



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MURANG'A**  
**ELC NO.35 OF 2018**

**PWM.....PLAINTIFF**

**VS**

**JMM.....1<sup>ST</sup> DEFENDANT**

**EQUATORIAL COMMERCIAL BANK LIMITED.....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR MURANG'A.....3<sup>RD</sup> DEFENDANT**

**LIMPOPO DEVELOPMENT K LIMITED.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit against the Defendants seeking orders as follows;

- a. An injunction restraining the parties from dealing with the property until the matter is heard and determined.
- b. A declaration that the Plaintiff is a co-proprietor of all that parcel of land known as NGINDA/SAMAR/BLK1/xxx (suit land).
- c. An order for rectification of the register directing that registration of the suit land in favour of the Defendant be cancelled as it was obtained or made by fraud or through a mistake and the cancellation be substituted by registering the Plaintiff as a co-proprietor of the suit land at the Defendants' expense.
- d. General and exemplary damages.
- e. Mesne profits.
- f. That the Deputy Registrar of this Honourable Court do execute all relevant transfer documents in favour of the Plaintiff.
- g. Costs of the suit
- h. Interest on d, c and g.

2. It is the Plaintiff's case that she and the 1<sup>st</sup> Defendant were married in 1992 and soon after [Particulars Withheld] Investments Limited, a company owned by the Plaintiffs parents gifted them the suit land to hold jointly. Wherefore the Plaintiff and the 1<sup>st</sup> Defendant jointly signed land control board consent and transfer forms.

3. That unknown to her and without her consent the 1<sup>st</sup> Defendant registered the suit land in his sole name in exclusion of the Plaintiff and was issued with a title on the 5/1/1995.

4. She averred that on various dates between 30/12/1994 and 5/1/95 the Land Registry Murang'a fraudulently caused the said land to be registered in the name of the 1<sup>st</sup> Defendant solely and issued a title.

5. The Plaintiff has pleaded and particularised fraud on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendant in para 9, 10 13 of the plaint.

