



REPUBLIC OF KENYA

IN THE NEVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 14 OF 2019

JOYCE WANJIRU MACHARIA.....PLAINTIFF

VERSUS

PETER METHU NGAHU.....DEFENDANT

JUDGMENT

By a Plaint dated **8th January 2019**, the Plaintiff brought this suit seeking Judgment against the Defendant for orders that:-

- 1. The title deed to land parcel No. Ruiru/Ruiru/ West / Block 2/296, be canceled and an order compelling the Land Registrar to issue a title in the Plaintiff's name.***
- 2. An eviction order against the Defendant from land parcel No. Ruiru/Ruiru/ West / Block 2/296, where he has been living with the Applicant and three of their children.***
- 3. Cost of the suit and interest thereon.***

In her statement of claim, the Plaintiff averred that in the year **2012**, she started living together with the Defendant though they were not legally married and that they were blessed with children. That they had an oral understanding to make equal contribution so that they could buy a plot and develop it for the sake of the children. It was her contention that the Defendant however did not give his contribution and pleaded with her to take a loan facility to facilitate the buying and development of the plot on condition that he would help her repay it. The Plaintiff further averred that she borrowed **Kshs.5,000,000/=** loan and purchased and developed the suit property, although it was registered in both their joint names. That she further borrowed two other loans of **Kshs.600,000/=** and **Kshs.2,000,000/=** to develop the house on the said property. That she is still repaying the said loans without the Defendant's assistance. That the Defendant has chased her away and the children have been left in the house with him and he is rarely at home and hence the children's safety is at a huge risk. Further that the Defendant has threatened to kill the Plaintiff and had even strangled her and tried to hit her with a car, which threats the Plaintiff has reported to Ruiru Police Station.

Despite service of Summons to Enter Appearance, the Defendant did not enter appearance and the suit proceeded by way of formal proof wherein the Plaintiff testified and closed her case.

PLAINTIFF'S CASE

PW1 Joyce Wanjiru Macharia adopted her witness statement dated **8th January 2019** as her evidence. She further produced her list of documents as **exhibits 1 to 7**. It was her testimony that though she invited the Defendant to defend the matter, he has failed to file a defence. Further that the Defendant and herself have a joint registration over the suit property. That she purchased the suit property using loan money and the Defendant did not and has not assisted her to pay the loan. That the Defendant is not living on the suit property as she lives on the said plot with her children.

After close of viva voce evidence, the Court directed the Plaintiff to file written submissions and in compliance with the said directive, the Plaintiff through the **Law Firm of Koki Nthuli & Company Advocates** filed her written submissions dated **7th May 2020**, and submitted that the Defendant misrepresented to the Plaintiff that he would pay 50% of the purchase price and the Plaintiff consented to the joint registration. That the Plaintiff has continued to suffer loss as she has cleared the loan without any contribution from the Defendant. Therefore, the Defendant should not benefit from misrepresentation.

It was further submitted that the Plaintiff has established that the joint registration was as a result of misrepresentation and the same meets the requirement set out in **Section 80 of the Land registration Act** which gives the Court the power to direct the rectification of a **land register**.

The above being the evidence and submissions present before this Court, the issue for determination is ***whether the Plaintiff is entitled to the orders sought.***

Though the Defendant did not defend the suit, the Plaintiff who has alleged has a duty to prove her case as provided by **Section 107** of the **Evidence Act**. Therefore, the Plaintiff had a duty to call evidence and prove her case on the required standard. **Section 107** of the **Evidence Act** states:-

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Even though the Plaintiff evidence was not controverted, the Court still has a duty to interrogate the evidence produced before it in order to arrive at a just determination as *ex parte* evidence is not automatic prove of a case. See the case of **Gichinga Kibutha..Vs..Caroline Nduku (2018) eKLR**, where the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

It is not in doubt that the suit property is jointly registered in the names of the Plaintiff and the Defendant. To this effect the Plaintiff has produced a Certificate of Lease of exhibit in Court. It is the plaintiff's further evidence that though the suit property has been registered in their joint name, She personally contributed to the purchase of the said suit property by taking a loan of **Kshs. 5,000,000/=** to buy the same and a further loan of **Kshs. 600,000/=** and **Kshs. 2,000.000/=** to develop the same.

The Court has seen the Overdraft facility from the Cooperative Bank and the Plaintiff's testimony has not been controverted and therefore the Court has no reason to disapprove the evidence by the Plaintiff herein that she took an overdraft for purchase of the suit property. The Court is therefore satisfied that the Plaintiff acquired the suit property using monies which she took out as loan without the help of the Defendant.

Further, it is the Plaintiff's contention that the registration of the Defendant as an owner of the suit property was acquired through misrepresentation of facts. It is not in doubt that the Plaintiff individually contributed to the acquisition of the suit property using monies advanced to her as loans. Misrepresentation has been defined by **TheLaw.com Law Dictionary & Black's Law Dictionary 2nd Ed.** as;

A false statement or misrepresentation made intended that the listener will rely upon it and act upon it to their detriment.

A **misrepresentation** is a false statement of a material fact made by one party which affects the other party's decision in agreeing to a contract. If the **misrepresentation** is discovered, the contract can be declared void and depending on the situation, the adversely impacted party may seek damages.

The Defendant having communicated to the Plaintiff that he would help in acquisition of the suit property by contributing 50% of the purchase price and failing to do so, it is this Court's considered view as aptly submitted by the Plaintiff, that the same amounted to misrepresentation of facts .

It is not in doubt that a title can only be challenged on grounds of fraud or misrepresentation in obtaining the same and in such case, the registered proprietor has to be shown to have been a party to the fraudulent or illegal activities that led to him being registered as owner. See **Section 26(1) which provides that;**

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

In the case of **Alice Chemutai Too ...Vs... Nickson Kipkurui Korir & 2 Others [2015] eKLR** the Court held that :

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation.”

There is no doubt that the Defendant who is the joint title holder in this instant was a party to the **misrepresentation** having been the one who had misrepresented to the Plaintiff that he would make contributions towards the acquisition of the suit property and then failed to do so. The Court finds and holds that the Plaintiff's claim is merited and the Court ought to impeach the Defendant's title.

Having impeached the Defendant's title, then it means that the registration of the Defendant must then be cancelled so that the register can be rectified. Under **Section 80** of the **Land Registration Act**, the Court has powers to cancel title. See **Section 80(1)** which provides;

“the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

Having found that the Registration of the Defendant was done by misrepresentation, this Court has no option but to order the cancellation of the said title. The Court notes that prayer 2 of the Plaintiff seeking eviction was spent by the time the matter was being heard.

Having carefully read and considered the Pleadings, the evidence produced before this Court and the written submissions, the Court finds and holds that the Plaintiff has proved her case on the required standard of balance of probabilities and consequently the Court enters judgment for the Plaintiff against the Defendant in terms of **prayers no. 1 and 3** of the Plaintiff dated **8th January 2019**.

It is so ordered.

Dated, signed and Delivered at Thika this 22nd day of October 2020

L. GACHERU

JUDGE

22/10/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff Though aware of the Judgment date

No appearance for the Defendant

L. GACHERU

JUDGE

22/10/2020