



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELCA E034 OF 2023

JANE WATIRI GITUNGO.....
.....APPELLANT

VERSUS

JOHNSON GITUNGO KAMAU.....1ST
RESPONDENT

STEPHEN KARANJA KUNGU.....2ND
RESPONDENT

JUDGMENT

- 1) This is an Appeal against the Judgment and Decree of Hon. Wilson Rading (SPM) in **Kiambu CM ELC No. 12 of 2020 - Jane Watiri Gitungo vs. Johnson Gitungo Kamau & Another**. By the said Judgment, the trial Court dismissed the Appellant's suit and allowed prayer (a) of the 2nd Respondent's Counterclaim save for costs. Aggrieved by the said Decree, the Appellant filed the instant Appeal.
- 2) The record shows that the Appellant is the wife/spouse of the 1st Respondent, Johnson Gitungo Kamau whereas the 2nd Respondent was a purchaser for value of the suit property known as Title No. Ndumberi/Riabai/5707 (hereinafter '**the suit property**').

3) Vide a Plaint dated 19/03/2020 the Appellant sued the Respondents seeking the following reliefs against them:

- a) A permanent injunction restraining the Defendants, their servants, agents or assigns from disposing off, selling, transferring, alienating and/or advertising for sale or otherwise dealing with all that piece of land known as Land Parcel Number **Ndumberi/Riabai/5707** measuring approximately 0.084 Ha;
- b) A Declaration that the transaction between the 1st and 2nd Defendant over Land Parcel Number **Ndumberi/Riabai/5707** was incomplete, ineffective, marred and tainted with fraud and/or illegalities thus null and void and that the title document purported to be registered in favour of and in possession of the 2nd Defendant was obtained fraudulently and that the 2nd Defendant does not have an indefeasible title to land Parcel Number **Ndumberi/Riabai/5707**;
- c) An order for revocation and/or cancellation of the title document registered and in possession of the 2nd Defendant and the Land Registrar - Kiambu be ordered to issue a proper title over the parcel of land Number **Ndumberi/Riabai/5707** measuring 0.084 Ha in joint name of the Plaintiff & the 2nd Defendant;
- d) Costs of the suit.

- 4) The basis of the Appellant's claim was that the Respondents without the Plaintiff's Consent executed what they termed as a "Loan and Sale Agreement' where the 1st Respondent pledged all that parcel of land known as **Ndumberi/Riabai/5707** to the 2nd Respondent as security for the loan. That the loan was to be paid within 90 days from the date of the Agreement.
- 5) However, she stated that when she did a search, she realized that the 2nd Respondent had transferred the suit property to his name with the sole intention of dispossessing the Plaintiff and her children. She contends that the suit property is ancestral land and no spousal consent was ever sought. She further stated that the 1st Respondent does not have an indefeasible title to the suit property and she alleges fraud, collusion and misrepresentation on the part of the 1st and 2nd Respondents.
- 6) The 1st Respondent did not file any Defence to the suit.
- 7) On his part the 2nd Respondent filed a Statement of Defence and Counter claim dated 27/05/2020 and denied all averments in the Plaint. He averred that it was an express term of the loan/sale agreement that the subject land would be transferred in favour of the 2nd Defendant prior to the disbursement of the land amount to the 1st Respondent hence his acquisition of the Land Control Board Consent and the transfer was legal and proper as per the agreement.

- 8) He stated that the Plaintiff and her children were all beneficiaries of the loan and now they seek to circumvent the wheels of justice. He thus filed a Counter-claim and reiterated paragraphs 2-9 of his statement and made a claim against the 1st Defendant for a refund of the loan amount plus interest accrued from the time of execution of the agreement.
- 9) In the Counter-claim the 2nd Respondent prays for the following:
- a) That the Plaintiff's suit be dismissed with costs.
 - b) A refund of the Loan Amount plus the accrued interest.
 - c) General damages.
 - d) Costs and interest of the Counter claim.
 - e) Any other relief that the Court deems fit to grant.
- 10) The record shows that upon a full hearing of the suit the trial Court dismissed the Appellant's suit and upheld prayer (a) of the Respondent's Counter-claim save for costs.
- 11) The Appellant filed a Memorandum of Appeal dated 14/04/2023 raising the following nine (9) Grounds of Appeal:
- a) The learned Principal Magistrate erred in law and facts in dismissing the Appellant's suit.
 - b) That the learned Resident Magistrate (I think he meant Principal Magistrate) erred in law and facts by holding that the "loan/sale agreement" between the Respondents was a valid contract whilst the same is alien to the law

