



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ELCC NO. 10 OF 2016**

**LILIAN WAIRIMU KIMOTHO.....PLAINTIFF**

**VERSUS**

**SAMUEL NJOGU KIMOTHO.....1<sup>ST</sup> DEFENDANT**

**SMART MOVERS.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Proceedings herein commenced through plaint filed on 21<sup>st</sup> January 2016. Subsequently, the plaintiff filed an amended plaint on 28<sup>th</sup> April 2016. The plaintiff and the first defendant are husband and wife having been married under Kikuyu customary law in 1958. The marriage was later solemnized in church in 1965 under the Christian Marriage and Divorce Act. The plaintiff and the first defendant were blessed with four children and were living together with one of their children by the name of Milka in their matrimonial home on a parcel of land which was formerly known as Bahati/Wendo Block 2/55 Ruguru but which later became Bahati/Wendo Block 2/258 Ruguru.

2. The plaintiff averred in the amended plaint that sometime in the month of November 2015, the first defendant threatened to sell part of the matrimonial land to the second defendant, a move which she opposed leading to the first defendant being hostile to her and Milka. That fraudulently and without her consent, the first defendant sold 2 acres of Bahati/Wendo Block 2/55 Ruguru to the second defendant as a result of which two new parcels were created: Bahati/Wendo Block 2/258 Ruguru and Bahati/Wendo Block 2/259 Ruguru.

3. The plaintiff therefore prayed for judgment against the defendants for:

- a. *A permanent injunction restraining the 1<sup>st</sup> defendant from selling, transferring or leasing our LR No. Bahati/Wendo Block 2/258.*
- b. *A declaration that the 1<sup>st</sup> defendant held Bahati/Wendo Block 2/55 Ruguru in trust for himself, the plaintiff and their children.*
- c. *A declaration that the subdivision and sale of LR No. Bahati/Wendo Block 2/259 to the 2<sup>nd</sup> defendant is null and void for lack of consent from the plaintiff.*
- d. *A permanent injunction restraining the 2<sup>nd</sup> defendant from entering, selling or interfering in any way with parcel LR No. Bahati/Wendo Block 2/259.*
- e. *Cancellation of titles No. Bahati/Wendo Block 2/258 (Ruguru) & Bahati/Wendo Block 2/259 (Ruguru) and restoration in the land register of the title LR Bahati/Wendo Block 2/55 (Ruguru).*
- f. *Costs of this suit.*

4. The defendants filed an amended joint statement of defence through M/s Elizabeth Wangari & Company Advocates in which they denied the allegations of fraud and lack of consent. They urged the court to dismiss the suit.

5. Subsequently, the second defendant instructed M/s Mirugi Kariuki & Company Advocates to represent it separately. It also filed a Notice of Claim and/or Indemnity against the first defendant in which it stated that in the event that the plaintiff succeeds against the defendants, it shall seek the following redress and/or remedy against the first defendant:

- a) *Refund of the purchase price received by the 1<sup>st</sup> defendant from the 2<sup>nd</sup> defendant together with interest at commercial bank rates with effect from 9<sup>th</sup> June 2015.*

*b) Indemnity against the plaintiff's claim in its entirety including costs.*

*c) Refund of the expenses incurred by the 2<sup>nd</sup> defendant in conveying of the suit property from the 1<sup>st</sup> defendant it (sic).*

*d) Loss of user on the suit piece of land since the beginning of this suit and mense (sic) profits at the rate of KShs 30,000/- per month*

*e) The Costs of the suit.*

6. At the hearing, the plaintiff testified as PW1. She stated that she resides together with the first defendant who is her husband on the parcel of land known as Bahati/Wendo Block 2/55 which was registered in her husband's name and which measured slightly above six acres. They purchased the land in 1964 using the first defendant's earning from his job and her contribution as a wife and mother to their four children. They moved into the land in 1965, built a family home on it and have been farming on it. She was still living on the land under one roof with her husband even as at the date of her testimony.

7. The plaintiff further testified that her husband sold two acres of the land at KShs 1,500,000 per acre to Paul Karuga and Kibe Njenga as directors of the second defendant. That the sale was done without her husband consulting her and their children or obtaining her consent and without her appearing before the Land Control Board to give consent. She added that she wrote a letter dated 28<sup>th</sup> October 2015 to the Land Registrar through Wambui Ndungu & Company Advocates asking that her husband be restricted from selling the land without the consent of his family. Prior to that, she wrote a letter dated 29<sup>th</sup> September 2014 to the County Commissioner Nakuru through Muranje & Company Advocates protesting threats by her husband to sell the property.

