

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC CASE NO. 30 OF 2022

SIDI NDORO TAURA
PLAINTIFF

VERSUS

CHAROLI NZAI KOMBE **1ST**
DEFENDANT

MAIMUNA AWADH **2ND**
DEFENDANT

JUDGMENT

PLEADINGS

Plaint.

1. The plaintiff in this case is wife to the first defendant who allegedly sold the suit land LR numbers **Gede /Mijomboni/ 387** (herein after also referred to as "*the suit land* " or "*the suit property*") without her knowledge to the second defendant which sale the plaintiff terms as fraudulent. The plaintiff's claim in the plaint dated 11th May 2022 is that their matrimonial home was located on the suit land. Geologist that her family comprising of **10** children and grandchildren reside within the suit land which is also their known home and do farming activities thereon. According to the plaint, the land has been divided into two portions number **1870** and **1871** all registered in the name of the first defendant. It is alleged that the subdivision was fraudulent and was affected in order to avoid the law. The plaintiff claims that the second defendant and the first defendant have threatened to dispose of the said portions to a third

party and have also threatened to obstruct the family from conducting subsistence farming on the said land; that the first defendant has also threatened the entire family with dire consequences should they fail to move away from the suit land. The plaintiff sought the following orders from this court:

- a. An order for cancellation of the sale agreement dated 7th April 2017 and order for rectification of the register by cancelling the new titles namely Gede/Mijomboni/1870 and 1871 and revert the same to the original status of 387;**
 - b. An order for permanent injunction restraining the defendants, their servants, employees and or any other person acting on their behalf from interfering with the original land personal number Gede /Mijomboni/387 subdivided into Gede /Mijomboni/1870 and 1871.**
2. The second defendant filed appearance and defence in the matter while the first defendant file only a memorandum of appearance dated 31st May 2022 through Ogero Ogeto advocates and nothing else, and a request for judgment was made on 13th July 2022 against him. The suit proceeded to hearing without his participation save as outlined herein above.

The Second Defendant's Statement of Defence.

3. In her pleading, the second defendant denied the claim that the couple's matrimonial home is located on the suit property. She admitted that she entered into a sale agreement with the first defendant who sold a portion of the suit land to her. She states on a without prejudice basis that the first defendant and herself visited the homestead of the plaintiff and the first defendant in a bid to enter into negotiations with the family concerning the portion on the

far end of the property, leading to a sale agreement drawn by an advocate, Wesley John Austin and Associates, who represented both the vendor and the purchaser of the portion; the portion, according to the 2nd defendant, measured **4** acres. However, when the 2nd defendant came to view the sale agreement's contents, she realized that the whole of the land p[arcel known as Gede/Mijomboni/387 had been transferred into her name contrary to her instructions to the effect that she was purchasing only 4 acres; thereafter, after that discovery, she changed legal representation and appointed Omar Said and Company Advocates and notified the first defendant of the error. Subsequently the property was successfully subdivided under her watch and she remained with her title deed for her rightful portion which was baptized Gede/Mijomboni/1870. She also had transfer forms for portion number 1871 prepared and she executed them in order to transfer the portion back to the first defendant. She then attempted to get the second defendant to travel to the office of Omar Said and Company Advocates to execute the said transfer forms in order to have title to portion number 1871 transferred into his name, and even sent him transport expenses for the purpose, but the first defendant on all occasions refused to visit the said advocates offices, citing feeble excuses. The second defendant also visited the homestead of the plaintiff and the first defendant to attain his signature to ensure the transfer of the matrimonial property back into the name of the first defendant but failed to find the first defendant. It is on that basis that the second

defendant claims that both the plaintiff and the first defendant have conspired to defraud her. She states that the plaintiff and the first defendant share a matrimonial homestead and thus the plaintiff was aware of the negotiations between the 1st defendant and the second defendant; that the error that led to transfer of the entire suit land to home was occasioned by the advocate pointed out by the first defendant, and should not be allowed to prejudice the second defendant's claim to the land she had purchased. She also claimed that ever since the filing of the suit herein, the land registry has misplaced the file for Gede/Mijomboni/387 and she has failed to obtain a copy of the Green Card for that parcel despite it being in her list of documents. She sought that the plaintiff's claim be dismissed. In what this court deems to be her counterclaim, rudimentary though it may seem, the 2nd defendant sought the following orders:

