



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC. CASE NO. 238 OF 2015**

**KIDBROOKE INVESTMENT LIMITED.....PLAINTIFF**

**VERSUS**

**ISAAC MWANGLI.....DEFENDANT**

**AND**

**BY WAY OF COUNTERCLAIM**

**ISAAC MWANGLI.....PLAINTIFF**

**VERSUS**

**KIDBROOKE INVESTMENT LIMITED.....1<sup>ST</sup> DEFENDANT**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR, THIKA.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiff brought this suit against the Defendant seeking a declaration that it is the absolute owner of land reference number Thika Municipality Block 1/801 (“the Suit Property”) and that the Defendant’s continued occupation of this property without the Plaintiff’s consent is illegal and amounts to trespass. The Plaintiff bought the Suit Property from Ms. Virginia Wanjiru vide an agreement dated 18/8/2014 and was registered as the proprietor on 14/11/2014. The Plaintiff gave the Defendant notice to vacate the Suit Property but the Defendant failed to do so and also refused to pay the rent demanded by the Plaintiff. The Plaintiff seeks a mandatory injunction to compel the Defendant to give vacant possession of the Suit Property to the Plaintiff and a permanent injunction to restrain the Defendant or his agents from interfering with the Plaintiff’s possession of the Suit Property. Further, he Plaintiff seeks an order to have the Officer Commanding the Thika Police Station enforce the mandatory injunctive order and provide security during the eviction of the Defendant from the Suit Property.

2. The Defendant claimed in its defence that the Suit Property was matrimonial property which he jointly acquired with Virginia Wanjiru. He averred that he married Virginia Wanjiru under Kikuyu customary law and they were blessed with two children born in 1992 and 1995. He claimed that they purchased the Suit Property when it was developed with two housing units each comprising two bedrooms. He claimed that they rented out one of the units and have been living in the other one from the time it was acquired to date. He stated that they had marital differences and his wife threatened to have him thrown out of the matrimonial property. He has been collecting rent as the landlord from the other house and was not aware that his wife had sold the Suit Property since she had never communicated this to him and he did not give his consent for its disposal. He claimed that the sale of the Suit Property was illegal and void.

3. He averred that the sale of the Suit Property was marred by fraud and misrepresentation of facts citing the reason that the Plaintiff was non-existent by the time it bought the Suit Property and was only incorporated on 28/8/2014. He maintained that the vendor in the agreement, who is his wife, was not in the country to sign the sale agreement and that the signature on the agreement for sale was forged. He also stated that the Plaintiff bought the Suit Property with full knowledge of his interest in it since he has always resided in the Suit Property.

4. The Defendant obtained leave of the court on 6/5/2015 to file a counterclaim, which he filed on 18/6/2015 and joined the National Land Commission and the Land Registrar Thika to the proceedings as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the counterclaim. He averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants illegally transferred the Suit Property to the Plaintiff through fraud and misrepresentation of facts. He sought a declaration

that the title deed issued to the Plaintiff was null and void and should be cancelled by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Further, he sought an order for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to remove the Plaintiff's name from the register as the proprietor of the Suit Property and reinstate him and his wife as the registered proprietors of the Suit Property.

5. The Plaintiff's director gave evidence on 24/9/2018. She produced a copy of the sale agreement executed on 18/8/2014 when the Plaintiff acquired the Suit Property from Virginia Wanjiru. She also produced a copy of the certificate of incorporation showing that the Plaintiff was incorporated on 28/8/2014 together with a copy of the certificate of lease issued to the Plaintiff on 14/11/2014 over the Suit Property. She also produced a copy of the Plaintiff's Advocate's letter of 18/11/2014 giving notice to the tenants in the Suit Property to vacate the property by 31/12/2014. She also produced a copy of an affidavit sworn on 18/8/2014 by Virginia Wanjiru deponing to the fact that she was not married and that the Suit Property did not form part of matrimonial property.

