



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 109 OF 2017

SWG.....PLAINTIFF

VERSUS

MWG.....1ST DEFENDANT

JGN.....2ND DEFENDANT

NATIONAL LAND COMMISSION.....3RD DEFENDANT

REGISTRAR OF TITLES, NAIROBI.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

JUDGEMENT

1. This dispute relates to the parcel of land known as land reference number 13683 situated in Karen, Nairobi (“the Suit Property”). The Plaintiff was in a love relationship with the 2nd Defendant from 1999 to 2015 which resulted in the birth of a son who was born in 2002. The Plaintiff claims that the 2nd Defendant promised to build a home for her and her son and that based on this, she sourced for and identified the Suit Property. She claims that she acquired the Suit Property after pooling resources with the 2nd Defendant and had the land registered in the 2nd Defendants name.

2. The Plaintiff claims that she paid the legal fees and stamp duty upon transfer of the Suit Property to the 2nd Defendant. She further claims that she purchased the building materials for the development and supervised the construction of the house on the land. Further, that she used the lump sum payment made to her upon retrenchment in 2010 to complete the house on the Suit Property and put it in a habitable state. She claimed that the 2nd Defendant gave her the title document over the Suit Property on the understanding that it would be registered in their joint names. She further claimed in the plaint that she took a loan of Kshs. 2,100,000 at the 2nd Defendant’s request to complete the house in 2010.

3. The relationship between the Plaintiff and the 2nd Defendant broke down in 2016 and the 2nd Defendant demanded the return of the title over the Suit Property which the Plaintiff declined to do. The 2nd Defendant reported to the 3rd and 4th Defendants that he had lost the title over the Suit Property and got a provisional title over the Suit Property. The 1st Defendant issued a notice to the Plaintiff to vacate the Suit Property in January 2017. At that point the Plaintiff learned that the 2nd Defendant had transferred the Suit Property to the 1st Defendant. She claims that this was a scheme to deprive her of the Suit Property. She filed suit on 15/2/2017 seeking a declaration that the transfer of the Suit Property by the 2nd Defendant to the 1st Defendant was illegal, and was obtained through fraud and misrepresentation, and that the transfer should be cancelled. She sought an order that she is a co-owner of the Suit Property and that her name should be registered alongside that of the 2nd Defendant as tenants in common, each holding half share in the Suit Property.

4. In her defence filed on 17/3/2017, the 1st Defendant maintained that she has always been married to the 2nd Defendant and that they have always enjoyed a good relationship as husband and wife as a result of which her husband gave her a surprise gift of a residential house in Karen during the *Mashujaa Day* of 2016. She counterclaimed for an order to evict the Plaintiff from the Suit Property claiming that all civil means of removing the Plaintiff had failed to bear fruits and urged the court to dismiss the Plaintiff’s claim.

5. The 2nd Defendant filed his defence on 18/4/2018 and denied that he jointly owned the Suit property with the Plaintiff. He also denied that he requested the Plaintiff to seek a loan to develop the Suit Property. He further denied that the Plaintiff supervised the development on the Suit Property. He stated that he was not aware that the Plaintiff had custody of the title over the Suit Property and averred that the Plaintiff should be directed by the court to surrender the title. He denied that he acted fraudulently when he transferred the Suit Property to the 1st Defendant who is his wife. He urged the court to dismiss the suit and award him costs.

6. The 3rd Defendant filed its defence on 13/4/2017 denying the Plaintiff's claim. A consent was recorded in court on 27/2/2018 allowing the Plaintiff to remain in possession of the Suit Property until the suit was heard and determined. When the case came up for hearing on 4/4/2019, Ms. Masinde asked to be excused from the proceedings on the ground that no orders are sought against the 3rd Defendant.

7. Following an application by the 1st Defendant, the court took her evidence on 4/4/2019 in order to allow her to travel to India for medical treatment. She produced a copy of the title over the Suit Property indicating that the suit land was transferred to the 2nd Defendant on 16/12/2004 for Kshs. 3,000,000/=. A provisional certificate was issued on 6/9/2016. The land was transferred to her on 1/7/2016. She produced a copy of the electricity bill for 1/09/2016 to 23/02/2017 issued in the 2nd Defendant's name. She also produced a receipt issued in her husband's name on 22/01/2009 for the proposed dwelling house on the suit land. She stated that her husband gave her the Suit Property as a gift on Mashujaa Day in 2016. She also produced a copy of the rates clearance certificate over the Suit Property issued to the 2nd Defendant on 28/11/2016.