6. The Plaintiff accused the 2<sup>nd</sup> Defendant of negligence in its fiduciary duty to the Plaintiff in charging the suit land and advancing a loan to the 1<sup>st</sup> Defendant in the sum of Kshs 21.8 million, which loan she avers was fraudulently acquired by the Plaintiff.
7. She contended that she later learnt that through the negligence of the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants the suit land was sold and transferred to the 4<sup>th</sup> Defendant.
8. In denying the Plaintiffs claim the 1<sup>st</sup> Defendant asserted that he and the Plaintiff divorced in 2007 and a decree absolute was issued in 2008. He contended that the suit land was gifted to him solely by the father of the Plaintiff 2 years after their marriage. Admitting that he charged the suit land to the 2<sup>nd</sup> Defendant to secure a loan facility, he denied any fraud or negligence in the transaction.
9. Maintaining that the suit is an afterthought, he stated that the Plaintiff did not make any claim against the property during the divorce proceedings.
10. Whilst putting the Plaintiff to strict proof, the 2<sup>nd</sup> Defendant denied the Plaintiffs' claims in particular fraud, negligence and breach of fiduciary duty. It contended that at the request of the 1<sup>st</sup> Defendant it advanced the sum of Kshs 21.8 million against a legal charge of the suit land as security. Its due diligence revealed that the suit land was registered in the name of the 1<sup>st</sup> Defendant solely. The consent of the LCB was duly obtained. Subsequently the 1<sup>st</sup> Defendant repaid the loan in full and a discharged of the suit land was registered. That it denied involvement in the transfer of the suit land to the 4<sup>th</sup> Defendant.
11. The 3<sup>rd</sup> Defendant denied the allegations of fraud and negligence levelled against it by the Plaintiff and sought to put her in the strictest proof. Further it contended that the suit does not disclose any cause of action against it as the facts are matrimonial in nature.
12. The 4<sup>th</sup> Defendant was categorical that it was a stranger to the allegations of fraud and negligence and stated that it purchased the suit land from the 1<sup>st</sup> Defendant on satisfaction of the due diligence which showed that the land belonged to the 1<sup>st</sup> Defendant and was unencumbered.
13. At the trial the Plaintiff led evidence and called one witness. She relied on her witness statement dated the 20/3/14 as her evidence in chief. She also relied on the list of documents filed on the 20/3/14 and marked PEX NO 1-5.
14. She informed the court that she married the 1<sup>st</sup> Defendant on the 30/5/1992. She testified that after their wedding, her father gifted them the suit land which was registered in the name of [Particulars Withheld] Investments Limited, a firm owned by her parents. She stated that she and the 1<sup>st</sup> Defendant signed the transfer forms at Kigumo LCB to transfer the land in their joint names. That soon thereafter the forms went missing at the LCB offices and she had no idea how 1<sup>st</sup> Defendant transferred the suit land in his name solely. She stated that she trusted the 1<sup>st</sup> Defendant to register the suit land in their joint names.
15. She stated that to her knowledge, her father did not process the registration of the transfer in the name of the 1<sup>st</sup> Defendant solely.
16. That the transfer of the land in the name of the 1<sup>st</sup> Defendant solely was fraudulent. That she realized in 2014 that the suit land was not in her name on carrying out a search at the land's office. She also discovered that the suit land had been charged to the 2<sup>nd</sup> Defendant.
17. Asked why she did not raise a claim on the suit land in the divorce proceedings she stated that it was agreed with the 1<sup>st</sup> Defendant that the suit land would be held in trust for their 3 children aged 19 years to 21 years. That she filed a consent to capture this though she admitted that she did not produce the said consent in court.
18. She testified further that although the loan was repaid the 2<sup>nd</sup> Defendant failed to obtain her consent before charging the property, which property was held jointly throughout. She admitted that at the time the suit land was being charged to the 2<sup>nd</sup> Defendant in 2012, she was no longer a spouse to the 1<sup>st</sup> Defendant, their divorce having been concluded in 2008.
19. When showed the searches of the suit land in cross examination by counsel of the 4<sup>th</sup> Defendant, she admitted that at no time was the suit land registered in her name. However she claimed her interest in the suit land subsisted notwithstanding.
20. PW2 – AW testified and stated that she is the mother of the Plaintiff. She relied on her witness statement dated the 24/6/14 as her evidence in chief. She stated that her husband gifted the suit land to the Plaintiff and the 1<sup>st</sup> Defendant in 1994, two years after their marriage. That the suit land belonged to [Particulars Withheld] investments limited where she and her husband were directors. In addition, she informed the court that she did not attend the land control board offices nor sign the transfer form. It was signed by her husband. She was categorical that it is her husband who physically took the title and transfer documents to the land's office at Murang'a for registration. She further confirmed that the 2<sup>nd</sup> Defendant charged the suit land without the consent of the Plaintiff and after the Plaintiff and the 1<sup>st</sup> Defendant had divorced.
21. With that the Plaintiff closed her case.
22. DW1-JMM led evidence and relied on his witness statement dated the 28/3/14 and 10/4/19 as evidence in chief. In addition, he relied on the documents listed and filed on the 28/3/14 and marked DEX 1-4.
23. He informed the court that he married the Plaintiff in 1992 and got three children who are now adults.