- a. A dismissal of the plaintiff's suit with costs;*
- b. A declaration that the sale and transfer of the portion identified as GED 1870s valid;*
- c. An order of mandamus be issued to the first defendant to visit the advocates offices to execute the transfer forms of Gede /Mijomboni/ 1871 to affect the transfer of the matrimonial home back to the first defendant;*
- d. A permanent injunction be issued against the plaintiff and the first defendant from interfering with the portion identified as Gede /Mijomboni/1870.*

4. The plaintiff filed a Reply to Defence dated 19th June 2023 denying the contents in the Defence and reiterating the contents of the plaint. She pointed out that the agreement provided for sale of the entire parcel and stated that the second defendant did not have any

right to commence an amendment of the sale agreement after the issue was raised before the court.

EVIDENCE

5. The plaintiff testified at the hearing and called one witness who is her son and who allegedly resides on the suit property. The 2nd defendant testified alone in support of her case. I have considered the evidence of the parties which closely reflects what they have stated in their respective pleadings without any substantive variation.

ANALYSIS AND DETERMINATION.

6. There is no doubt that an agreement was entered into between the defendants herein on the 7th April 2017 which provided for sale of the entire plot number **Gede/Mijomboni/387** measuring approximately **4.6** hectares. The 1st defendant's explanation is that she was only purchasing a small portion of **4 acres** out of the said land, but the advocate who represented both parties in the transaction transferred the entire portion no **Gede /Mijomboni/387** to her. However, the copy of the Green Card produced by the plaintiff shows that the whole of plot number **Gede /Mijomboni/387** comprises of **4.6 acres** and not **4.6 hectares**.
7. The consideration for the portion bought by the 2nd defendant was fixed at Kenya shillings **1,400,000/=** and there is no insight that can be gained from that lumpsum as to what was the proper price per acre to enable this court conclude that the advocate included the wrong acreage in the agreement as a *bona fide* mistake.

8. Out of that Kenya Shillings **1,400,000/=** Kenya shillings **350,000/=** was paid upon the execution of the agreement. The contract terms were that the balance was to be paid upon successful transfer in favour of the purchaser. The completion date was to be within **7** days after full payment was made excluding Saturday and Sunday. The agreement bears a photograph of the first defendant in its final page pasted opposite his name. The 1st defendant has not denied executing the agreement and there are no claims of forgery and this court is persuaded that the 1st defendant indeed executed the agreement.
9. The second defendant has stated that she was purchasing **4** acres; that the transfer to her of the entire parcel was by mistake of the transaction advocates; that upon detecting the said mistake, she caused subdivision of plot number Gede /Mijomboni/ 387 into two parts and took her portion numbered Gede /Mijomboni/ 1870, presumed to be of 4 acres, and left the other one for the first defendant, who has apparently refused to take it. If the 2nd defendant transferred the entire of plot no Gede /Mijomboni/ 387 to herself and later subdivided the same in order to release a portion to the 1st defendant, then that explains why the two resultant portions are in her name; both the titles number Gede /Mijomboni/ 1870 and Gede /Mijomboni/ 1871 must have naturally issued in her name after the subdivision.
10. The title for plot number Gede /Mijomboni/ 1871 measures 6.590157 acres. Partly executed transfer forms for plot number

Gede /Mijomboni/ 1871 have been exhibited by the second defendant as evidence of her willingness to transfer it back to the first defendant, claiming that it hosts the couple's homestead.

11. The second defendant claimed in her evidence that the plaintiff and the first defendant are out to defraud her; that the plaintiff was aware of the transaction since she shares matrimonial home with the first defendant.

12. There is no evidence whatsoever that any money was paid to the first defendant as the balance of the purchase price in the agreement. The second defendant has only established what was acknowledged by the agreement which is only Kenya shillings **350,000/=**. No copy of a transfer of the entire parcel of land plot number Gede /Mijomboni/ 387 was produced by either party. It would have signified acknowledgment of receipt of the entire Kenya shillings **1,400,000/=** by the 1st defendant. Its absence among the documents of the parties implies that neither party has established that the whole consideration was indeed paid to the first defendant. It was for the first defendant to attend court and give evidence and declare that he was not paid the money and he failed to do that. The court thus sits in the dark regarding a very vital part of the transaction.

