



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 252 OF 2017

MILLICENT ORIEYO.....PLAINTIFF

-VERSUS-

1. LILLY SULEIMAN SHARBAID

2. LAND REGISTRAR, KWALE.....DEFENDANTS

JUDGMENT

1. Millicent Orieyo, the Plaintiff herein instituted this suit by way of a Plaint dated 11th July, 2017 and filed on even date. The plaintiff is seeking for judgment against the defendants for:

a. A declaration that the transfer of the LAND PARCEL NUMBER KWALE/DIANI BEACH BLOCK/1583 to the 1st defendant was done illegally and fraudulently.

b. A declaration that the registration of the LAND PARCEL NUMBER KWALE/DIANI BEACH BLOCK/1583 in the name of the 1st defendant was fraudulent, null and void and that the said parcel of land belongs to the plaintiff and her joint lessee, Faith Chege.

c. A cancellation of Certificate of Lease to LAND PARCEL NUMBER KWALE/DIANI BEACH BLOCK/1583 in the name of the 1st defendant and a reversion of LAND PARCEL NUMBER KWALE/DIANI BEACH BLOCK/1583 in the plaintiff's name and that of her joint lessee.

d. An order of mandatory injunction compelling the 2nd defendant to issue a Certificate of Lease in respect of LAND PARCEL NUMBER KWALE/DIANI BEACH BLOCK/1583 in the name of the plaintiff and Faith Chege.

e. An order of Permanent Injunction restraining the 1st defendants by herself, her agents, servants, employees and/or any person authorized by the 1st defendant from entering onto and/or interfering with the plaintiff and her joint lessee's quiet possession of LAND PARCEL NUMBER KWALE/DIANI BEACH BLOCK/1583.

f. General damages

g. Cost of the suit.

2. The plaintiff's case is that at all material time relevant to this suit, the plaintiff together with another joint lessee, Faith Chege, were the registered proprietors of all that parcel of land known as Title LAND PARCEL NUMBER KWALE/DIANI BEACH BLOCK/1583 being a leasehold interest from the Government of Kenya for a term of 99 years beginning 13th December 2006 (hereinafter as "the suit property"). The plaintiff avers that the said property comprised of several different plots which were consolidated into the suit property when the title was issued. The plaintiff further avers that the said property was to be held by herself and her joint lessee in equal shares.

3. The plaintiff avers that at the time of acquiring the suit property, she was married to one Jasper Omondi Oduor and her share of the property formed part of their matrimonial property. The plaintiff states that on or about 31st January, 2017, she was shocked to discover that the said property had been transferred to the 1st Defendant vide a transfer document dated 15th March, 2016. The plaintiff states that the transfer of the said property to the 1st defendant was done without her knowledge or that of her joint lessor making it fraudulent and illegal. The plaintiff has set out the particulars of fraud and illegality as:

- a. Preparing the transfer instrument without the knowledge or consent of the plaintiff or her joint lessee while being fully (sic) that they were the registered owners of the property.
- b. Causing the transfer instrument to be executed by persons other than the plaintiff.
- c. Forging the plaintiff's signature
- d. Conspiring to defraud the plaintiff and to dispossess her of her share of the suit property.
- e. Transferring the property without the written consent of the plaintiff or her spouse.

4. The plaintiff states that following the transfer, the 2nd defendant caused the suit property to be registered in the name of the 1st defendant and a certificate of lease was issued to the 1st defendant by the 2nd Defendant on 15th April 2016. The Plaintiff avers that neither she nor her spouse gave any written consent allowing the transfer of the said property to the 1st defendant as required under the law. The plaintiff further states that she did not execute any transfer documents indication that she was acceptable to the transfer of the suit property to the 1st defendant and that unless the said transfer is annulled and the title issued to the 1st defendant by the 2nd defendant is cancelled, she and her spouse stand to lose their interest in the said property.

5. The defendants were duly served with summons to enter appearance but failed to do so. The 2nd defendant was served personally while the 1st defendant was served by advertisement in the Daily Nation Newspaper of 12th January 2018. Upon request by the plaintiff interlocutory judgment was entered against the defendants in default of appearance on 23rd November, 2018. The matter proceeded for formal proof on 23rd May, 2019 wherein the plaintiff gave her testimony and did not call any witness.

6. The plaintiff adopted her witness statement dated 27th June, 2018 as her testimony and evidence-in-chief and produced list of documents dated 11th July 2019 and supplementary list of documents dated 27th June 2018 which documents were marked as P.exhibits 1 to 5. It is the plaintiff's testimony and evidence that by a certificate of lease issued by the Land Registrar on 13th December, 2006, the Plaintiff and her joint lessee Faith Chege were registered as the joint proprietors of the suit property. She produced the certificate of lease and Green Card to the suit property as p.exhibit 1. She stated that the suit property was held by her and her joint lessee, Faith Chege in equal shares. That at the time of acquiring the property, she was married to Jasper Omondi Oduor and therefore shared the property to form part of their matrimonial property. The plaintiff produced the copy of marriage certificate as P.exhibit 2.

