subject also to....., but save as aforesaid the transfer when registered shall in all respects have the same effect as a transfer for valuable consideration.”

This provision has been retained in the Land Registration Act No. 3 of 2012 under section 27 which states;

“ 27 (1) A proprietor who has acquired land, a lease or charge by transfer without valuable consideration shall hold it subject to-

(a) any unregistered rights or interests subject to which the transferor held it.

(b)

(c)

(2) Notwithstanding subsection (1), the transfer when registered, shall have the same effect as a transfer for valuable consideration.”

The Plaintiff has taken the position that the suit land was transferred to him by his father and was therefore family land. That position appear to get confirmation from the 4th Defendant who in her replying affidavit said as follows:

“the suit property herein known as Bukhayo/Mundika/1537, a family property which was a gift from my father – in-law to my family, and we agreed with my husband, the Plaintiff herein, to transfer the same to my name and that of our first born child, James Kamau Njau (5th Defendant)”

The affidavit evidence clearly shows a meeting of mind between Plaintiff on one part, and 4th and 5th Defendants on the other part, that the suit property was a family property from the time it got registered with Plaintiff through to the time 4th and 5th Defendants got registered as proprietors. The 4th and the 5th Defendants therefore were obliged to obtain the concurrence of the Plaintiff to any disposition of the suit land. The suit land was a family property and therefore matrimonial property, which is defined under the matrimonial property Act No. 49 of 2013 at section 6 as:

“6. (1) For the purpose of this Act, matrimonial property means;-

(a) the matrimonial home or homes.

(b) household goods and effects in the matrimonial home or homes;- or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

(2)

This suit was commenced through originating summons and viva voce evidence was not tendered. Had the suit been commenced through a plaint, the parties would possibly have explained the real reasons that made the Plaintiff transfer the suit land to the names of his wife and son instead of the wife alone. However noting that the 5th Defendant did not find it necessary to file a separate replying affidavit, the court can only take what 4th Defendant deponed to as the position that he agreed with. That is that the land, though in the joint names of 4th and 5th Defendants remained family land and hence marital property. Marital property is defined in Black’s Law dictionary, 9th Edition. as;

“Property that is acquired during marriage and that is subject to distribution or division at the time of marital dissolution.”

The suit land was acquired on 5th September, 1984 when it was registered in the names of the Plaintiff. This was some five years after the Plaintiff married the 4th Defendant in 1979 as deponed by 4th Defendant in her replying affidavit.

6. That as the suit property was family property, the 4th and 5th Defendants were registered as proprietors of the said land subject to the Plaintiff’s rights as a spouse in terms of section 28 of Land Registration Act 2012 which states.

“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-

Spousal rights over matrimonial Property;
.....”

The 4th and 5th Defendants were therefore obligated to seek the Plaintiff concurrence or consent before entering into a sale agreement and eventually transferring the suit land to the 1st and 3rd Defendants. The affidavit evidence availed to the court does not contain any written manifestation of the Plaintiff consenting to the suit land’s disposition. The 1st and 3rd Defendants never met the Plaintiff to establish whether he was agreeable to the sale. They relied on what their representative, one Patrick Muthiga Kinuthia and 4th Defendant told them to the effect that the Plaintiff had given his consent. The Plaintiff has however denied having given his consent through his further supporting affidavit at paragraphs 4, 5 and 6 which states;

“4. That at no time did I agree or give consent to the 4th and 5th Defendants to dispose off the property as alleged.’

5. That I was not consulted nor did I give consent to sell the property to pay for my daughters fees.

6. That I have read the replying affidavit of Patrick Muthiga Kinuthia and aver that the allegations are strange to me, the travel receipts have no nexus with me neither am I party to the agreement dated 15th September, 2012.”

7. That the 1st and 3rd Defendants were also under a duty satisfy themselves that the Plaintiff had consented to the sale of the suit land as provided for under section 93 (3) which states;

“93 (3) where a spouse who holds land or a dwelling house in his or her name individually undertake a disposition of that land or dwelling house,

(a).....

(b) the assignee or transferee shall, if that disposition is an assignment or 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.”

The Plaintiff has disputed the claim by 4th and 5th Defendants that he had consented to the sale of the suit land. He has also denied the claim by Patrick Muthiga Kinuthia that he had given his consent to the transaction. The 1st and 3rd Defendants as the buyers of the suit land never met the Plaintiff to confirm from him that he had given his consent. The safest way they would have satisfied themselves that indeed the Plaintiff had consented to the transaction was to insist that the consent be reduced in writing. This is especially so when one considers the provision of section 3 of the Law of contract Act and Section 38 of the Land Act No. 6 of 2012 that dispositions of an interest in land be in writing. Section 38 of the Land Act states;

“ 38 (1) No suit shall be brought upon a contract for disposition of an interest in land unless –

(a) the contract upon which the suit is founded is in writing;

is signed by all the parties thereto; and

(b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.”

It is also important to remember that transactions affecting agricultural land are subject to the land Control Board Consent as provided for under section 6 of the Land Control Act Cap. 302 of L.O.K . Section 8 of the said Act requires that the application for the consent be made in writing “ in the prescribed form” The Land Control Board Consent is also given in writing. Even though there is no specific provision requiring a spouse’s consent be in writing, the court is of the considered view that such consent should be in writing for certainty. This is especially so as the transactions in land are by law required to be in writing and the spousal consent to such transaction should be no option. The court is of the view that the Cabinet Secretary should, while making the regulations pursuant to section 110 of the Land Registration Act , consider providing for the form or nature of the spousal consent to ensure and enhance a certainty in this important aspect of land disposition.

