



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 1261 OF 2015

FKN.....PLAINTIFF

VERSUS

JWM.....1ST DEFENDANT

GEORGE KARIUKI MURIITHI.....2ND DEFENDANT

COUNTY LAND REGISTRAR THIKA....3RD DEFENDANT

JUDGMENT

Introduction:

The plaintiff and the 1st defendant were at all material times living together as husband and wife. They lived together between 1994 and 2014 during which period they were blessed with two children. During their stay together, they acquired a number of properties some of which were registered in the name of the 1st defendant alone while the others were registered in their joint names. The properties which the plaintiff and the 1st defendant acquired while they were living together the particulars of which have been disclosed to the court are the following:

1. L.R No. Thika Municipality/Block [...] (Ngoiwa) – registered in the joint names of the plaintiff and the 1st defendant.
2. L.R No. Thika Municipality/Block [...] – sold.
3. L.R No. Thika Municipality/Block [...] (Ngoiwa) – formerly registered in the name of the 1st defendant and now in the name of the 2nd defendant.

The plaintiff's claim:

The plaintiff brought this suit against the defendants on 9th December, 2015 seeking the following reliefs:

1. A declaration that the sale and transfer of L.R No. Thika Municipality/Block [...] (Ngoiwa) by the 1st defendant to the 2nd defendant was null and void for lack of spousal consent.
2. An order directing the 3rd defendant to cancel the fraudulent entry in the register purporting to transfer L.R No. Thika Municipality/Block [...] (Ngoiwa) to the 2nd defendant and the title deed issued to the 2nd defendant on 14th October, 2015.
3. A permanent injunction against the 2nd defendant restraining him from interfering with the plaintiff's quiet possession of L.R No. Thika Municipality/Block [...] (Ngoiwa).
4. A permanent injunction restraining the 1st defendant from alienating, disposing of, transferring, charging or in any other way dealing with L.R No. Thika Municipality/Block [...] (Ngoiwa) pending the determination of a suit for the division of matrimonial property.
5. Costs of the suit.

In his plaint, the plaintiff averred that he contracted a customary law marriage with the 1st defendant in 1994. He averred that in 2003, the 1st defendant and he purchased L.R No. Thika Municipality/Block [...] (Ngoiwa) (hereinafter referred to as "Plot No. [...]") which was registered in their joint names and on which they constructed their matrimonial home. He averred further that in 2007 they bought another parcel of land known as L.R No. Thika Municipality/Block [...] (hereinafter referred to as "Plot No. [...]"). He averred that before Plot No. 1418 was transferred to them, L.R No.Thika Municipality/Block [...] (Ngoiwa) (hereinafter referred to as "the suit property") which is adjacent to their matrimonial home was put up for sale and they agreed to sell Plot No. [...] and use the proceeds thereof to purchase the said property. The plaintiff averred that the agreement for sale in respect of the suit property was in their joint names as purchasers and that the 1st defendant, the vendor and he attended the Land Control Board meeting and obtained consent for the transfer of the suit property to their joint names. The plaintiff averred that the vendor gave them executed instrument of transfer and other documents necessary to have the suit property transferred into their names. The plaintiff averred that they did not transfer the suit property to their names immediately. He averred that they took possession of the suit property and he put up thereon cow sheds and chicken cage for rearing dairy cattle and chicken. The plaintiff averred that he was at all material times carrying out dairy and poultry farming on the suit property for his upkeep and that of his family.

The plaintiff averred that a dispute arose between him and the 1st defendant which led to the 1st defendant moving out of the matrimonial home in 2014. He averred that when the 1st defendant left the matrimonial home, she carried with her all the documents relating to the suit property. He averred that on 26th May, 2015, the 1st defendant filed a petition for divorce against him at Thika Law Court. The plaintiff averred that in November, 2015, a group of youth invaded the suit property and informed him that they had been instructed by one, George to demolish all the structures thereon. The plaintiff averred that following this incident, he carried out a search at the Land Registry, Thika which revealed that the suit property was registered in the name of the 2nd defendant and that a title deed had been issued to him in respect thereof on 14th October, 2015.