8. She further testified that although a family meeting was held on 22<sup>nd</sup> July 2014, no resolution was reached at the meeting allowing her husband to sell a portion of the property. That although her home is within the remaining four acres after the sale, she is claiming the entire six acres since it belongs to her and her husband and since it is the only property that she has with her husband. She also stated that although her husband claimed that he sold the land to buy medicines, he like her is just old and she has never seen him take any medicine.

9. The plaintiff's case was closed at that point.

10. The first defendant Samuel Njogu Kimotho testified next as DW1. He partly gave oral testimony and also adopted his written witness statement. He stated that the plaintiff is his wife of many years and that he has had various disagreements with her leading to her deserting the matrimonial home on occasions. That he was the registered owner of the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) measuring 2.444 hectares and that he sold 0.8094 of it to the second defendant through a sale agreement dated 9<sup>th</sup> June 2016. The land was later surveyed and he obtained consent of the land control board. Subsequently, new subdivisions being Bahati/Wendo Block 2/258 (Ruguru) and Bahati/Wendo Block 2/259 (Ruguru) were created and titles duly issued. The second defendant got title for and took possession of Bahati/Wendo Block 2/259 (Ruguru).

11. DW1 further stated that he had been sickly and on medication and that the proceeds of the sale were for his upkeep and securing his medication since at the time of the sale he was all alone as the plaintiff had deserted the matrimonial home around November 2014 only to return around 27<sup>th</sup> June 2015, some two weeks after the sale agreement. He added that there was a meeting on 22<sup>nd</sup> July 2015 during which it was agreed that he sells part of the plot to take care of himself. He confirmed that as at the date of his testimony he, the plaintiff and their son Simon were living in the same house on the retraining 4 acres of the disputed property. He added that he is ready to share the 4 acres with the plaintiff.

12. When asked what ailment he was seeking treatment for, DW1 stated that he could not remember the details of his sickness or how much he had spent on treatment. He stated that the purchase price was deposited in his account where he is the sole signatory and that besides treatment, he used the money for transport and to buy food in hotels. He added that the plaintiff did not attend the Land Control Board since she was not at home at that time and further that he did not invite any of his children to attend the board.

13. Next on the stand was Charles Kariuki Gachahi (DW2). He too gave part oral testimony and also adopted his written witness statement. He stated that at the request of the Chief Wendo sub-location Nakuru North District, he chaired a family meeting on 22<sup>nd</sup> July 2014 which was attended by the plaintiff accompanied by her brother and one other witness while the first defendant was accompanied by his two brothers. The meeting made resolutions about how the plaintiff and the first defendant should co-exist and further that they have the mandate to sell part of their land if they feel the need to do so.

14. The first defendant's case was then closed.

15. Paul Njamba Karuga opened the second defendant's case, testifying as DW3. He stated that the second defendant was incorporated on 23<sup>rd</sup> April 2015 under the name Smart Movers Investment Company Ltd and that the first defendant sold to it the parcel of land known as Bahati/Wendo Block 2/259 (Ruguru) through a sale agreement dated 9<sup>th</sup> June 2015. The company was made up of a group of businessmen. Under the agreement, they purchased two acres which were to be excised from Bahati/Wendo Block 2/55 (Ruguru). They conducted a search on 10<sup>th</sup> June 2015 which showed that the owner of the plot was the first defendant and that there was no encumbrance on the title. We did not pay anything to the vendor until after search certificate came out. The purchase price was Kshs.2.5 million which they paid in full. The first defendant was to effect a subdivision. He gave the purchasers a copy of consent of the land control board in respect of the subdivision. No one objected to the subdivision. Subsequently, consent of the land control board for transfer of Bahati/Wendo Block 2/259 (Ruguru) was granted, transfer registered and title was issued to the second defendant on 20<sup>th</sup> August 2015. A search was also conducted on 12<sup>th</sup> October 2015 which showed that the second defendant was registered owner.

16. DW3 further stated that they did not encounter any objection at any point of the transaction and that they only encountered problems

from the plaintiff when they were about to complete fencing. On that occasion, the plaintiff emerged from somewhere outside the homestead and found DW3 and others fencing. She made noise saying that they should not fence. The first defendant who was present told DW3 and others to go ahead with fencing. Later, the first defendant called DW3 and told him that what had happened was a family issue and that they would talk as a family. He added that when they first went to see the plot in June 2015, it already had beacons and they did not see the plaintiff at that time. They asked the first defendant if he had a wife and children and he informed them that his wife left him eight months earlier with the children. They were satisfied with the explanations and proceeded with the transaction.