8. The Plaintiff gave evidence after the 1st Defendant had testified. She stated that she entered into a love relationship with the 2nd Defendant in November 1999 and that they were blessed with a son in November 2002. She stated that the 2nd Defendant shouldered more financial responsibilities in the relationship than she did and that he spent most of his time with his other family. She stated that they started searching for a place to build a home in 2004 and that they were looking for a place which would be central to enable the 2nd Defendant manage his two families and his businesses. The 2nd Defendant ran businesses in Ngong and Ongata Rongai and his family resided in Ngong.

9. She stated that they identified a plot in KB which was acquired in 2004 for Kshs. 3,000,000/=. She claimed that she made a contribution to the purchase of the land vide a bankers cheque and that she initially fenced the land with the 2nd Defendant. The house was constructed in 2009 which, she claims was done through her joint contributions with the 2nd Defendant. She stated that she took a loan in 2010 when the 2nd Defendant's business was not doing too well to enable them complete the house, and that the 2nd Defendant promised her that she would be registered as a joint owner of the Suit Property.

10. The Plaintiff lost her job in 2011 and claims that she solely undertook the completion of the house to put it in a habitable state and thereafter moved into the house with her son in April 2011. She claimed that she lived in the Suit Property with the 2nd Defendant as part of the family, despite the fact he spent most of his time with the other family.

11. The relationship between the Plaintiff and the 2nd Defendant broke down in 2015 and the 2nd Defendant asked her to move out of the Suit Property. She claimed that he did not pay their son's fees on time. Further, that she paid their son's secondary school fees alone. She received a letter on 23/1/2017 giving her a month's notice to vacate the Suit Property. She was to learn later that the 2nd Defendant had gazetted the loss of the certificate of title over the Suit Property and proceeded to transfer the land to the 1st Defendant who is his wife on 5/12/2016. She stated that on 13/2/2017, the 1st and 2nd Defendants went to the Suit Property and caused commotion in her compound forcing her to lock herself in her bedroom. She reported the matter to police.

12. She produced an undated transfer over the Suit Property signed by the 2nd Defendant and herself, but which was not registered at the lands office. She also produced copies of invoices for fittings dated 29/1/2011 for Kshs 195,525/=: 16/3/2009 for 72,422/=: 18/3/2009 for 64,033/=: 4/1/2011 for Kshs 72,780/=: and another one dated 14/3/2009 for Kshs 57,000/=: She produced her bank statement for January 2005 and a copy of the cheque issued to Kaplan and Stratton Advocates dated 11/1/2005 for Kshs. 350,000/=: She also produced a copy of the gazette notice on the issuance of a provisional certificate of title over the Suit Property. She stated that she had the original title deed.

13. The Plaintiff stated that she occupied the Suit Property on the basis of the contributions she made towards the purchase and construction of the Suit Property and also on the basis that she has a child with the 2nd Defendant. She stated that she got into the relationship with the 2nd Defendant while she was aware that he was married. She claimed that his wife knew that she had a child with her husband. She confirmed that the sale agreement did not bear her name and that the transfer of the Suit Property to the 2nd Defendant was registered in December 2004. She maintained that she contributed Kshs. 350,000/=: towards the purchase of the Suit Property even though she conceded that by the date of the cheque the suit land was already registered in the 2nd Defendant's name. She confirmed that she worked at Unilever with the 2nd Defendant. She also confirmed that she had other properties in Juja and elsewhere where she had constructed. She stated that she did not record all the transactions relating to the Suit Property because she was in a relationship with the 2nd Defendant, which was based on trust. She further claimed that the 2nd Defendant gave her the title over the suit land willingly.

14. The 2nd Defendant gave evidence and stated that he solely purchased the Suit Property. He stated that he used his personal resources and started constructing a house on the Suit Property in 2009 with the intention of relocating his family from Ngong to Karen. He claimed that he completed the construction in 2011 and put a "to let" sign at the main road to market the Suit Property. He claimed that he was surprised in April 2011 when he learned that the Plaintiff had moved into the Suit Property. The Plaintiff refused to pay rent claiming that the house was built for her son since his father was the owner and also refused to move out. He later made an offer to the Plaintiff to purchase 50% stake in the Suit Property but the Plaintiff failed to conclude this offer.