- c) The Learned Principal Magistrate fell in error by holding that the suit property was ancestral and not matrimonial property against the clear provisions of section 9 of the Matrimonial Property Act and section 93 (2) of the Land Registration Act and hence came to the wrong conclusion.
- d) The Learned Principal Magistrate erred in law by not finding that the transfer of Land Reference No. Ndumberi/Riabai/5707 by the 1st Defendant to the 2nd Defendant was tainted with illegalities for want of spousal consent in any event.
- e) The Learned Magistrate fell in error by not finding that the transfer of the suit property was in any event premature.
- f) The learned Magistrate erred in law and facts by proceeding with the matter when on the face of it he lacked both pecuniary and geographical jurisdiction to hear and determine the same.
- g) That the Learned Principal Magistrate erred in law and fact by entertaining the 2nd Defendant's counter-claim when on the face of it and against the provisions of Order 7 of the Civil Procedure Rules, 2010, there was none.
- h) The Learned Principal Magistrate completely disregarded the Appellant's evidence, submissions and the authorities cited thus fell in error.

- i) That the Principal Magistrate's Judgment and orders were against the weight of the evidence on record and therefore bad in law.
- 12) As a consequence, the Appellant sought the following reliefs:
- i. That the Appeal herein be allowed and the Judgment in the lower Court dismissing the suit, be set aside and be substituted thereof with an order allowing the suit in terms of the prayers in the Plaint dated 19/03/2020.
 - ii. That the costs of this Appeal be awarded to the Appellant.
- 13) This Court in the case of **Christopher Ngeno -vs- Eunice Langat (2021) eKLR** guided by the principle established in the Court of Appeal case of **Selle -vs- Associated Motor Boat Company Ltd (1968) EA 123** respecting the role of an appellate Court while considering an appeal as in the instant matter held thus:

"This Court being the first appellate Court is under a duty and indeed is obligated to re-evaluate the evidence adduced before the trial Court in order to determine whether the determination made by the trial Court as justified. The Court is not bound by the finding of fact and law reached by the trial

Court and is at liberty to make its own findings and/or reach different conclusion upon evaluation and reconsideration of the evidence.”

- 14) In this Appeal the following facts are undisputed:-
- i. Whether the suit property is matrimonial property;
 - ii. Whether spousal consent was sought;
 - iii. Whether the sale agreement was a valid contract.
- 15) When the Appeal was listed for directions, it was directed that the same shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions are dated 27/11/2024 whereas the 2nd Respondent's submissions are dated 28/01/2025. The 1st Respondent's submissions, however, were not on record by the time of preparation of the Judgment.
- 16) I have considered the submissions and authorities that both Counsel have referred to in their submissions in my decision.

Analysis and Determination

- 17) Whereas the Appellant have lodged this Appeal citing nine (9) Grounds of Appeal I have picked out to be the issues for determination:

- i. **Whether the Learned trial Magistrate erred in law and in fact by forming the opinion that the transfer of the suit property from 1st Respondent Johnson Githungo Kamau to the 2nd Respondent was legal despite the Appellant herein not giving consent to the transfer given that she is a wife to the 1st Respondent.**
 - ii. **Whether the Learned Trial Magistrate erred in law and in fact by forming an opinion that the transfer of the suit property from 1st Respondent was legal even when the period for repay of the soft of loan of 90 days had not expired.**
 - iii. **Whether the Learned Trial Magistrate erred in forming the opinion that the 2nd Respondents had proved his Counter Claim**
 - iv. **Whether the Appeal is merited and if so, who should bear costs?**
- 18) This being a first Appeal, the Court is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned Magistrate are to stand or fall and give reasons either way. See **Pumwani Riyadhha Mosque Committee & Another v Gikomba Business Centre Limited (Civil Appeal E965 of 2024) [2025] KECA 1257 (KLR).**
- 19) Similarly in the case of **The Chairman, Secretary and Treasurer (Suing as the officials on behalf of House of**

Hope Vs. Wolta House Ltd (2018) eKLR it was held thus:-

“The general principles applicable, when the appellate Court is called upon into interfere with the exercise of discretion of the trial Court is well settled and was stated as follows in Mbogo & Another Vs. Shah (1968) EA - 93, 96 “An appellate Court will interfere if the exercise of discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of discretion of a Judge unless it is satisfied that the judge in exercising his discretion has misdirected himself or has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”

- 20) In **Peters Vs. Sunday Post Ltd (1958) EA 424**, cited by the Court of Appeal in **Aroni Sure & 9 Others Vs. Gesare Nyamaiko (1988) eKLR O’Connor P** stated;

“An appellate Court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon

that evidence should stand.” The Court has relooked at the evidence presented at the subordinate Court and which is contained in the Record of Appeal.”