13. The 1st defendant's counsel, Mr Ogeto who appeared severally in court and who at the hearing of the case on 22nd October 2024, excused himself with leave of Court from the proceedings. No evidence was called for the first defendant in the matter.

14. I have examined the documents produced by the plaintiff in this case. They include a copy of a Green Card for plot number Gede /Mijomboni/ 387, apparently certified by the Land Registrar, one S.K. Gatui. That document states that plot number Gede /Mijomboni/ 387 is **4.6 acres** in contrast with the certified copy of the green card produced by the second defendant also apparently signed by the same S.K. Gatui, which states that plot number Gede /Mijomboni/ 387 is **4.6 hectares**.

15. Both parties herein want me to believe their respective version of the story. The plaintiff wants this court to believe that the entire land she calls her matrimonial home is gone with the 2nd defendant, and has produced a copy of a Green Card to suit her purpose, which reads the approximate amount of land the 2nd defendant has admitted that she was intending to purchase; the second defendant has produced a copy of a Green Card to show that she left some land for the plaintiff and the 1st defendant in order to suit her purpose too, to show that she left them their homestead, to prove that she has not taken away their matrimonial home. No explanation has been produced by the first defendant as to how much land was being bought and how much was being left; he has left this court with no information at all, to make its own computations; all the evidence of the second defendant not having been discredited by both the first defendant and the plaintiff, I find it credible. Consequently, of the 2 witnesses in this case, i.e., the plaintiff and the second defendant, I am inclined to believe that the

copy of green card that the second defendant has produced is genuine and that the one produced by the plaintiff is not.

16. The conduct of both the plaintiff and the first defendant- the production of a Green Card bearing what the court deems to be improper details as to the size of plot number Gede/Mijomboni/387, and non-appearance of the first defendant to testify in his case - leave this court with only one conclusion: that both the plaintiff and the first defendant were conscious of the sale of a portion of the land to the second defendant and are acting in concert to defeat her claim to the portion that she purchased. All that was required for this court enable it believe that there is no collusion between the plaintiff and the first defendant was the testimony of the first defendant and it is lacking. Their conduct reeks of fraud.

17. With regard to the matrimonial home, the provisions of the Matrimonial Property Act were not enacted to enable fraud by couples against innocent land purchasers but to only to protect the matrimonial homes as a habitat for the building block of the nation, the family unit and to enhance the value of social cohesion. However, the plaintiff herself has left gaps unfilled which could have enabled this court do equity in her favour in the matter by granting her some appropriate relief. There is, for example, no claim for a refund for any sum allegedly paid save Kshs **350,000/=**. I had earlier in this judgment stated that there is no evidence of payment of the balance, or even any transfer executed by the 1st defendant by which this court could upon perusal deem it that the full

purchase price was paid. These are grievous omissions and this court thus thinks that it is unsafe to proceed on the assumption that the entire consideration for the portion of **4** acres was paid by the 2nd defendant. It is also quite remarkable that the 2nd defendant seeks no alternative prayer for a refund thereof. Besides, the calculations show that if Gede /Mijomboni/ 1871 measures 6.59 acres, then Gede /Mijomboni/ 1870, which the 2nd defendant desires to be hers, measures 4.77 acres, and no indication has been given as to whether the 2nd defendant paid the 1st defendant for the extra 0.77 acres.

18. This court has pointed out the glaring gaps in both parties' respective cases but the major point upon which the present case turns, however, is on whether plot Gede/Mijomboni/387 is or is not matrimonial property for the purposes of the Matrimonial Property Act.

19. **Section 2** of the Matrimonial Property Act defines "*matrimonial property*" as follows:

"“matrimonial home” means 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;”

20. A matrimonial home is thus matrimonial property; not all matrimonial property can be a matrimonial home. In the case of *Stella Mokeira Matara v Thaddues Mose Mangenya & another [2016] eKLR* it was held as follows:

“Taking into account the above definition, the learned judge held that the appellant had failed to show, firstly, that there is

a home on the suit properties and, secondly, that together with the 1st respondent they were occupying the alleged home. Perhaps photographs of the home, if at all, or a valuation report containing appropriate description of the suit properties would have sufficed. In the circumstances, we cannot fault the learned judge for the conclusion that he arrived regarding absence of proof of existence of a matrimonial home on the suit properties.”