24. That in 1994 his father in law Mr G gifted the suit land to him solely. That he and Mr G attended Land control board offices to obtain the consent and subsequently he went to the land's office at Murang'a to effect the registration of the title which he personally handed over to him at United Club in Nairobi.
25. It was his evidence that to his knowledge, nothing precluded the Plaintiff's father from registering the suit land in the joint names of the Plaintiff and the 1<sup>st</sup> Defendant.
26. He stated that he enjoyed a close relationship with his father in law who he described as his mentor in business.
27. That the suit land remained in his sole name for a period of over 20 years and no action was taken by the Plaintiff to claim it. That the Plaintiff was all along aware that the suit land was registered in his name solely. He referred to the petition she filed in the divorce proceedings where she stated that the suit land is being utilised by the 1<sup>st</sup> Defendant alone. He maintained that if indeed the suit land was joint, the Plaintiff would have contested it in the proceedings as matrimonial property.
28. He denied ever altering any documents to remove the name of the Plaintiff.
29. The witness admitted taking the loan in the sum of 21.8 million in 2012 and charged the suit land as security but explained that by this time their marriage with the Plaintiff had ended having divorced in 2008, a fact that he disclosed to the bank. That spousal consent was therefore not required. That the bank carried out due diligence before charging the property and no instance of fraud arose.
30. The witness informed the court that upon repaying the loan in full the suit land was discharged and thereafter sold it to the 4<sup>th</sup> Defendant for value.
31. The 2<sup>nd</sup> Defendant led evidence through its legal officer one John Wangeche who testified DW2. He adopted his witness statement filed on the 24/6/19 and produced the documents listed in the 2<sup>nd</sup> Defendants list of documents filed on the 19/6/14.
32. He testified that the 1<sup>st</sup> Defendant applied for a loan in the sum of Kshs 21.8 million. The bank carried out its due diligence and confirmed that the suit land was registered in the name of the 1<sup>st</sup> Defendant as the sole proprietor on the 5/1/95. That before 2012 the suit land was unencumbered as shown on the encumbrance section of the official search dated the 20/12/12. The land control board consent was duly obtained. Vide a duly sworn affidavit and dated 3/12/12, the 1<sup>st</sup> Defendant declared that he was not married and therefore the suit land was not a matrimonial property.
33. Finally, the suit land was charged for the sum of Kshs 21.8 million and a charge dated the 3/12/12 was produced in evidence.
34. He informed the court that upon full repayment the suit land was duly discharged.
35. He informed the court that he was unaware of any fraud committed by the 2<sup>nd</sup> Defendant nor any evidence that the suit land was held under a trust. He also stated that the 2<sup>nd</sup> Defendant was a stranger to the transaction between the 1<sup>st</sup> Defendant and the 4<sup>th</sup> Defendant.
36. The 3<sup>rd</sup> Defendant elected not to adduce any evidence but its counsel cross examined the witnesses.
37. The 4<sup>th</sup> Defendant led evidence through DW3 – Timothy Mundia Warao who introduced himself as the director and majority shareholder of the 4<sup>th</sup> Defendant. He relied on his witness statement filed on the 23/1/19 and the 4<sup>th</sup> Defendants list of documents filed on even date and marked DEX 14-17.
38. He informed the court that he carried out due diligence on the suit land which included but not limited to conducting a search studying the green card investigating the history of the land. That the search indicated that the suit land was owned solely by the 1<sup>st</sup> Defendant and charged to the 2<sup>nd</sup> Defendant. He produced the search dated the 11/2/14. That on the 3/3/14 they entered into an agreement for the sale of the land with the 1<sup>st</sup> Defendant whereupon the 4<sup>th</sup> Defendant cleared the outstanding loan with the 2<sup>nd</sup> Defendant and the remainder of the consideration was paid to the 1<sup>st</sup> Defendant.
39. The witness informed the court that the suit land was transferred to the 4<sup>th</sup> Defendant which took over vacant possession of the suit land and commenced development thereto. He estimated the developments in the sum of Kshs 20 million comprised of livestock and farm produce.
40. He stated that in acquiring the suit land he followed all the legal steps including obtaining LCB board consent and denied all allegations of fraud and negligence levelled against it by the Plaintiff. That the 1<sup>st</sup> Defendant produced a decree nisi at the land control board to evidence his divorce from the Plaintiff therefore obviating the requirement for spousal consent to the transfer. That the bank discharged the loan facility and a discharge of charge was registered against the suit land.
41. Further he informed the court that he was aware that the 1<sup>st</sup> Defendant petitioned for divorce from the Plaintiff in November 2005 and that a decree nisi was issued on the 25/7/2007 and made absolute on the 12/2/2008 and therefore there was no requirement for a spousal consent at the time of disposal of the suit land as the parties were divorced.
42. He also informed the court that the 1<sup>st</sup> Defendant and the Plaintiff were got married in 1992 and the 1<sup>st</sup> Defendant was gifted the land

solely and on his own capacity in 1994 after a period of 2 years into their marriage. That he was aware that the suit land had been in the name of the 1<sup>st</sup> Defendant for a period of 20 years and the Plaintiff had not never made any claims to the suit land. In addition, that he was aware that the Plaintiff despite being represented by counsel during the divorce proceedings, she did not contest the suit land. The witness was categorical that the suit was filed on the 20/3/14, 7 days after the disposal of the suit land on the 13/3/14.