17. The second defendant's case was then closed.

18. Parties then filed and exchanged written submissions. I have carefully considered the parties respective pleadings, evidence and submissions. The issues that arise for determination are whether the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) was matrimonial property; secondly, whether this court has jurisdiction; thirdly, whether the first defendant held the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) in trust; fourthly, if the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) was matrimonial property, whether spousal consent was obtained in respect of its sale and subdivision and transfer of Bahati/Wendo Block 2/259 (Ruguru) to the second defendant; fifthly, whether the defendants are guilty of fraud; sixthly, whether the second defendant is a bona fide purchaser; and lastly, whether the parties are entitled to the reliefs sought.

19. Ordinarily, questions of jurisdiction should be dealt with first. In the circumstances of this case, I have found it necessary to deal with the issue of whether the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) was matrimonial property first since its determination has a bearing on the question of jurisdiction.

20. There is no dispute that the plaintiff and the defendant are husband and wife having been married under Kikuyu customary law in 1958. The marriage was later solemnized in church in 1965 under the Christian Marriage and Divorce Act. The plaintiff and the first defendant were blessed with four children and were living together with one of their children by the name of Milka in their matrimonial home on the parcel of land which was formerly known as Bahati/Wendo Block 2/55 (Ruguru).

21. Equally, there is no dispute that Bahati/Wendo Block 2/55 (Ruguru) measuring 2.444 hectares was registered in the name of the first defendant and that pursuant to a sale agreement dated 9<sup>th</sup> June 2015, the first defendant sold to the second defendant 0.8094 hectares of Bahati/Wendo Block 2/55 (Ruguru). As a result, the parcel was subdivided resulting in Bahati/Wendo Block 2/258 (Ruguru) measuring 1.650 hectares which remained in the name of the first defendant and Bahati/Wendo Block 2/259 (Ruguru) measuring 0.8094 hectares which was registered in the name of the second defendant on 20<sup>th</sup> August 2015.

22. Was the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) matrimonial property? I am convinced that it was. The phrase "matrimonial property" is defined at **Section 6** of the **Matrimonial Property Act, 2013** to among others mean the matrimonial home or homes. And what does matrimonial home mean? We need not look further than **Section 2** of the same statute which defines it to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, including any other attached property. A similar definition of matrimonial home is found at **Section 2** of the **Land Registration Act, 2012**. To the extent that the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) was owned by the first defendant who is the plaintiff's husband and further considering that the spouses occupied and utilized it as their family home, there can be no doubt whatsoever that the said property was matrimonial property.

23. I am alive to the fact that the second defendant has in its submissions tried to shift focus to Bahati/Wendo Block 2/259 (Ruguru) which was later registered in its name by arguing that the said parcel was not matrimonial property. That is a misleading approach since the second defendant came onto the scene through the sale agreement dated 9<sup>th</sup> June 2015, pursuant to which it purchased 0.8094 hectares of Bahati/Wendo Block 2/55 (Ruguru), thus triggering the subdivision that resulted in Bahati/Wendo Block 2/259 (Ruguru). The dispute in this case is about the sale and subdivision of Bahati/Wendo Block 2/55 (Ruguru), which property must remain the focus and entry point of all further discourse.

24. That leads us to the second issue for determination, whether this court has jurisdiction. Jurisdiction is the very lifeblood of any proceedings. Without it, the proceedings come to a certain end and the court cannot make any further step. See **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**.

25. In **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, the Supreme Court emphasised the importance of jurisdiction as follows:

*A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...*

26. The Court of Appeal also echoed the Supreme Court when it recently stated in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR** as follows:

*... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. ...*

*20. It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. ...*

27. The import of the position taken by the Court of Appeal is that a suit filed in a court without jurisdiction is stillborn, bereft of life from the onset and incapable of being revived or sustained in any manner. Among others, such a suit cannot be transferred to a court with jurisdiction for purposes of hearing and determination.

28. This court's jurisdiction is provided for under **Article 162** of the **Constitution** and **Section 13** of the **Environment and Land Court Act, 2011**. The court has jurisdiction in matters to do with the environment, the use and occupation of land, and title to land as well as in matters concerning redress of a denial or infringement or threat to rights or fundamental freedom relating to a clean and healthy environment under **Articles 42, 69** and **70** of the **Constitution**. The court also has wider jurisdiction when dealing with disputes involving environment and land, to resolve claims concerning breaches of other fundamental rights related to environment and land. See **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR**.