The plaintiff averred that he was not involved in the sale of the suit property by the 1st defendant to the 2nd defendant and that the transaction was un-procedural, fraudulent and illegal in that the same was conducted without his knowledge and consent. The plaintiff averred that the 2nd defendant had threatened to demolish the structures on the suit property and to take over possession of the same unless restrained by the court. The plaintiff averred further that unless restrained by the court, the 1st defendant was likely to dispose of Plot No. [...] in the same way she sold off the suit property.

The defence to the claim:

The 1st defendant filed a defence and counter-claim against the plaintiff on 23rd February, 2016. The 1st defendant denied that she was married to the plaintiff. The 1st defendant averred that although Plot No. [...] was registered in their joint names, the plaintiff did not make any contribution towards the acquisition of the same and as such the plaintiff was only holding the same in trust for her. The 1st defendant averred further that she paid the full purchase price for Plot No. [...] which was sold later on by the plaintiff. With regard to the suit property, the 1st defendant averred that she acquired the same single handedly through a loan that she obtained from Mwalimu Sacco. The 1st defendant denied that the plaintiff made any contribution towards the acquisition of the said parcel of land. The 1st defendant admitted that the agreement for sale of the suit property was in their joint names. She contended however that the name of the plaintiff was put in the agreement not on account of any contribution which he made but as her trustee.

The 1st defendant averred that she parted ways with the plaintiff due to irreconcilable differences and that she took away the title documents for Plot No. [...] and the suit property because the two properties belonged to her. The 1st defendant averred that the dairy cattle and poultry which the plaintiff was rearing on the suit property were purchased by her and not by the plaintiff. The 1st defendant averred that she did not require the consent of the plaintiff when selling the suit property because the property belonged to her and furthermore, the plaintiff was not her legal spouse. The 1st defendant denied that she had attempted to dispose of Plot No. [...] which was registered in their joint names. In her counter-claim, the 1st defendant reiterated the contents of her defence and sought a declaration that:

1. The plaintiff holds Plot No. [...] in trust and for the benefit of the 1st defendant.
2. The sale and transfer of the suit property to the 2nd defendant was valid and legal.
3. Costs of the counter-claim.

The 2nd defendant filed a defence and counter-claim against the plaintiff on 5th May, 2016. The 2nd defendant denied that he had an intention of demolishing the structures on the suit property. He averred that such move was not necessary because the person who sold to him the property had undertaken to give him vacant possession. The 2nd defendant averred that it was not necessary for him to consult the plaintiff before purchasing the suit property because due diligence which he conducted revealed that the suit property was registered in the name of the 1st defendant alone. The 2nd defendant denied that the sale of the suit property to him was marred with illegalities and fraud. In his counter-claim, the 2nd defendant averred that he purchased the suit property from one, Antony Karanja who had purchased the suit property from the 1st defendant at Kshs.2,200,000/-. He averred that he purchased the property at Kshs.3,500,000/- from the said Antony Karanja. He stated that when he purchased the property, the same had not been transferred to the name of Antony Karanja by the 1st defendant and that the 1st defendant agreed to transfer the property to him directly. He averred that after he paid the purchase price for the suit property in full, the 1st defendant executed the instrument of transfer in his favour and handed over to him all the completion documents which he lodged for registration at Thika Land Registry. He averred that the instrument of transfer was duly registered after which he was issued with a title deed for the suit property on 14th October, 2015. The 2nd defendant averred that he was a bona fide purchaser of the suit property for value without notice of the plaintiff's alleged interest in the same. The 2nd defendant sought the following reliefs against the plaintiff by way of a counter-claim:

1. A declaration that the 2nd defendant was the legal registered owner of the suit property.
2. Costs of the suit and the counter-claim.

