



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 353 OF 2014

ZIBRETA ATAMBA SHIKUMBA.....PLAINTIFF

VERSUS

LIVINGSTONE SHIKUMBA1ST DEFENDANT

WILLIAM SAYIA.....2ND DEFENDANT

JUDGEMENT

The Plaintiff contends that, at all material times relevant to this suit, the Plaintiff is the wife of the 1st Defendant having cohabited as husband and wife since December 1971 and thereafter solemnized their union under Luhya Customary Law on 24th November 1986; the union was blessed with four children currently all adults. At all material times relevant to this suit the Plaintiff is a beneficial owner of Land Parcel No. N/KABRAS/MATSAKHA/772, measuring approximately 6 acres (herein referred to as "suit property") located in Kakamega County, having established her matrimonial home with the 1st Defendant sometimes in 1986 on the suit property which was then registered in the names of the 1st Defendant. That the Plaintiff avers that all was well in the union until 1990 or thereabouts when the 1st Defendant married a second wife and deserted his matrimonial home and duties thereto. The Plaintiff developed the suit property solely and proceeds from the activities thereto used to cater for the needs of the children and herself. The only time the 1st Defendant visited the home was to dispose of movable properties within the home. The Plaintiff avers that sometime in 2007 or thereabouts she learnt that the 1st Defendant had disposed off part of the suit property to a third party and immediately registered a caution on the suit property to prevent any transfer citing beneficiary interest. The caution was removed by a court order in Butali vide Butali S,R.M.C Misc. App. No 1 of 2011 Livingstone Shikuyu -vs- Zibreta Atamba Shikumba on 23rd January 2012.6. That the Plaintiff avers that sometimes in June 2012 she found out that the 1st Defendant had disposed off and transferred on 20th February 2012 the entire suit property to the 2nd Defendant without her consent and or knowledge as a beneficial owner of the suit property; the 2nd Defendant who resides within the same region is and was aware of the Plaintiff's interest on the suit property. Her efforts to trace the transfer documents from the Land's office in Kakamega have been futile. The Plaintiff avers that on or about 2nd September 2012, the 1st Defendant together with agents and or servants of the 2nd Defendant moved onto the suit property and without notice violently evicted the Plaintiff, the son, daughter in-law and the grandchildren of the Plaintiff and 1st Defendant from the suit property; demolished all the semi-permanent structures and defaced the main permanent house, destroyed crops and scattered household and personal items and tools of trade belonging to the Plaintiff. That the Plaintiff avers that after the incidence she sought refuge at a friend's house within Kakamega County where she currently resides she later found out that the eviction was occasioned after the Court in Butali PM,C,C No 70 of 2012 William Saiga -vs- Livingstone Shikumba Shikuyu issued the eviction order a suit which the Plaintiff was not party despite being the person who had actual possession of the suit property. The Plaintiff contends that, the Defendants actions aforesaid were malicious and fraudulent.

The Plaintiff avers that from the above the sale and subsequent transfer of the suit property from the 1st Defendant to the 2nd Defendant was illegal ab initio The Plaintiff avers that the Defendants actions and or omissions resulted into gross violations of her rights and freedoms as provided for and protected by the Constitution of Kenya 2010 as follows, The disposal of the matrimonial home by the Defendant and the acceptance to purchase by the 2nd Defendant violated the provisions of Article 68 of the Constitution that protects a matrimonial home. The eviction of the Plaintiff from her home was in violation of Articles 27(1), (2) and (3), 28, 29 (c), (d) and (e) of the Constitution. That is as much as the 1st Defendant was the registered owner of the suit property the Plaintiff as a wife had equal rights to own and use the property as the 1st Defendant as provided for under Article 45 (3) of the Constitution. The forceful eviction of the Plaintiff from her matrimonial home was contrary to the provisions of the Ministry of Lands Eviction Guideline of 2012 and Article 11 of the International Covenant on Economic Social and Cultural that deals with right to housing which over the years has included protection against forced eviction, Kenya as a signatory to the Covenant under Article 2 (5) and (6) of the Constitution of Kenya is bound by it. The Plaintiff further states that she and her entire family have suffered and will continue to suffer irreparable loss and damage as they have already been physically evicted from the said suit property which was their only known home and source of livelihood for over two decades. The plaintiff's claim against the Defendant is for:-

1. Revocation of title deed issued on 21st February 2012 and rectification of the register by cancelling entries made to the suit property pursuant to the transfer of 20th February 2012 and entries of 21st February 2012; and a new title be re-issued in the name of

1st Defendant and the Plaintiffs interest be registered on the suit property and or the suit property be registered in joint names of the 1st Defendant and the Plaintiff.

2. That the 1st Defendant be ordered to put up a house for the Plaintiff

3. An injunction restraining the defendants through themselves their agents and or servants from interfering with the Plaintiff peaceful user and occupation of the suit property.

The Plaintiff avers that there is no proceeding pending but there existed proceedings between her and the 1st Defendant in Butali S.R.M.C Misc. App. No 1 of 2011 Livingstone Shikuyu -vs- Zibreta Atamba Shikumba the same was fully heard and determined. The Plaintiff avers that there is no suit pending, and that there have been no previous proceedings, in any court between the Plaintiff and the 2nd Defendant over the same subject matter.

The 1st defendant testified that, the plaintiff is his wife while the 2nd defendant is the registered owner of the suit property herein – Kakamega/Matsakha/772.