6. She produced a copy of a letter dated 13/8/2014 from the Registrar of Companies confirming the reservation of the name Kidbrooke Investment Limited alongside two other names. The witness confirmed that she signed the sale agreement with her co-director. She maintained that the Plaintiff's lawyer carried out due diligence and that they visited the suit land before purchasing it. She confirmed that it was occupied by a tenant of the seller. They did not talk to the tenant. They conducted a search before purchasing the land which showed that Virginia Wanjiru was the registered owner.

7. The Defendant gave evidence. He stated that he got married to Virginia Wanjiru in 1989 through a customary marriage and that they were blessed with two children. His wife relocated to the United Kingdom(UK) in 1999 and has lived there since then. He stated that he acquired the Suit Property with his wife in January 2009 and it was registered in his wife's name and became their matrimonial home. He relocated to the Suit Property from Eldoret. He produced copies of the birth certificates for the two children showing the father as Isaac Kariuki Mwangi and the mother as Virginia Wanjiru. He produced a copy of the letter dated 9/2/2011 written by Jesse Kariuki and Company Advocates asking him to give vacant possession to Paul Waweru Karanja, said to have purchased the property. He also produced copies of the pleadings in **Thika Magistrates Court Misc. Civil Cause No. 46 of 2011** which he filed against the auctioneers who had purported to levy distress for rent on behalf of the landlord stated to be Virginia Wanjiru. He produced a copy of the ruling by Honourable B. J. Ndeda, Senior Resident Magistrate given on the 3/10/2011 which allowed the application seeking to stop the auctioneers from distraining for rent. He produced a copy of the tenancy agreement which he entered into with the tenant occupying the other house on the Suit Property together with the receipts issued on payment of rent in 2010, 2011 and 2012. The tenant was paying rent of Kshs 9,000/= as at October 2012.

8. He maintained that the sale of the Suit Property to the Plaintiff was illegal. He claimed that he married Virginia in 1989 and went for "*ruracio*". He stated that he had witnesses who went with him for the marriage ceremony even though he did not have evidence of this in court. He confirmed that Virginia went to the UK in 1999 and is in London having become a citizen. He also confirmed that their children went to join Virginia in the UK in 2003 and that the Suit Property was bought in 2009 after Virginia had left the country.

9. He claimed that they bought the Suit Property jointly and that he contributed Kshs. 500,000/= towards the purchase of the property which cost Kshs. 2.5 million. He claimed that he looked for the property and they bought it and registered it in Virginia's name. It was his evidence that they bought the Suit Property from Jacob Chege Murungami and signed an agreement with in his presence. He had no evidence to support this. He claimed that Virginia tried to evict him from the property in 2011 when they had matrimonial issues, just like any other normal couple, but he did not move out. He also claimed that when Virginia came to Kenya in 2010 they stayed in the Suit Property.

9. He confirmed that he had not sued Virginia for a share of the matrimonial property. He did not know who transferred the Suit Property since he maintained that Virginia did not come to Kenya at that time. He contended that he had improved the Suit Property by building a perimeter wall around it and repairing the house which was in a dilapidated state.

10. The issues for determination are:

- a. Was the Suit Property matrimonial property?
- b. Did the Plaintiff acquire good title to the Suit Property?
- c. Should the court issue the orders sought in the plaint or those sought in the counterclaim?
- d. Who should pay the costs?

12. Parties filed submissions which the court has considered. Section 6 of the Matrimonial Property Act defines matrimonial property. Ownership of the matrimonial property vests in the spouses according to the contribution each spouse made towards the acquisition of the property under the Act. Contribution encompasses both monetary and non-monetary forms such as child care, companionship, farm work, domestic work and management of family business or the matrimonial home.

13. The Defendant stated in evidence that he married Virginia Wanjiru under Kikuyu customary law and that he had done "*ruracio*". He did not adduce any evidence to prove that he married Virginia Wanjiru. He only produced copies of the birth certificates for the two children he claims he got with Virginia Wanjiru.