At the trial the plaintiff adopted his witness statement as part of his evidence in chief. The plaintiff reiterated that the 1st defendant was his wife the two having celebrated a customary marriage in 1994. He stated that their marriage was blessed with two (2) children born in 1994 and 2006 in addition to a child that the 1st defendant had before they got married. He stated that they stayed together as husband and wife for 20 years before the 1st defendant filed a petition for divorce. He stated that the divorce case had not been concluded and as such their marriage had not been dissolved. He reiterated that during their marriage, they purchased Plot No. [...], Plot No. [...] and the suit property. He stated that the 1st defendant took a loan which he topped up to enable them purchase Plot No. [...] on which they constructed their matrimonial home. He stated further that they purchased Plot No. [...] in 2007 and sold the same to enable them acquire the suit property. He stated that they did not cause the suit property to be transferred to their names immediately due to financial constraints. He stated that the suit property was purchased with the proceeds of sale of Plot No. [...]. He stated that the purchaser of Plot No. [...] issued a cheque directly in favour of the person who sold to them the suit property in settlement of the purchase price. The plaintiff reiterated that after they had purchased the suit property he constructed thereon cow sheds and chicken cages. He also fenced the said parcel of land. He stated that he was still in occupation of the suit property. He stated that he separated with the 1st defendant in 2014 and in 2015 he learnt that the 1st defendant had sold the suit property to a Mr. Karanja. A search that he carried out at the Land Registry revealed that the suit property was transferred to the 2nd defendant on 14th October, 2015. He stated that his consent was not obtained before the suit property was transferred to the 2nd defendant. He stated that he was also not a party to the agreement for sale which the 1st defendant entered into with one, Antony Karanja Kariuki in respect of the suit property. He stated that he was in possession of the suit property when the same was purportedly sold to the 2nd defendant and that the 2nd defendant did not consult him before he purchased the property. He urged the court to cancel the 2nd defendant's title over the suit property and to restrain him from demolishing the structure standing thereon.

In her evidence, the 1st defendant also adopted her witness statement as part of her evidence. She told the court that she was a [particulars withheld] employed by the Teachers Service Commission and that she had been teaching for 30 years. She stated that she sold Plot No. [...] for Kshs.400,000/- and that it was that amount which she used to purchase the suit property. She stated that the plaintiff did not contribute towards the purchase of the suit property. She stated that the purchase price for the suit property was Kshs.415,000/- out of which she obtained Kshs.400,000/- from the sale of Plot No. 1418 and the balance in the sum of Kshs.15,000/- from her other sources. The 1st defendant reiterated that the plaintiff did not make any contribution towards the purchase of Plot No. [...], Plot No. 1418 and the suit property. She stated that she purchased the said properties from the loans that she obtained from Mwalimu Sacco. She stated that when she separated from the plaintiff, the suit property had already been transferred to her name and that plaintiff did not raise any issue with regard to that transfer while they were still living together.

The 2nd defendant gave evidence and called one witness, Antony Karanja Kariuki (DW 3). The 2nd defendant adopted his witness statement that was filed in court on 5th February, 2016 as part of his evidence in chief. He told the court that he purchased the suit property in September, 2015 from Antony Karanja Kariuki (DW 3) at Kshs.3,500,000/-. He stated that he conducted due diligence before purchasing the property. He stated that DW 3 gave him copies of the title deed for the suit property and the agreement for sale that he had entered into with the 1st defendant in respect thereof. He stated that a search that he carried out at the Land Registry showed that the suit property was registered in the name of the 1st defendant. He stated that he asked DW 3 to arrange for a meeting between him and the 1st defendant following which request, he met the 1st defendant at a lawyer's office in Thika town. The 2nd defendant stated that after that meeting, he entered into a sale agreement with the said Antony Karanja (DW 3) who had a duty to provide him with all the completion documents. He stated that DW 3 obtained Land Control Board consent and the suit property was ultimately transferred to him. He stated that after he was issued with a title deed for the property, he sent workers to the suit property to erect a gate when the plaintiff came with Administration Police to stop the exercise. He stated that the said workers were arrested and taken to the Administration Police Camp in the area and he went to the said camp to have them released when he met the plaintiff for the first time. He urged the court to grant the reliefs sought in his counter-claim against the plaintiff.