7. The plaintiff stated that on or about 30th January, 2017, she was shocked to discover that the said property had been transferred to the 1st defendant without her consent and that of her spouse. A copy of the transfer dated 15th March, 2016 was produced as p.exhibit 3. The plaintiff added that she immediately wrote a letter to the Land Registrar Kwale, the 2nd defendant herein, informing him of the irregular transfer of the said property and requesting him to register a caution against the said property. A copy of the Letter was produced as p.exhibit 4. The plaintiff testified that upon perusal of the copy of the transfer instrument, she discovered that the 1st defendant had actually forged her signature or caused the same to be executed by an unknown person. That she also discovered that her spouse had not issued any consent allowing the said property to be transferred to the 1st defendant. That no spousal consent to transfer the land was given. The plaintiff stated that even though she owned part of the suit property she was not consulted prior to the said transfer and that she ultimately lost her interest in the suit property when the said transfer and subsequent issuance of certificate of title to the 1st defendant to the 2nd defendant happened. The plaintiff produced copy of certificate of official search dated 15th April, 2017 as p.exhibit 5 which confirmed that indeed the 1st defendant is currently the registered proprietor of the said property pursuant to a certificate of lease issued on 15th April, 2016.

8. In their submissions, the plaintiff's advocates M/s Munyao, Muthama & Kashindi Advocates summarized the plaintiff case and submitted that based on the uncontested evidence, the plaintiff has proved her case on a balance of probabilities. They relied on the case of **Stephen Gachau Githaiga & Another –v- AG(2015 eKLR (quoted in MWK –v-SKK & Others (2018)eKLR)** where the Court of Appeal stated:

“Where a party does not appear and defend the suit and or substantiate on its pleadings, they remain mere allegations and therefore the balance of probabilities should tilt in favour of the plaintiff or the party who has appeared and substantiated on his or her pleadings.”

9. The plaintiff's counsel submitted that the particulars of fraud and illegality pleaded have not been disputed or challenged and therefore have been proved and relied on the case of **Vijay Morjaria –v- Nausingh Madhusingh Darbar & Another (2000)KLR**. Further, the plaintiff's counsel cited Section 12 (1) of the Matrimonial Property Act as read with Section 93 of the Land Registration Act and the case of **Kadzo Mkutano –v- Mukutano Mwambaje Kadosho & 2 Others (2016) eKLR** and submitted that it is settled law that the absence of a spousal consent at the point of selling matrimonial property makes the said sale null and void. It was submitted that the transfer of the suit property from the plaintiff to the 1st defendant was illegal and fraudulent. Counsel submitted that the plaintiff has proved her case and judgment should be entered in her favour as prayed in the plaint.

10. The plaintiff's claim against the defendants is anchored on fraud and illegalities in the procedure in which the transfer and registration of title in favour of the 1st defendant was done. The particulars of the said fraud and illegalities have been sufficiently particularized in paragraph 9 of the plaint. The issues for determination in this matter are as follows:

- i. Was the suit property lawfully transferred to the 1st defendant?
- ii. Is the plaintiff entitled to the reliefs sought?

11. It is not in dispute that the suit property otherwise known as LAND PARCEL NUMBER KWALE/DIANI BEACH BLOCK/1583 was initially owned and registered in the names of Faith Chege and Millicent Orieyo, the plaintiff herein. The plaintiff has testified that at the time of acquiring the interest in the suit property, she was married to one Jasper Omondi Oduor and that the suit property formed part of their matrimonial property. According to the plaintiff neither the plaintiff nor Faith Chege executed the transfer in favour of the 1st defendant. It is the plaintiff's case that the signature in the transfer instrument was forged and that she had no knowledge and never consented to the said transfer. The plaintiff has also stated that her spouse did not issue any consent allowing any sale and transfer of the suit property which is matrimonial property. Section 12(1) of the Matrimonial Property Act provides as follows: -

“An estate or interest in any matrimonial property shall not, during the substance 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.”

It is clear that spousal consent is required before a spouse can sell matrimonial property. In the absence of such consent, the sale becomes null and void.

12. In this case, the plaintiff's evidence remains uncontroverted. There being no explanation of how the suit property was transferred into the 1st defendant's name in the absence of spousal consent and without the consent and/or knowledge of the plaintiff, the 1st defendant's title is impeachable. I find the evidence on record sufficient to prove that the plaintiff is entitled to the reliefs sought. From the material placed before me, I am satisfied that the plaintiff has proved her case on balance of probabilities. In the result, judgment is entered for the plaintiff in terms of prayers (a), (b), (c), (d), (e), (f) and (g) of the Plaintiff.

DATED, SIGNED and DELIVERED at MOMBASA this 25th day of November 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Gitari for Plaintiff

No appearance for the defendants.

Yumna Court Assistant

C.K. YANO

JUDGE