29. Citing **Section 17 (1) and (2)** of the **Matrimonial Property Act, 2013**, the first defendant argued that the dispute before the court is a matrimonial dispute and that it should not therefore be before this court. Additionally, the first defendant pointed out that the plaintiff dwelt in her submissions on the rights of parties to a marriage and on her contributions towards acquisition of the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru).

30. **Section 17** of the **Matrimonial Property Act, 2013**, provides as follows:

**17. Action for declaration of rights to property**

**(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.**

**(2) An application under subsection (1) -**

**(a) shall be made in accordance with such procedure as may be prescribed;**

**(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.**

31. The foregoing provisions deal with applications for declaration of rights to any property that is contested between spouses or a former spouses. The first defendant concedes in his submissions that there is no such application before the court. In such circumstances, the argument that this court lacks jurisdiction is not founded. A perusal of the pleadings herein shows that the court has not been invited to make any determination regarding whether or not the parties' marriage should be dissolved. While it is true that the dispute pits one spouse against another over matrimonial property, we must not lose sight of the fact that there is a third party: the second defendant which is proclaiming that it is not only a bona fide purchaser of a portion of the property in dispute but also a registered proprietor in respect of the portion. The plaintiff is seeking not only the nullification of the subdivision of the matrimonial property but also cancellation of the second defendant's title. The matter concerns the use, occupation and title to the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) and its subsequent subdivisions. It falls squarely within this court's jurisdiction.

32. The third issue for determination is whether the first defendant held the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) in trust. The plaintiff argued that the first defendant held the property in trust for her and her children. On his part, the first defendant argued that the plaintiff's interest in the property have not been declared in terms of **Section 17 (1)** of the **Matrimonial Property Act, 2013** and that the plaintiff has not demonstrated the existence of any form of trust.

33. Whether or not trust exists is really a question of fact which must be proven. The Supreme Court stated as follows in **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR** with regard to trusts and customary land rights:

***Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:***

**1. The land in question was before registration, family, clan or group land**

**2. The claimant belongs to such family, clan, or group**

**3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.**

**4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.**

**5. The claim is directed against the registered proprietor who is a member of the family, clan or group.**

34. I found above that the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) was matrimonial property. It follows therefore that

the plaintiff has a proprietary interest in it pursuant to **Section 7** of the **Matrimonial Property Act, 2013**. The extent of her interest would have to be determined upon dissolution of the marriage. See **EJT v JKL [2019] eKLR**. The section provides as follows:

### **7. Ownership of matrimonial property**

**Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.**

35. From the material on record, the first defendant became registered proprietor of Bahati/Wendo Block 2/55 (Ruguru) on 12<sup>th</sup> February 1991, during the life of his marriage with the plaintiff. Pursuant to **Section 14 (a)** of the **Matrimonial Property Act, 2013**, there is a rebuttable presumption that it is held in trust for the plaintiff. The defendants have not rebutted that presumption. Further, the plaintiff and the first defendant had four children. Consequently, the plaintiff as spouse and the children had an overriding interest over the property in the form of customary trust pursuant to **Section 28 (b)** of the **Land Registration Act**. The land was reserved for family use. Besides the spouses, there is evidence on record that some of the children like Milka and Simon lived on it at various times. As at the date of hearing of the suit, Simon was living on the property with his parents. I am therefore satisfied that the first defendant held the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) in trust for the plaintiff and the children.

36. Was spousal consent obtained in respect of the sale and subdivision Bahati/Wendo Block 2/55 (Ruguru)? **Section 12 (1)** of the **Matrimonial Property Act, 2013** provides that an estate or interest in any matrimonial property shall not be alienated in any form during the subsistence of a monogamous marriage without the consent of both spouses. According to **Black's Law Dictionary 10<sup>th</sup> Edition**, the verb alienate means “to transfer or convey (property or a property right) to another”.

37. The second defendant has argued that subdivision of Bahati/Wendo Block 2/55 (Ruguru) did not amount to alienation and did not therefore require consent. That may be so if the first defendant remained the registered proprietor of the ensuing parcels. There is more however in this case: the subdivision resulted in conveyance of Bahati/Wendo Block 2/259 (Ruguru), one of the two resulting subdivisions, away from the first defendant and in favour of the second defendant. It was taken away from the realm of the first defendant's and plaintiff's matrimonial property. The plaintiff's consent was required for that transaction pursuant to **Section 12 (1)** of the **Matrimonial Property Act, 2013**.