Antony Karanja Kariuki (DW 3) gave evidence on behalf of the 2nd defendant. He adopted his witness statement filed in court on 13th April, 2017 as part of his evidence in chief. He told the court that he purchased the suit property from the 1st defendant at Kshs.2,200,000/- which amount he paid in full. He told the court that he subsequently sold the suit property to the 2nd defendant at Kshs.3,500,000/- which amount the 2nd defendant paid through bank transfer and in cash. DW 3 confirmed that he arranged for a meeting between the 1st defendant and the 2nd defendant and that the 1st defendant transferred the suit property directly to the 2nd defendant. DW 3 contended that the plaintiff was aware that the 1st defendant had sold the suit property to him and that the plaintiff had promised that he would vacate the property. He stated that he informed the plaintiff that he had sold the suit property to the 2nd defendant. He stated that the plaintiff never disclosed to him that he was the husband of the 1st defendant. He claimed that the suit by the plaintiff took him by surprise.

After the close of evidence, the parties made closing submissions in writing. The plaintiff filed his submissions on 9th February, 2018 while the 1st and 2nd defendants filed their submissions on 31st July, 2018 and 28th June, 2018 respectively. I have considered the plaintiff's claim and the defences and counter-claims that were put forward by the defendants in response thereto. I have also considered the evidence that was tendered by the parties and the submissions of counsel. The parties did not agree on the issues for determination by the court. In their submissions, each party framed his own issues. From my review of the pleadings and the evidence on record, the following are the issues which arise for determination in this suit:

1. Whether the plaintiff and the 1st defendant were married when the parcels of land known as Thika Municipality/Block [...] (Ngoiwa) and Thika Municipality/Block [...] (Ngoiwa) ("the suit property") were acquired.
2. Whether the two parcels of land were matrimonial property.

3. Whether the 1st defendant required the consent of the plaintiff before selling the suit property.
4. Whether the sale and transfer of the suit property by the 1st defendant to the 2nd defendant was fraudulent and illegal.
5. Whether the 2nd defendant was an innocent purchaser of the suit property for value without notice.
6. Whether the plaintiff is entitled to the reliefs sought.
7. Whether the 1st and 2nd defendants are entitled to the reliefs sought in their counter-claim.

Whether the plaintiff and the 1st defendant were married when they acquired the parcels of land known as L.R No. Thika Municipality/Block [...] (Ngoiwa) and and L.No. Thika Municipality/Block [...] (Ngoiwa) (“the suit property”).

Whereas the plaintiff contended that the 1st defendant was his wife whom he married under customary law in 1994, the 1st defendant denied that she was married to the plaintiff. Apart from stating that he lived together with the 1st defendant for 20 years during which period they had two children, the plaintiff did not tender any evidence of customary marriage to the 1st defendant. In her witness statement dated 17th February, 2016, the 1st defendant stated that she started co-habiting with the plaintiff in 1994 until January, 2015 when they separated due to irreconcilable differences. The 1st defendant did not deny that she had two children with the plaintiff one of whom was staying with the plaintiff. In cross-examination by the plaintiff’s advocate, the 1st defendant admitted that she had filed a divorce petition for the dissolution of her marriage to the plaintiff. The 1st defendant contended however that she was misled into filing that petition because the same was unnecessary since she was not married to the plaintiff. In re-examination by her advocate, the 1st defendant claimed that she withdrew the divorce petition. No evidence was however placed before the court in proof of the alleged withdrawal. It is my finding that the plaintiff and the 1st defendant lived together as husband and wife from 1994 to 2014. It is my further finding that the plaintiff did not establish customary marriage between him and the 1st defendant. The evidence before me shows that the plaintiff and the 1st defendant were not married but co-habited for a period of 20 years during which period they held each other as husband and wife. In the case of Joseph Gitau Githongo v Victoria Mwhiki Munya [2014] eKLR, the Court of Appeal stated as follows:

“It has been accepted in Kenya over a long time that cohabitation of a man and a woman for a considerable period of time in circumstances where the community treats them as husband and wife, can give rise to the presumption of marriage. In HOTENSIAH WANJIKU YAWE VS. PUBLIC TRUSTEE (Supra) (Civil Appeal No. 13 of 1976), it was held that long cohabitation as man and wife gives rise to a presumption of marriage and that only cogent evidence to the contrary can rebut such presumption. The court further stated that the presumption of marriage arising from long cohabitation applies even under customary law.”

I am satisfied that the plaintiff adduced sufficient evidence from which this court can presume marriage between the plaintiff and the 1st defendant. The plaintiff and the 1st defendant cohabited for 20 years during which period they shared a matrimonial home and had two children. The 1st defendant’s act of filing a divorce petition for dissolution of her marriage to the plaintiff was a further testimony to the fact that for all intents and purposes the plaintiff and the 1st defendant considered themselves as married. It is my finding therefore that between 2002 and 2007 when Plot No. [...] and the suit property were acquired the plaintiff and the 1st defendant were married.

Whether the two parcels of land were matrimonial property.

What constitutes matrimonial property is defined in section 6 of the Matrimonial Property Act, 2013 as “**matrimonial home or homes, household goods and effects in the matrimonial home or homes and any other immovable and movable property jointly owned and acquired during the subsistence of marriage**”. In Section 2 of the Matrimonial Property Act, 2013, matrimonial home is defined as “**any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property**”. In section 2 of the Land Act, 2012, matrimonial home is defined “**as any property that is owned or leased by one or both spouses and occupied by the spouses as their family home**”.

From the foregoing, it is clear that a matrimonial home is a matrimonial property and that matrimonial property extends beyond matrimonial home to cover any other immovable or movable property acquired by the spouses or any of them during the marriage. Since Plot No. [...] was occupied by the plaintiff and the 1st defendant as their family home, the same was a matrimonial home and as such matrimonial property. With regard to the suit property, there was no evidence that the same was occupied by the plaintiff and the 1st defendant as family home. The evidence on record shows that the same was being used by the plaintiff and the 1st defendant for dairy and poultry farming. Due to its proximity to the matrimonial home and the activities which were being undertaken thereon, I would treat it as an extension of the matrimonial home and as such a matrimonial property. If I am wrong in that conclusion, the property is still a matrimonial property on account of having been acquired during the marriage between the plaintiff and the 1st defendant.

Whether the 1st defendant required the consent of the plaintiff before selling the suit property.

As at the time the suit property was sold and transferred to the 2nd defendant, the marriage between the plaintiff and the 1st defendant was subsisting. The 1st defendant had filed a petition for divorce but the court had not pronounced the dissolution of their marriage. Section 12(1) of the Matrimonial Property Act provides that an estate or interest in a matrimonial property shall not during the subsistence of the marriage be alienated by way of sale, gift, lease, mortgage or otherwise without the consent of both spouses. Section 93 (3) of the Land Act, 2012 puts an obligation upon any person intending to acquire land held by a spouse in her or his own name to inquire from such a spouse whether the other spouse has consented to the sale or transfer. Section 93 (4) of the Land Act, 2012 provides that where such disposition has

taken place without consent of the other spouse the same is voidable at the option of the spouse who has not given consent.

There is no doubt from the foregoing that the 1st defendant required the consent of the plaintiff to sell and transfer the suit property to the 2nd defendant.