43. All the parties with the exception of the 3<sup>rd</sup> Defendant have filed written submissions which I have read and considered.

44. The Plaintiff submitted that she is challenging the title acquired by the 1<sup>st</sup> and 4<sup>th</sup> Defendant on the basis of section 26 (1 ) of the LRA as the title was acquired through fraud, illegal and in unprocedural manner. She relied on section 80 of the said LRA which mandates the court to cancel title if it is satisfied that the registration was obtained made or omitted by fraud or mistake.

45. Further the Plaintiff submitted that the Matrimonial Property Act 2013 provides under section 14 (a) of the said Act that where a property is acquired in the name of one spouse, there is a rebuttable presumption that the property is being held in trust for the other spouse. That the Plaintiff's father's incentive in gifting the suit land to the 1<sup>st</sup> Defendant was his marriage to his daughter the Plaintiff herein. Relying on the Marriage Act 2014 which she submits, states that parties to a marriage have equal rights and obligations at the time of the marriage during the marriage and at the dissolution of the marriage, it matters not that the suit land was not included at the time of divorce in law, the Plaintiff retained an equal interests in the suit land.

46. She submitted that the 1<sup>st</sup> and 4<sup>th</sup> Defendants did not acquire a better title as the Plaintiff had not consented to the sale/charge of the suit property nor did she confer authority to the 1<sup>st</sup> Defendant to sell the land to the 4<sup>th</sup> Defendant.

47. In addition, she submitted that the 1<sup>st</sup> Defendant has not provided evidence that he was gifted the suit land to the exclusion of the Plaintiff.

48. The 1<sup>st</sup> Defendant in his submissions gave a brief history of the case and the summary of the evidence of the parties as well as the issues for determination.

49. As to whether the Plaintiff was gifted the property jointly with the 1<sup>st</sup> Defendant and whether he transferred it to himself fraudulently, the 1<sup>st</sup> Defendant submitted that the Plaintiff did not substantiate her evidence that the transfer forms got lost at the LCB offices nor called a witness from the LCB offices for cross examination.

50. That the Plaintiff's father registered the title in the name of the 1<sup>st</sup> Defendant and brought him the registered title. That PW2 corroborated this evidence and further stated that she did not get involved in obtaining the LCB consent nor the registration of the title in the name of the 1<sup>st</sup> Defendant. That nothing precluded the Plaintiff's father from gifting the suit land to both the Plaintiff and the 1<sup>st</sup> Defendant.

51. On the issue of whether or not the Plaintiff proved fraud to the required standard, the 1<sup>st</sup> Defendant relied on the following cases; **Mbuthia Macharia Vs Annah Mutua Ndwiga Mutua & Anor (2015) ECLR** where the court relied on the case of **Ratilal Gardhanbhai Patel Vs Lalji Makanji (1957) EA 314** where the appellate court established the threshold of proof in fraud cases that allegation of fraud must be strictly proved on a higher than a mere balance of probabilities. Further in **Koinange & 13 others Vs Koinange (1986) KLR 23**, the court stated that whoever asserts a fact is under an obligation to prove it in order to succeed.

52. The 1<sup>st</sup> Defendant also relied in the case of **Grace Wanjiru Macharia Vs James Duncan Mwarangu Gikonyo (2018) ECLR** where the court reiterated the principles set out in the cases quoted above.

53. It is the submission of the 1<sup>st</sup> Defendant that the Plaintiff failed to prove fraud and instead has attempted to restructure its case in her submissions to a matrimonial cause under the matrimonial Property Act 2013. That the section under the said Act are only relevant to a claim for matrimonial property rights which this suit is not. That the suit of the Plaintiff is based on fraud and negligence and is therefore bound by her pleadings.

54. The 1<sup>st</sup> Defendant submitted that the Plaintiff and the Defendant was declared absolute in 2008. The suit land was charged to the 2<sup>nd</sup> Defendant on the 20/12/12 and the land sold to the 4<sup>th</sup> Defendant on the 13/3/14 and the title registered in its name on the 14/3/14. It his submissions therefore that at the time of the charge and transfer the Plaintiff was no longer a spouse of the 1<sup>st</sup> Defendant and therefore has no locus to challenge the said transactions because spousal consent was not required and the Plaintiff was not a co-proprietor to the suit land.