15. The 2nd Defendant claimed that he realised in 2016 that his title over the Suit Property was missing and reported the loss at the Ngong Police Station where he was issued an abstract. He applied for a provisional certificate of title and one was issued on 6/9/2016. He bequeathed the Suit Property to his wife, the 1st Defendant as a gift on 20/10/2016. The transfer was registered on 5/12/2016. When the Plaintiff was served with the notice to vacate premises in January 2017 she filed this suit. He maintained that he has never jointly owned the Suit Property with the Plaintiff.

16. He claimed that the Plaintiff handled his correspondence since they were working in the same office. He admitted that he was in a relationship with the Plaintiff from 1999 until 2014 and that he was retrenched in 2009. He claimed that he allowed the Plaintiff to occupy the house while he was looking for a tenant but lacked the willpower or strength to evict the Plaintiff from the Suit Property since it was part

of the maintenance of their child. He stated that he had agreed with the Plaintiff that she would move out of the Suit Property into a house in Kitengela or Gatanga. He also stated that he offered to sell the Plaintiff 50% share in the Suit Property in consideration of Kshs. 4,000,000/= which the Plaintiff failed to pay. He admitted that he signed the unregistered transfer over the Suit Property produced by the Plaintiff, and claimed that the Plaintiff was supposed to have purchased 50% stake in the Suit Property. He maintained that the Plaintiff did not contribute to the development of the Suit Property and added that she would only accompany him as a lover when he went to buy building materials for the construction of the house on the Suit Property. He emphasised that the Plaintiff never acquired the status of a wife since he was still legally married to the 1st Defendant.

17. Parties filed submissions which the court has considered. The issue for determination is whether the Plaintiff and the 2nd Defendant jointly owned the Suit Property, and whether the court should grant the orders sought in the plaint or those sought by the 1st Defendant in her counterclaim. The Plaintiff submitted that she jointly purchased the Suit Property with the 2nd Defendant in 2004 and relied on the cheque for Kshs. 350,000/= paid to Kaplan and Stratton Advocates on 11/1/2005. The Plaintiff also asserted that she took out a loan of Kshs. 2,100,000/= at the 2nd Defendant's request to complete the house.

18. The Plaintiff relied on Section 26 of Land Registration Act in challenging the 1st Defendant's title to the Suit Property which she claims was acquired through misrepresentation of facts by the 2nd Defendant to deprive her of her rights to the Suit Property. The Plaintiff urged that the 2nd Defendant could not have gifted the 1st Defendant the share in the Suit Property which he held in trust for the Plaintiff without the Plaintiff's consent. The Plaintiff further submitted that the Suit Property did not constitute the 1st Defendant's property.

19. The 1st Defendant submitted that she was legally registered as the proprietor of the Suit Property, being a gift from her husband. She submitted that she supported her husband when he acquired the Suit Property as both a loving wife and business partner, and that the Plaintiff should respect her position as a spouse under the Matrimonial Property Act. She relied on Section 2 of that Act in urging that the Suit Property formed part of their matrimonial property and Section 28 of the Land Registration Act on spousal rights over matrimonial property. She urged the court to dismiss the Plaintiff's claim and order the eviction of the Plaintiff from the Suit Property. The court notes that the amendments of 2016 removed spousal rights over matrimonial property from the list of overriding interests that need not be noted on the land register.

20. The 2nd Defendant submitted that the cheque relied on by the Plaintiff dated 11/1/2005 for Kshs. 350,000/= did not relate to the Suit Property because by that time the Suit Property was already registered in his name. The 2nd Defendant submitted that the Plaintiff had failed to submit evidence of the loan which she claims she took to complete the house. Further, that the Plaintiff failed to show how much money she was paid on retrenchment which she claims to have spent on the construction of the house on the suit land. The 2nd Defendant submitted that he was the registered proprietor of the Suit property which he lawfully transferred to the 1st Defendant. He urged the court to dismiss the Plaintiff's suit.