Whether the sale and transfer of the suit property by the 1st defendant to the 2nd defendant was fraudulent and illegal.

As I have held herein earlier, the 1st defendant required consent of the plaintiff to sell the suit property. Section 12(1) of the Matrimonial Property Act, 2013 and Section 93 (4) of the Land Act, 2012 which I have cited above makes it illegal for a spouse to alienate a matrimonial property without the consent of the other spouse. It follows therefore that the purported sale of the suit property by the 1st defendant to Antony Karanja Kariuki (DW3) and subsequent transfer of the property to the 2nd defendant which was undertaken without the consent of the plaintiff were illegal. In view of the manner in which the whole transaction was conducted, fraud cannot also be ruled out. The 1st defendant did not place before the court the paper trail leading up to her registration as the owner of the suit property. The agreement for sale of the suit property (at page 4 of P Exh.1) shows that the property was purchased by the plaintiff and the 1st defendant jointly. The 1st defendant did not explain under what circumstances the property came to be registered in her sole name. Neither the instrument of transfer nor the Land Control Board Consent was placed before the court for scrutiny. With regard to the sale and transfer of the suit property to the 2nd defendant, the paper trail that was placed before the court raised more questions than answers. Two agreements for sale were placed before the court; the first being the one between the 1st defendant and Antony Karanja Kariuki dated 30th April, 2015 and the second being the one between Antony Karanja Kariuki and the 2nd defendant dated 12th September, 2015. In the first agreement, the 1st defendant purportedly sold the suit property to Anthony Karanja Kariuki at Kshs.2,200,000/-. In the second agreement which was made five months later, Antony Karanja Kariuki purportedly sold the suit property to the 2nd defendant at Kshs.3,500,000/- although the property was not registered in his name. Within a period of 5 months, the value of the suit property had appreciated by over 50%. In the agreement for sale between the 2nd defendant and Antony Karanja Kariuki it is indicated that the 2nd defendant paid to Antony Karanja Kariuki the entire purchase price of Kshs.3,500,000/- in cash on the execution of the agreement. The internal funds transfer form dated 12th September, 2015 which was part of the 2nd defendant's exhibits shows that on 12th September, 2015 when the said agreement for sale was executed Anthony Karanja Kariuki received a sum of Kshs.1,500,000/- from one, Rachel M. Ndungu. Of more interest again is the letter of consent that was issued to the 1st defendant for the transfer of the property to the 2nd defendant. The letter of consent is dated 3rd September, 2015. This was before the 2nd defendant had entered into an agreement for sale of the suit property with Antony Karanja Kariuki on 12th September, 2015. What this means is that the 1st defendant obtained consent of the Land Control Board to transfer the suit property to the 2nd defendant before the agreement for sale was entered into. Something else worth of note is the fact that in the letter of consent, the consideration which the 2nd defendant is said to have paid for the suit property is indicated as Kshs.1,800,000/= and not Kshs.3,500,000/-. By declaring that he had purchased the suit property at Kshs.1,800,000/- instead of Kshs.3,500,000/- which he claims to have paid, the 2nd defendant was out to defraud Kenya Revenue Authority of Stamp Duty on the actual value of the suit property. The foregoing shows that the sale and transfer of the suit property by the 1st defendant to the 2nd defendant was marred with illegalities and fraud. It is therefore my finding that the sale and transfer of the suit property by the 1st defendant to the 2nd defendant was irregular, illegal and fraudulent.

Whether the 2nd defendant was an innocent purchaser of the suit property for value without notice.