21. No doubt has been raised as to whether the plaintiff and the 1st defendant were man and wife. Was there proof that the plaintiff’s matrimonial property was on plot no Gede/Mijomboni/387? To answer that question it is the case that the plaintiff called a witness, her son James Karisa Charo, whose evidence renders it evident that he resides on the suit land as a child of the marriage between the plaintiff and the 1st defendant. It is clear that plot no Gede/Mijomboni/387 was before its subdivision a property that was *“owned by one or both spouses and occupied or utilized by the spouses as their family home.”* I am persuaded that the plaintiff’s evidence that the suit land hosts her homestead and thus her matrimonial home is genuine.

22. The provisions of the Matrimonial Property Act are unrelentingly poised against the disposal of matrimonial property without the spousal consent of either spouse. The provisions of the Act are as follows in its **Section 6**:

6. Meaning of matrimonial property

(1) For the purposes of this Act, matrimonial property means—

(a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.”

23. **Section 12** of the Act provides as follows:

“12. Special provisions relating to matrimonial property

*(1) An estate or interest in any matrimonial property **shall not**, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.*

(2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man’s wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

(3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.

(4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except—

(a) on the sale of any estate or interest in the matrimonial home in execution of a decree;

(b) by a trustee in bankruptcy; or

(c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.

(5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.”

24. The language employed in **Section 12** includes the words

“*shall not.*” This court interprets that to be a peremptory command that during the subsistence of a monogamous marriage matrimonial property can not, without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise. No claim has been made that the plaintiff’s was a

polygamous family. Her matrimonial home is, in the consideration of this court, covered by the provisions of the Act, and is protected from any dealings such as sale by the 1st defendant without her consent. In any event the 1st defendant has not denied that the suit property is the couple's matrimonial home. Consequently, this court is persuaded that the 1st defendant held title to Gede /Mijomboni/ 387 in trust for himself and for the plaintiff. *Mugo Muiru Investments Limited v E W B & 2 others [2017] KECA 179 (KLR)* held as follows:

"51. Elizabeth's interest in the matrimonial home was an overriding, equitable and unregistered interest. Such interest entitled her to remain in the property. It was an interest in the property. It follows that a purchaser of the matrimonial property even without notice that Elizabeth was in possession would take the property subject to Elizabeth's interest. The evidence in this appeal shows that the appellant either did not do due diligence, or was unconcerned with the occupation of the property by Elizabeth and her interest in it. The appellant took the property subject to Elizabeth's overriding interest in it and Elizabeth being a part-owner could not be removed from the property. Even before the Land Registration Act Cap 300 came into force on 2nd May 2012, the equitable beneficial interest of a spouse in a matrimonial home occupied by such spouse was an overriding interest and therefore transfer of the title to the matrimonial home was subject to such overriding interest. It is immaterial that there was not at the time statutory provision expressly declaring it to be an overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property. In this appeal, the appellant acquired the title registered in the name of S B subject to the interest of Elizabeth. In effect, the appellant neither obtained legal title of the property as notionally it was overridden by Elizabeth's overriding interest nor was the appellant entitled to possession. The transfer to the appellant was subject to Elizabeth's unregistered overriding encumbrance."

25. The position with regard to Elizabeth's interest in her matrimonial home in *Mugo Muiru Investments Limited* (supra) must

be applied to the transfer of the entire title of Gede /Mijomboni/ 387 to the 2nd defendant. The same case should apply to the transfer to the 2nd defendant of any portion of Gede /Mijomboni/ 387 since that portion must have, before the subdivision, formed part of the land to which the matrimonial home was attached within the meaning of **Section 2** of the Act which has the expression “...and includes any other attached property.”

26. Consequently, I find that the plaintiff’s claim has merit and it is hereby allowed while the 2nd defendant’s counterclaim lacks merit and it is hereby dismissed. The upshot is that judgment is hereby entered in favour of the plaintiff as prayed for in **prayers number (i) and (ii)** of the plaint dated **11/5/2022**. In the light of the circumstances outlined in the evidence in this case, this court orders that each party shall bear their own costs of the suit.

Dated, signed and delivered at Malindi on this 12th May 2026.



**MWANGI NJOROGE
JUDGE, ELC MALINDI.**