55. Relying on the case of **Stella Nyakio Ngugi Vs Wilberforce njenga Ndonga & 7 others (2018) ECLR** where the court stated that;

“ ... the suit properties were charged when the Plaintiffs was no longer a wife to the chargor, hence spousal consent from the Plaintiff was not necessary”.

56. The 2<sup>nd</sup> Defendant submitted that by a charge dated the 3/12/12 between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the 2<sup>nd</sup> Defendant granted a loan in the sum of Kshs 21.8 million to the 1<sup>st</sup> Defendant over the suit property. The 1<sup>st</sup> Defendant was then a sole owner of the suit land.

57. It submitted that the Plaintiff in her pleadings is claiming that the 2<sup>nd</sup> Defendant failed to obtain necessary consents from the Plaintiff before charging the suit land; disregarded the interest of the Plaintiff in the suit property and the duty of care owed to the Plaintiff and that the registered the charge whilst having knowledge that the documents were forgeries.

58. It further testified that at the time of charging the property the 1<sup>st</sup> Defendant swore an affidavit indicating that he was not married to the 1<sup>st</sup> Defendant. It submitted that section 12 of the Matrimonial property applies to a property considered to be matrimonial. At the time of the transaction, the Plaintiff and the 1<sup>st</sup> Defendant were not married and therefore no consent was required. It relied on the case of **Stella Mokeira Matara Vs Thaddues Mose Mangenya & Anor (2014) EKLK** where the court stated that in order to establish a prima facie case the Plaintiff had a duty to prove that she is the 1<sup>st</sup> Defendants' spouse and that she had a matrimonial home on the suit land.

59. That section 93 (3) (a) of the Land Registration Act 2012 required a lender to inquire on the marital status of a borrower. That the 1<sup>st</sup> Defendant indicated that he was not married. A search of the suit land indicated that the 1<sup>st</sup> Defendant was a sole registered owner. That LCB consent was duly obtained and that by the time of the institution of the suit, the loan had been fully repaid.

60. That the Plaintiff did not prove any negligence on the part of the 2<sup>nd</sup> Defendant. That the 2<sup>nd</sup> Defendant did not owe the Plaintiff a duty of care since she was not a wife at the time of the transaction. That the Plaintiff has failed to prove that she was owed a duty of care and that she has proved negligence on the part of the Plaintiff.

61. The 2<sup>nd</sup> Defendant submitted that the Plaintiff has not proved fraud on the part of the 2<sup>nd</sup> Defendant. That it is our law that fraud and illegality must be proven before a title can be nullified and that in this case the Plaintiff has not discharged the burden of proof.

62. In conclusion, it submitted that at the point of transfer of the land to the 4<sup>th</sup> Defendants the 2<sup>nd</sup> Defendants' rights had been discharged as the amount owing had been paid. That it was not involved in the transaction between the 1<sup>st</sup> Defendant and the 4<sup>th</sup> Defendant.

63. The 4<sup>th</sup> Defendant submitted that the suit having been filed more than 20 years from the time the cause of action is claimed to have arisen, is time barred.

64. The 4<sup>th</sup> Defendant joined the co-Defendants in submitting that the Plaintiff failed to prove fraud on its part. That the court cannot infer fraud at all. The burden rests with the Plaintiff to discharge which she did not. In respect to the Plaintiff's evidence that the land was to be held in trust for the children, the 4<sup>th</sup> Defendant submitted that the children were not called to testify in the case, neither have they claimed any beneficial interest in the suit land.

65. It submitted that the 4<sup>th</sup> Defendant was a bonafide purchaser for value and that in acquiring the suit land it carried out due diligence and the suit land was registered in the name of the 1<sup>st</sup> Defendant. He relied in the case of **Katende V Haridar & Company Limited (2008) 2 EA 173** where the court set out the requirements to be met for one to be a bonafide purchaser for value. That as such the 4<sup>th</sup> Defendant being a bonafide purchaser of a legal estate without notice has absolute unqualified and answerable defence against prior equities.