Section 93(3) of Land Act, 2012 placed an obligation upon the 2nd defendant while conducting due diligence to inquire from the 1st defendant whether she was married and if she was, whether her spouse had given consent to the sale of the suit property. In his evidence in cross-examination by the plaintiff's advocate, the 2nd defendant stated that he met the 1st defendant and that he did not ask her about her marital status. In my view, he failed to ask this important question at his own risk. According to his testimony in re-examination, such information was not necessary. Again, when the 2nd defendant visited the suit property, he found some activities going on. He found the plaintiff's cow sheds, dairy cattle and poultry on the property. Upon making inquiry, Antony Karanja Kariuki (DW 3) who purportedly sold the property to him misled him that those structures and the animals belonged to him a fact that turned out to be incorrect. The 2nd defendant had only himself and the said Antony Karanja Kariuki to blame for not getting the correct information on the status of the suit property. If the said Antony Karanja Kariuki had told him the truth, he would have known of the plaintiff's interest in the property. I wonder why the 2nd defendant did not make inquiries with the 1st defendant who was the registered owner of the suit property on the status of the property. I am not satisfied that the 2nd defendant was an innocent purchaser of the suit property for value without notice. First, he did not purchase the property from the registered owner. Secondly, he was negligent in his conduct of due diligence. He did not bother to ask the 1st defendant who was the registered owner of the suit property whether she was married or not and her relationship if any with the person who was in possession of the suit property. Thirdly, it is not clear how much the 2nd defendant paid for the suit property, whether it was Kshs. 1,800,000/- or Kshs.3,500,000/-.

Even if it is assumed that the 2nd defendant was an innocent purchaser of the suit property for value without notice, the interest that he acquired could not defeat the plaintiff's interest in the suit property which was a legal interest. In the Court of Appeal case of Arthi Highways Developers Limited v West End Butchery Limited & 6 others [2015]eKLR, that was cited by the plaintiff and the 2nd defendant in their submissions, the court stated as follows on the applicability of the doctrine of "bona fide purchaser without notice":

"67.

Furthermore, the protection accorded by law in the event of fraud, is to a "bona fide purchaser without notice" and even then, only against equitable interests. We have seen the definition of "bona fide purchaser" from **Black's Law Dictionary** and from **the Katende case** (supra). The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner. **Snell's Principles of Equity** (supra) illustrate the issue, thus:-

“An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests.

The doctrine. A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B’s right, although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser’s conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails.”

Whether the plaintiff is entitled to the reliefs sought.

I am satisfied that the plaintiff has proved his case against the defendants on a balance of probabilities with respect to the suit property and as such he is entitled to the reliefs sought in prayers (a), (b) and (c) of the plaint. With regard to prayer (d), I have noted that Plot No. 2327 is registered the joint names of the plaintiff and the 1st defendant and as such the 1st defendant cannot alienate the same without the involvement of the plaintiff. The injunction sought by the plaintiff in respect of the said parcel of land is unnecessary in the circumstances. On the issue of costs, the dispute is largely between the plaintiff and the 1st defendant who is husband and wife. Each party shall bear its own costs of the suit.

Whether the 1st and 2nd defendants are entitled to the reliefs sought in their counter-claim.

From the findings made earlier in this judgment, the counter-claims by the 1st and 2nd defendants against the plaintiff have no merit and must fail.

In conclusion, I hereby make the following orders:

1. Judgment is hereby entered for the plaintiff against the defendants in terms of prayers (a), (b) and (c) of the plaint dated 8th December, 2015.
2. The plaintiff and the 1st defendant shall be at liberty to institute appropriate proceedings in the High Court for the determination of their respective shares or interest in Thika Municipality/Block 20/2327(Ngoiwa) and Thika Municipality/Block 20/2328(Ngoiwa) and the division thereof between them.
3. The 1st and 2nd defendants’ counter-claims against the plaintiff are dismissed.
4. Each party shall bear its own its own costs of the suit and the counter-claims.

Delivered and Dated at Nairobi this 14th day of February, 2019

S. OKONG’O

JUDGE

Judgment read in open court in the presence of:

Mr. Manyara h/b for Ms.Munyao for the Plaintiff

N/A for the 1st Defendant

Mr. Thuku h/b for Mr. Wachira Maina for the 2nd Defendant

Mr. Waweru-Court Assistant