38. The second defendant further argued that the plaintiff's consent was obtained in view of the meeting of 22<sup>nd</sup> July 2014 and the resolutions in respect thereof. While the plaintiff admitted that the meeting was held, she denied that any resolution was reached in the meeting that the first defendant could sell a portion of the land. A reading of the resolutions shows that they were not signed by the plaintiff and the first defendant. Item 8 of the resolutions states that “in case the husband and wife feel the need to sell part of their land they have the mandate to do so”. Assuming that there was indeed such a resolution, it is manifest that any sale had to be jointly undertaken. In this case the first defendant has admitted that he conducted the sale to the plaintiff's exclusion, in her absence and banked the proceeds beyond the plaintiff's reach in an account where he is the sole signatory. If at all such a resolution existed, there would have been no need for the first defendant to act in the manner in which he did.

39. That there was no consent is also supported by the conduct of the plaintiff as captured in the testimony of Paul Njamba Karuga (DW3), one of the people behind the second defendant. He stated that when he and other representatives of the second defendant went to fence Bahati/Wendo Block 2/259 (Ruguru), the plaintiff emerged and protested. There was a confrontation, complete with allegations that one of DW3's colleagues assaulted the plaintiff. A report was made to the police and a P3 Form filled. In view of the foregoing, I find that no spousal consent was obtained in respect of the sale and subdivision of Bahati/Wendo Block 2/55 (Ruguru) and transfer of Bahati/Wendo Block 2/259 (Ruguru) to the second defendant.

40. Are the defendants guilty of fraud? The plaintiff averred in the amended plaint that the sale of two acres of Bahati/Wendo Block 2/55 (Ruguru) and its subsequent subdivision was fraudulent. She argued in her submissions that the transaction was fraudulent since it was undertaken without her involvement and without her consent. On his part, the first defendant argued that legal requirements were complied with prior to the sale. The second defendant termed the allegations of fraud as generalized and argued that fraud has been established against it.

41. The authors of **Black's Law Dictionary 10<sup>th</sup> Edition** define fraud to mean “A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment”. By way of further elaboration, the authors quote the following extract from **John Willard, A Treatise on Equity Jurisprudence 147 (Platt Potter ed., 1879)**:

**“Fraud has been defined to be, any kind of artifice by which another is deceived. Hence, all surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one, is to be considered as fraud.”**

42. Any allegation of fraud is a serious matter. Procedural law requires that such an allegation must not only be pleaded and particularised, it must also be strictly proven. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR**. The party alleging fraud faces a burden of proof which is higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR**.

43. Bahati/Wendo Block 2/55 (Ruguru) was matrimonial property which the plaintiff and the first defendant occupied and utilized as their family home. The plaintiff had both a proprietary and an overriding interest in it. The first defendant sold a portion of it and subdivided it without informing the plaintiff and without seeking her consent. In his own words, did the transaction when the plaintiff was away from the matrimonial home. He claimed that he sold the property since he was sick and needed money for treatment. He neither stated what exactly ailed him nor did he produce any doctor's report or medical receipts to support his allegations.

44. In his testimony, Paul Njamba Karuga (DW3) stated that prior to buying the land, when he and other representatives of the second

defendant went to see the plot in June 2015 they asked the first defendant if he had a wife and children and the first defendant answered in the affirmative but added that his wife left him eight months earlier. That was sufficient notice to the second defendant which was represented in the transaction by an advocate. Clearly, in the absence of an order dissolving the marriage, desertion alone even if proven, could not extinguish the plaintiff's rights over the property. The defendants ploughed ahead with the transaction knowing well that the plaintiff and even her children had valid proprietary and equitable interest in the property. Their determination was so much that even a loud confrontation at the site did not deter them. I am therefore satisfied that the plaintiff has established fraud as against the defendants.

45. Is the second defendant a bona fide purchaser? To qualify to be a bona fide purchaser, the second defendant would need to satisfy the test in the Ugandan case of **Katende vs. Haridar & Company Limited [2008] 2 E.A.173** cited with approval by our Court of Appeal in **C O Okere v Esther Nduta Kiiyukia & 2 others [2019] eKLR**:

*For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:*

- a) he holds a certificate of title;*
- b) he purchased the property in good faith;*
- c) he had no knowledge of the fraud;*
- d) he purchased for valuable consideration;*
- e) the vendors had apparent valid title;*
- f) he purchased without notice of any fraud;*
- g) he was not party to any fraud.*

46. The second defendant is the registered proprietor of Bahati/Wendo Block 2/259 (Ruguru) pursuant to title issued to it on 20<sup>th</sup> August 2015. From the foregoing discussion it cannot be said that second defendant purchased the property in good faith or that it had no knowledge of the fraud or that it was not party to the fraud. On the contrary, it actively participated in the transaction despite the glaring red flags as to fraud. It was party to the fraud. I hold that the second defendant is not a bona fide purchaser.