66. The issues for determination are;

- a. Whether the suit is statutorily barred.
- b. Whether the Plaintiff was gifted the suit land with the 1<sup>st</sup> Defendant.
- c. Whether the Plaintiff has proved fraud on the part of the Defendants.
- d. Was the Plaintiff's consent/knowledge required prior to registration charge and subsequent sale of the suit land.
- e. Whether the 2<sup>nd</sup> Defendant is in breach of fiduciary duty/duty of care in respect to the Plaintiff.
- f. Whether the suit land qualify to be a matrimonial property
- g. Who meets the costs of the suit

67. At the onset there are undisputed facts in the case which I must highlight. The suit land was a resultant subdivision of parcel NGINDA/SAMAR/xx registered in the name of [Particulars Withheld] Investments Limited on the 11/10/1990. This title was subdivided and closed on the 16/11/94 and yielded parcel Nos. xxx-xxx.

68. Parcel No. xxx, the suit land became registered in the name of the 1<sup>st</sup> Defendant on the 30/12/94 and the title issued on the 5/1/95.

69. It is commonly acknowledged that the Plaintiff and the 1<sup>st</sup> Defendant got married on the 30/1/1992 and their marriage was dissolved in 2008 on the issuance of a decree nisi absolute.

70. The 4<sup>th</sup> Defendants have submitted that the suit as filed is time barred and urged the court to dismiss it in limine. This Court pronounced itself on this issue on 21/3/14 when the Hon Justice Ombwayo in his orders issued on the 20/3/14 extended the period within which the suit could be filed. The issue is therefore moot.

71. As to whether the Plaintiff was gifted the suit land with the 1<sup>st</sup> Defendant, evidence was led by the Plaintiff that her father gifted the suit land to them jointly. She averred that she and the 1<sup>st</sup> Defendant signed the transfers forms at the land control board offices at Kigumo which

went missing under unclear circumstances in the said offices. She contended that she did not know how the 1<sup>st</sup> Defendant registered himself solely as the proprietor of the suit land. She claims it was done fraudulently.

72. The 1<sup>st</sup> Defendant testified that the suit land was gifted to him solely by the Plaintiffs father who he went with to the LCB offices to obtain the LCB consent to transfer. Later the Plaintiffs father attended to the lands office at MURANG'A and registered the title of the suit land in his name. That the title was delivered to him by his father in law at United Club in Nairobi.

73. This evidence was not challenged by the Plaintiff. She failed to produce in court the transfer forms showing that the suit land was to be registered in joint names. She also failed to call a witness from the LCB offices to support her allegations. Interestingly her own witness PW2 confirmed that it is Mr G, her husband who registered the suit land in the name of the 1<sup>st</sup> Defendant at the lands office at Murang'a.

74. Section 107 of the Evidence Act states as follows;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

75. To answer the issue, the Plaintiff has not substantiated her allegations and remains unsupported.

76. It is the finding of the court that the Plaintiff did not lead any evidence to support her claim that the suit land was gifted to her and the 1<sup>st</sup> Defendant jointly.

77. As to Whether the Plaintiff has proved fraud on the part of the Defendants, the Plaintiff has put up a spirited claim that the 1<sup>st</sup> Defendant through fraud transferred the suit land in his name to her exclusion when the land was gifted to both of them by her parents after their wedding. She has implored the court to declare that she owns a share of the suit land. Further that the suit land was charged fraudulently and in breach of a duty of care/fiduciary duty owned to her by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. It is her case that her consent was not obtained before the suit land, which she believes is jointly held, was encumbered. Further the sale to the 4<sup>th</sup> Defendant was also fraudulent. She has particularised the instances of fraud and negligence on the part of the Defendants.

78. In the case of In **R. G. Patel v. Lalji Makanji (1967 EA 314)**, the former Court of Appeal for Eastern Africa stated thus:-

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”

79. Fraud being a serious charge, it is trite law that it must be pleaded and strictly proved to the standard higher than the balance of probabilities but slightly lower than beyond reasonable doubt. Courts cannot infer fraud from the facts/evidence in a case. The burden of proof lies with the one who alleges fraud to do so. It is the duty of the court therefore to determine if the Plaintiff has successfully proved fraud on the part of the Defendants.