21. Section 25 of the Land Registration Act protects the rights of a proprietor, who in this case is the 1st Defendant, subject to the overriding interests set out in Section 28. One such interest is trusts. The Plaintiff contended that there was a resulting trust in her favour since she had advanced the purchase money irrespective of whether or not the Suit Property was registered in her name. It was incumbent upon the Plaintiff to prove that the 2nd Defendant held the Suit Property in trust for her. Apart from making general statements about taking a loan to complete the house in 2010 at the 2nd Defendant's instigation and claims that she expended her retrenchment payment on the development of the house, the Plaintiff did not provide evidence of the contributions she made towards the purchase and development of the Suit Property.

22. The Suit Property was registered in the 2nd Defendant's name on 16/12/2004 which makes it very doubtful that the cheque the Plaintiff relied on for Kshs. 350,000/= dated 11/1/2004 drawn in favour of Kaplan and Stratton Advocates, could have gone towards the purchase of the Suit Property. There is nothing to link that cheque to the Suit Property. The Plaintiff has failed to establish that the 2nd Defendant held the Suit Property in trust for her before he transferred it to his wife. As the registered proprietor, the 1st Defendant should hold the Suit property with all the rights and privileges appurtenant to it.

23. It would only have been possible for the Plaintiff to apply Part IX of the Land Registration Act on the division of land that is jointly owned had she and the 2nd Defendant been registered as co-owners of the Suit property. The transfer from the 2nd Defendant to the Plaintiff was never registered. Had that transfer been registered before the 2nd Defendant transferred the Suit property to the 2nd Defendant, it would have conferred good title to the Plaintiff.

24. The 1st Defendant relied on the Matrimonial Property Act and submitted that she supported her husband while he purchased the Suit Property. The Matrimonial Property Act which provides for the rights and responsibilities of spouses in relation to matrimonial property defines a spouse as a husband or wife bringing the 1st Defendant within the realm of this statute while excluding the Plaintiff who described herself as having been in a love relationship with the 2nd Defendant that resulted in the birth of the Plaintiff's son.

25. Section 4 of the Matrimonial Property Act empowers a married woman to hold or dispose of property. Section 6 defines matrimonial property to include other immovable property other than the matrimonial home, jointly owned and acquired during the subsistence of the marriage. Section 6 (2) excludes trust property from matrimonial property. Not having been a spouse, Section 7 of the Act would not apply to the Plaintiff's claim to half share of the Suit Property. Section 14 which raises the presumption that property acquired during the subsistence of a marriage and registered in the name of one spouse would lead to the presumption that the 2nd Defendant held the Suit Property in trust for the 1st Defendant since it was acquired during the subsistence of their marriage. There is a rebuttable presumption under Section 15 where a spouse gives any property to the other spouse as the 2nd Defendant did, that the property belongs to the recipient which in this case would be the 1st Defendant. The Plaintiff did not lead evidence to rebut the presumptions under the Matrimonial Property Act.

26. The Plaintiff claimed that she occupied the Suit Property not only based on the contributions she claimed she made towards the purchase

and construction of the Suit Property, but also on the basis that she has a child with the 2nd Defendant. In the court's view, the Plaintiff should have filed a claim against the 2nd Defendant for child support and maintenance since the land laws only protect the rights of the registered proprietor unless it can be shown that the registration was done fraudulently or through misrepresentation to which the person is proved to be a party.

27. The Plaintiff failed to prove that the registration of the 1st Defendant as proprietor of the Suit Property was illegal, or that it was obtained through fraud or misrepresentation. The court declines to order that the transfer from the 2nd to the 1st Defendant should be cancelled. The Plaintiff stated that she has lived on the Suit Property since 2011. If indeed she made any contributions towards the development of the Suit Property, then she is deemed to have recouped whatever investment she may have made to the Suit Property since she lived in the Suit property without paying any rent to the 2nd Defendant.

28. The Plaintiff has failed to prove her case on a balance of probabilities, it is dismissed. The 1st Defendant's counterclaim is allowed, the eviction of the Plaintiff from the Suit Property will be undertaken in strict compliance with the law. The Plaintiff is granted 90 days to arrange for alternative accommodation and move out of the Suit Property. Each party will bear its own costs.

Dated and delivered at Nairobi this 8th day of August 2019

K.BOR

JUDGE

In the presence of: -

Mr. W. Ndanu holding brief for Ms. Mosoti for the Plaintiff

Ms. W. Kiarie for the 1st Defendant

Ms. I. Ngugi for the 2nd Defendant

Mr. V. Owuor- Court Assistant