14. It was his evidence that he acquired the Suit Property with his wife in January 2009 and that it was registered in his wife's name. He did not provide evidence on how the property was acquired and why it was registered in his wife's name if indeed they had bought it jointly and he contributed part of the purchase price. He did not state whether his wife came to Kenya in January 2009 to execute documents and conclude the conveyance of the Suit Property. From the evidence he gave, it seemed that the only time that Virginia who lives in the UK came to Kenya, was in 2010 when the Defendant alleges she stayed in the Suit Property.

15. He stated at paragraph 17 of his counterclaim that they rented out one of the houses and lived in the other as their matrimonial home yet

his evidence was that Virginia Wanjiru went to the UK in 1999 and the children went to join her in 2003. The Suit Property was purchased in 2009 after Virginia had left the country. He stated that he has been collecting rent from the second house while living in the other house and produced copies of the receipts he issued for the rent payments.

16. If the Suit Property were contested matrimonial property, the Defendant should have applied to for a declaration of his rights to the property under Section 17 of the Matrimonial Property Act. The Defendant did not make such an application which would have been against Virginia Wanjiru who he claims was his spouse. The Defendant produced copies of letters dating back to 2011 which show that Virginia Wanjiru was keen on disposing of the Suit Property which he claims is matrimonial property. He did not take any steps towards securing whatever interest he might have had in the Suit Property.

17. The Defendant did not provide any evidence of the contribution he made towards the acquisition of the Suit Property. He neither led evidence to show that he made any non-monetary contribution contemplated by the Matrimonial Property Act, nor did he adduce evidence to show the improvements he maintained he had made to the Suit Property. The Defendant failed to prove that the Suit Property was matrimonial property. The court finds that the Suit Property was not matrimonial property.

18. The Defendant submitted that as at 18/8/2018 when the sale agreement was executed, the Plaintiff had not been incorporated and could not therefore transact because it was non-existent. It is not in dispute that the Plaintiff was incorporated after it had entered into the sale agreement with Virginia. It is also not in dispute that the Plaintiff had been incorporated by the time the Suit Property was transferred to it and the certificate of lease issued to it. The Defendant submitted that since the Plaintiff had not been incorporated by the time the sale agreement was executed, then the sale transaction was invalid. The Defendant relied on the decision in **Root Capital Incorporated v Tekangu Farmers Cooperative Society Limited and another [2016] eKLR** where Ngaah J. stated that the only proof that a company is duly registered and is a body corporate capable of exercising the functions of a company is a certificate of incorporation. That case which dealt with capacity to sue by an unincorporated entity lends no support to the Defendant's contention.

19. The Plaintiff contends that it did due diligence and conducted a search before purchasing the Suit Property. The Land Registration Act was amended in 2016 to remove spousal rights over matrimonial property from the overriding interests that registered land was subject to without being noted on the register.

20.. Under the Land Registration Act, it is the registration of a person as the proprietor of land or a lease that vests in the person absolute ownership of the lease or land. An agreement for sale merely expresses the intention of the parties to enter into a sale transaction but does not confer title. The act of registration of the transfer of lease or land and of the new proprietor of the land is what really confers title. This court has to take the certificate of title issued by the Registrar to the Plaintiff upon registration of the transfer as *prima facie* evidence that the Plaintiff is the registered proprietor of the Suit Property under Section 26 of the Land Registration Act. The Defendant neither demonstrated that the sale of the Suit Property to the Plaintiff was fraudulent nor did he prove that the Plaintiff participated in any fraud or misrepresentation when it acquired the Suit Property, or that it acquired its title illegally, unprocedurally or through a corrupt scheme. The Plaintiff acquired a good title to the Suit Property.

21. The Defendant failed to prove his counterclaim, it is dismissed with costs to the Plaintiff and the other Defendants sued in the Counterclaim. The court grants the prayers sought in the Plaintiff together with the costs of the suit. The Plaintiff will not evict the Defendant from the Suit Property until three months have elapsed from the date of this judgement to give the Defendant time to arrange for alternative accommodation. The Plaintiff must comply with the provisions of the Land Act on eviction.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of February 2019.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. G. Mwangi for the Plaintiff

Mr. S. Baraza holding brief for Mr. Kingori for the Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the Counterclaim