8. That Patrick Muthiga Kinuthia had in his replying affidavit stated that he was introduced to the Plaintiff by 1st Defendant during a telephone conversation in August, 2012. However, the 3rd Defendant who swore a replying affidavit for herself and 1st Defendant has not confirmed this or disclosed how 1st Defendant got to know the Plaintiff. The relevant portions of 3rd Defendant replying affidavits are paragraph 3, 4, 5 and 6 which states;

“ 3. That around the month of August, 2012, I received a phone call from my auntie, Leonida Ogutu who resides in Busia (and) is well known to the Plaintiff herein informing me that the Plaintiff was disposing off and (sic) around the area of Lukonyi Bukhayo in Busia measuring (0.12)HA Zero Decimal one two.

4. That I immediately informed my husband, the 1st Defendant herein whom we had being (sic) looking for property and he agreed to purchase the same since it was near my family.

5. That my husband, the 1st Defendant herein called one Mr. Patrick Muthiga Kinuthia who he send (sic) to assist in negotiations and purchasing of the said property.

6. That the said Patrick Kinuthia, then travelled to Busia where he met the Plaintiff herein who informed him that they were in a financial constraints and needed money for their daughter’s college fees and that he subsequently introduced him to his wife, Miss Nancy Watheka, the 4th Defendant herein whom they agreed to sell the property.....

The court has noted that none of the Defendants has specified the date that the Plaintiff met Patrick Muthiga Kinuthia and or introduced him to 4th Defendant. The bus tickets attached to the replying affidavit of Patrick Muthiga Kinuthia are of dates between months of July to November, 2012. It is

therefore impossible for the court to know from the tickets which of the ten tickets was for the day Patrick met Plaintiff or Plaintiff introduced Patrick to the 4th Defendant.

It was upon the 1st and 3rd Defendants to satisfy themselves that, indeed the 4th and 5th Defendants had the consent of the Plaintiff to transact as they did in the suit land. Section 93 (4) of the Land Registration Act provides for what happens to a transaction over matrimonial property where the other spouse has not given consent to in the following words;

“ 93 (4). If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by 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.”

9. That the Plaintiff has disputed that the purchase price of the suit land was employed in paying college fees and maintenance of his daughter Agnes. However the Plaintiff and his wife, 4th Defendant, did not avail an affidavit from the said Agnes to confirm either of the positions. Even though this is not among the issues to be determined by this court, an affidavit from Agnes would have assisted in confirming the role, if any, that she played in the transaction as she is mentioned in paragraph 6 of the 4th Defendant replying affidavit.

10. That the Defendants did not explain how 1st and 3rd Defendant got registered with the suit land on 31st August, 2012 when the date of the sale agreement was 1st September, 2012. The sale agreement should have preceded the transfer and registration of the transfer to enable the parties obtain the consent from the Land Control Board. None of the parties addressed the issue of the Land Control Board Consent and the court could not get the opportunity to seek clarification on the issue as the matter was commenced through originating summons and prosecuted through affidavits.

11. That for reasons set out above, the court finds that the 1st and 3rd Defendants failed to conduct due diligence to confirm from the Plaintiff that he had indeed given his consent to the transaction. To rely on what Patrick Muthiga Kinuthia and 4th Defendant may have told them about the Plaintiff's verbal consent was not enough considering that the law requires contracts for the disposition of an interest in land to be in writing, signed by the parties and such signatures attested.

12. That the 1st and 3rd Defendants title to the suit land was acquired unprocedurally as the Plaintiff consent was not obtained. The fact that they got registered as proprietors of the land a day before the sale agreement was executed leaves the court with doubt as to whether the due process of obtaining consent to the transaction from the Land Control Board was complied with. If it was, then the consent was obtained after the date of the sale agreement and one wonders how the transfer and registration of the transfer had been done without the Land Control Board consent. The court therefore concludes that the title acquired by the 1st and 3rd Defendant to the suit land was illegally and unprocedurally acquired for reasons of absence of spousal consent.

The Plaintiff has therefore proved his case against the Defendants and the court issues the following orders;

That a declaration is hereby issued that Plaintiff and transferred land parcel Bukhayo/Mundika/1537 to the 4th and 5th Defendants to hold it in trust as family land.

That the 4th and 5th Defendants entered into a sale agreement over the said land and transferred it to the 1st and 3rd Defendant without obtaining prior consent of the Plaintiff and therefore the disposition was void under section 93 (4) of the land Registration Act and the title should revert back to the names of 4th and 5th Defendants.

That the 4th and 5th Defendants should not enter into any transaction involving the disposition of the suit land without prior approval or consent of the Plaintiff.

That in view of the relationship between the Plaintiff and 4th and 5th Defendants, each party to bear

his/her own costs.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 9th DAY OF JULY, 2014.

IN THE PRESENCE OF; Plaintiff and Mr. Mahen for Defendants and Mr. Onsongo for the Plaintiff.

JUDGE.