80. In the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

81. Section 26 of the Land Registration Act cited above provides two instances where a title can be impeached/challenged. The first is on the ground of fraud and/or misrepresentation to which the person is proved to be privy to and/or a party and secondly where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

82. As stated in the preceding para 78, the Plaintiff failed to produce evidence on fraud on the part of the 1<sup>st</sup> Defendant as far as the registration of the title in his name solely. It is clear that the 1<sup>st</sup> Defendant held the suit land from 1995 to 2014 when it was sold to the 4<sup>th</sup> Defendant.

83. In an apparent departure, the Plaintiff's in her submissions pleaded that the suit land was matrimonial. This is not borne out of the pleadings and evidence on record and the court finds this as an afterthought.

84. The Plaintiff led evidence that there was a consent between her and the 1<sup>st</sup> Defendant that the suit land would be held in trust for the children and that explains why she did not lay a claim on it in the divorce proceedings. She however failed to produce the consent in court. The children being adults were not called to give evidence to support this allegation. The court found that no evidence of trust was adduced and this claim is unsupported.

85. Even if the issue of matrimonial property was to be argued, both the Plaintiff and the 1<sup>st</sup> Defendant adduced evidence that they separated in 2002 when the Plaintiff left the country and lived in the United Kingdom leaving the children with the 1<sup>st</sup> Defendant. According to the

decree nisi on record, their union stood dissolved in 2008. It therefore follows that by the time the suit land was charged in 2012, the marriage was long dissolved and the requirement for spousal consent was not legally necessary.

86. It is the finding of the court that though pleaded the Plaintiff failed to prove fraud on the part of the Defendants and the allegation of fraud remain unsubstantiated at all.

87. In respect to the 4<sup>th</sup> issue, the answer has been given partly in the preceeding paragraphs. The suit land was charged to the 2<sup>nd</sup> Defendant in 2012. The Plaintiff and the 1<sup>st</sup> Defendant were divorced by then. The 1<sup>st</sup> Defendant disclosed this to the 2<sup>nd</sup> Defendant vide an affidavit sworn in 2012. The 2<sup>nd</sup> Defendant was not obligated in law to obtain spousal consent for the transaction as she was neither a spouse nor a co-owner of the suit land.

88. In the case of **Stella Mokeira Matara Vs Thaddeaus Mose Mangenya & Anor ELC 209 of 2012**, the court held that;

“the Plaintiffs argument is that the charge over the suit properties is invalid because her consent was not obtained prior to the execution of the same. In order to establish a prima facie case the Plaintiff has a duty to prove that she is the 1<sup>st</sup> Defendants spouse and that she has a matrimonial house on the property.

89. In this case the Plaintiff failed to prove any and the reason is because she was no longer a spouse at the time the suit land was being charged to the bank.

90. It is the finding of the court that neither the 2<sup>nd</sup> Defendant nor the 4<sup>th</sup> Defendant owed the Plaintiff any duty of care. She failed to adduce any evidence to support this claim.

91. The court answers the 4<sup>th</sup> and 5<sup>th</sup> issues in the negative.

92. It is the finding of the court that the 4<sup>th</sup> Defendant is an innocent purchaser without notice. Evidence was led that it carried out due diligence, obtained consent to transfer and paid the full purchase price. The Plaintiff has failed to produce any evidence that would impeach its title either under section 26 a and b or section 80 of the LRA, that is to say evidence that would support a plea of fraud, misrepresentation for which the 4<sup>th</sup> Defendant was a party or evidence to support illegality, unprocedurality, corrupt scheme or mistake.

93. As to whether the suit land qualify to be a matrimonial property, the Plaintiff has raised this issue in her written sub missions. The court notes that the Plaintiff failed to plead any cause of action in respect to beneficial interest and or matrimonial property.. In the case of **Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consultation And Training Limited & another [2004] eKLR Korir J** held that:

“The Applicant, the Respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.

94. It is the finding of the court that this is a non-issue as it was not pleaded.

95. In the upshot the Plaintiffs case fails and is hereby dismissed.

96. The Plaintiff shall pay the costs of the suit in favour of the Defendants.

97. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 31<sup>ST</sup> OCTOBER 2019**

**J. G. KEMEI**

**JUDGE**

**In the presence of:**

Plaintiff – Absent

Defendants – Wachira HB Ms Muriithi

Wachira HB Ms Mwakenzie

Attorney General - Absent

Ms.Njeri and Mr. Kuiyaki, Court Assistants.