47. The last issue for determination is whether the parties are entitled to the reliefs sought. In view of the foregoing discourse, I am satisfied that the plaintiff is entitled to prayers (b) and (c) of her plaint.

48. Prayer (e) of the plaint seeks cancellation of titles in respect of Bahati/Wendo Block 2/258 (Ruguru) and Bahati/Wendo Block 2/259 (Ruguru) and restoration in the land register of the title in respect of Bahati/Wendo Block 2/55 (Ruguru). Ordinarily, the court would be duty bound under **Section 26** of the **Land Registration Act** to accept a certificate of title as proof of ownership. A title can however be nullified on account of fraud or misrepresentation to which the proprietor is proved to be a party or if it is shown that it was acquired illegally, unprocedurally or through a corrupt scheme. The discourse above discloses fraud. Further, the first defendant conceded that he did not involve the plaintiff in the process of seeking consent of the land control board in respect of the subdivision of Bahati/Wendo Block 2/55 (Ruguru). Further, both defendants despite being fully aware of the plaintiff's matrimonial interest over Bahati/Wendo Block 2/55 (Ruguru) and its subdivisions, kept her away from their application for consent of the land control board in respect of transfer of Bahati/Wendo Block 2/259 (Ruguru) to the second defendant. Such conduct amounts to misrepresentation to which both defendants were parties. The transactions that saw the creation of Bahati/Wendo Block 2/258 (Ruguru) and Bahati/Wendo Block 2/259 (Ruguru) were contrary to the law in that the plaintiff's consent was not obtained as was required by **Section 12 (1)** of the **Matrimonial Property Act, 2013**. I therefore hold that prayer (e) of the plaint is merited. As a result, the orders sought at prayers (a) and (d) of the plaint are unnecessary since the defendants will no longer be the registered proprietors of the respective parcels.

49. In view of the success of the plaintiff's claim with resulting nullification of its title, the second defendant is entitled to a refund of the sum of KShs 2,500,000 which it paid to the first defendant as purchase price. The said amount is verified by the sale agreement and the first defendant's confirmation during his testimony that he received the full purchase price. Although the second defendant claimed interest on the purchase price at commercial bank rates with effect from 9<sup>th</sup> June 2015, no evidence was led on such bank rates. I will therefore award interest at court rates from the date of this judgment.

50. The second defendant also claimed refund of the expenses it incurred in conveying the property to itself as well as loss of user and mesne profits at the rate of KShs 30,000 per month. No evidence was however adduced to support those claims. I will therefore not grant those prayers.

51. Regarding costs, I take into account that the parties have had a measure of success against each other. I further bear in mind that the plaintiff and the first defendant are married. Taking all those factors into account, each party shall bear own costs of these proceedings.

52. In the result, I make the following orders:

- 1. I enter judgment in favour of the plaintiff as follows:**

(a) A declaration is issued that the first defendant held the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) in trust for himself, the plaintiff and their children.

(b) A declaration is issued that the subdivision of the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) and sale of the parcel of land known as Bahati/Wendo Block 2/259 (Ruguru) to the second defendant is null and void for want of consent from the plaintiff.

(c) The titles in respect of the parcels of land known as Bahati/Wendo Block 2/258 (Ruguru) and Bahati/Wendo Block 2/259 (Ruguru) are hereby cancelled.

(d) The land registrar is hereby ordered to restore in the register the title in respect of the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru).

2. I also enter judgment against the first defendant and in favour of the second defendant as follows:

(a) KShs 2,500,000 (two million five hundred thousand) being refund of the purchase price.

(b) Interest on (a) above at court rates from the date of this judgment.

3. Each party shall bear own costs.

53. It is so ordered.

Dated, signed and delivered at Nakuru this 30<sup>th</sup> day of November 2020.

**D. O. OHUNGO**

**JUDGE**

**In the presence of:**

**Ms Nancy Njoroge for the plaintiff**

**Mrs Mukira for the first defendant**

**Mr Mwangi for the second defendant**

**Court Assistants: B. Jelimo & J. Lotkomoi**