- 21) This suit was filed by the Appellant through the Plaint dated 29/03/2020. Paragraphs 1-5 has provided a narration of the suit. The Appellant during the hearing at the trial Court testified that the suit property was given to the 1st Respondent by his father before they were married.
- 22) This being the case, I am guided by the Matrimonial Property Act that clearly addresses this issue. The Matrimonial Property Act, 2013, explicitly states in **Section 5** that property acquired or inherited before marriage does not form part of the matrimonial property. This property remains the separate asset of the spouse who owns it.
- 23) Therefore, spousal consent is a mandatory legal requirement under the Land Act and Matrimonial Property Act primarily for transactions involving *matrimonial property* (property acquired during the marriage and used as the family home or for the family's benefit). Since inherited land acquired before marriage is generally considered separate property, the requirement for formal spousal consent for its alienation may not apply in the same way.
- 24) A spouse can, however, acquire a "beneficial interest" in the other spouse's separate property if they can prove they made a **contribution** (monetary or non-monetary,

such as domestic work, child care, or direct financial investment) towards its improvement or development during the marriage.

- 25) In the instant case it is clear that the suit property was acquired before marriage and therefore it falls outside the cover of matrimonial property. The Appellant did not submit before the trial Court any evidence of direct financial or non-financial contribution she had made to improve the land.
- 26) Given the analysis above, I do not find that the trial Magistrate erred on finding the suit property is not matrimonial property.
- 27) On the second issue I note that the Sale Agreement is dated 24/12/2019 had a timeframe within which the loan money had to be repaid and this is 90 days from 24/12/2019 and this would be 24/12/2020. Meaning that the lender could not claim to take over the security being Ndumberi/Riabai/5707 before the 24/03/2020.
- 28) My perusal of the documents submitted at the trial Court I noted from the Copy of the Official Search dated 12/03/2020 that the suit property was registered in the name of the 2nd Respondent on 29/01/2020 and a title issued to the 2nd Respondent on 29/01/2020 which was only 34 days from the date of the Sale Agreement and granting of the suit property as security.
- 29) The Appellant has pleaded fraud, collusion and or misrepresentation on the part of the Respondents.

- 30) In land disputes, allegations of fraud **must be specifically pleaded and distinctly proved** with evidence that is higher than the normal civil standard of a balance of probabilities. The Appellant/Plaintiff bears the burden of proof to demonstrate the specific fraudulent acts and that the land transfer was indeed improper, such as occurring before the expiry of a relevant period without following due process.
- 31) To prove fraud, the party alleging fraud cannot just make a general claim; they must explicitly state the particulars of the fraudulent acts. In the circumstances of this case the Appellant has proved through submission of the Sale Agreement and the Search that the 2nd Respondent transferred the suit property which was meant to be security within 34 days in outright contravention of paragraph 4 of the Sale Agreement.
- 32) If a specific legal timeline or condition governs the transfer of land, a transfer outside these parameters is considered an illegality or procedural impropriety that can lead to the title being challenged or cancelled.
- 33) I do hold that the Appellant/Plaintiff did present at the trial sufficient evidence to demonstrate that the transfer occurred improperly and that the legal requirements were not met. The transfer was made before the expiry of the statutory period provided in the Sale Agreement thus an outright breach of the agreement.

34) This being the case, the Learned Trial Magistrate erred in overlooking this important fact of the Sale Agreement and the condition that was provided being 90 days for realizing the security agreed upon. The suit property was therefore illegally and irregularly transferred to the 2nd Respondent.

35) Section 26 of the Land Registration Act specifies that a Certificate of Title can be challenged and cancelled or amended if it is shown that it was obtained by fraud or misrepresentation (to which the current proprietor is a party) or acquired illegally, unprocedurally or through a corrupt scheme.

36) In the Case of **Zacharia Wambugu Gathimu & Another V John Ndungu Maina [2019] eKLR** it was held that:

“... As it may be observed, the law is extremely protective of title but the protection can be removed and title impeached, on two instances. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

163. The import of Section 26 of the Land Registration Act was considered in the case of **Elijah Makeri Nyangwra _vs- Stephen Mungai Njuguna & Another [2013] eKLR** where Munyao J,

answered the question as to whether title is impeachable under Section 26 (1) (b) of the said Act as follows;

“First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

- 37) Having found that the acquisition of the suit property was fraudulent, I am obligated to find that the Learned Magistrate erred by upholding prayer (a) of the Counter-Claim. The Counter-Claim should have been dismissed altogether.

38) I have considered the totality of the evidence tendered and I find that the Learned Trial Magistrate erred in forming the opinion that the 2nd Respondent had proved his case and granted prayer (a) of the Counter-claim.

39) In conclusion I find merit on this Appeal and the same is allowed.

40) In essence the Judgement dated and delivered on 30/03/2023 is hereby set aside and an order is hereby issued dismissing the 2nd Respondent's Counter Claim.

41) The 2nd Respondent shall bear the costs of the Appeal and of the suit in the Lower Court.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19TH DAY OF JANUARY, 2026 VIA MICROSOFT TEAMS.

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**MOGENI J
JUDGE**

In the presence of:

Mr. Njehu for the Appellant

Respondent - Absent

Mr. Melita - Court Assistant

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**MOGENI J
JUDGE**

ORIGINAL