Previously he was the registered owner of the property. He sold the property to William Sayia – 2nd defendant through property dealers, M/s. Gachegu Commercial Agencies. He wishes to confirm that prior to offering the parcel of land for sale, he consulted his family members who all agreed to the sale. That further he knows very well that he has other parcels of land which his family is aware of and have settled on. He also wish to make it known that he did receive all the sale proceeds as they had agreed with the 2nd defendant. What he does not understand is what got into the plaintiff who is one of his wives that she turned against him after he sold the land with her full knowledge. He has cared for all his wives and entire family members and have struggled to provide for all of them without discrimination or bias.

DW2 Florence Khavela is married to the 1st defendant as a second wife. The plaintiff is the first wife. The 1st Defendant informed them that intended to sell the land and buy other parcels to settle the co-wives separately. The plaintiff did not object until after the land had been sold. The land was even advertised through property agents. From the sale proceeds, Livingstone bought two parcels at Butsotho where she occupies one of them. The plaintiff is meant to settle on another parcel which was bought from the proceeds of the land. The land is in Kambiri Ileho. She does not know the reasons for her change of mind.

DW4, the 2nd defendant testified that, sometime in January, 2012 his attention was drawn to an advertisement by Real Estate property dealers M/s. Gachegu Commercial Agencies regarding parcel of land available for sale in various parts of former Western Province. He got interested in one of the Kakamega/Matsakha/772 and visited the agent's offices whereupon he was linked up with the owner, the 1st defendant herein. He negotiated the purchase price and had the deal reduced into writing before an advocate: M/s. J.I. Khayumbi & Company after satisfying himself of the authenticity of the registered owner. he proceeded to make payment by instalments and upon completion another agreement was drawn confirming the same. The same advocate was mandated to effect transfer of the property upon execution of the requisite documents by the parties. Currently, he is the registered proprietor of the property having purchased the said property for value which had been publicly advertised and offered for sale. He believes that the suit against him is misplaced and ought to be dismissed with costs.

The Defendant by way of Counter -Claim states that sometime in January 2012 he saw a notice in Kakamega township by GACHEGU COMMERCIAL AGENCIES dated 25th January 2012 advertising plots for sale and became interested in one of them, being 6 acres at BUTALI with a house. Then that upon contacting the agents he was given the particulars of the property being N/KABRAS/MATSAKHA/772 registered in the names of the 2nd Defendant herein way of Counter —Claim. The Plaintiff in the Counter -claim states that he made contacts with the 2nd Defendant in the Counter - claim and after negotiation struck a deal to purchase the suit property at a consideration of Kshs 1,920,000/=. That the 2nd Defendant in the Counter-claim informed him, which information he verily believed to be true, that he had consulted with the entire family who all signified their consent before the advert was put out. That he sought the services of a lawyer who prepared an agreement of sale of the property which was duly executed by the Vendor, the 2nd Defendant in the Counter-claim, and two (2) witnesses, That the full purchase price was paid as, when, and how agreed upon. That the advocates prepared the requisite conveyance documents which were duly executed by the respective parties, requisite fees availed and title prepared in favour of the purchaser.

It was mutually agreed that the 1st Defendant would make arrangements to render vacant possession of the property to the new owner within a reasonable period upon securing other properties for the family as he had planned. That when the waiting became unbearable, the 2nd Defendant moved to court for appropriate orders that would enable him exercise proprietary rights over his newly acquired property which he did. The plaintiff and 1st defendant are enjoying both possession of the suit property duly owned by him as well as the sale of proceeds which were used to purchase other properties being enjoyed by the couple and other family members. That upon taking possession of the suit property, he built a house thereon and ploughed the land in preparation of planting sugarcane crop but he has since been evicted by hired goons without a court order and has thus lost the amount expended thereon. He claims damages. The claim against the plaintiff and 2nd defendant is for refund of the purchase price Kshs1, 920,000/= conveyance fee as well as mesne profits and general damages. The 2nd Defendant in the main action prays that:-

- (a) The Plaintiffs suit in the main action be dismissed with costs, and judgment be entered for him against the Defendants for;
- (b) A declaration that the suit property N/KABRAS/MATSAKHA/772 is rightly owned and belongs to the 2nd Defendant in the main action
- (c) An order for eviction do issue against the Plaintiff and the 1st Defendant in the main action in favour of the 2nd Defendant

thereof.

- (d) Alternatively, an order for refund of the entire purchase price Kshs 1,920,000/= and mesne profits and interest from February 2012 till payment in full.
- (e) General damages for trespass to property
- (f) Costs of the suit plus interest from date of judgment till payment in full.

DW6, stated that he did participate as a witness when the agreement of sale was drawn by M/s. J.I. Khayumbi Advocate, Kakamega. To the best of his knowledge all transactions relating the land was done above board.

DW5, stated that the plaintiff and 1st defendant are couple while the 2nd defendant is the registered owner of the land parcel – Kakamega/Matsakha/772 which he bought from the 1st defendant. He participated in the sale transaction during negotiations over purchase price, execution of the agreement of sale before the advocate as a witness and eventually delivered the title to the purchaser as he is a resident of Nairobi. He knows very well that the seller gave personal assurance to the purchaser that he had the family's blessings to sell the land as he had consulted all members of the family. He also knows the 1st defendant has other parcels of land where the family is resident. He was therefore taken by surprise to hear that of the wives was opposing the concluded sale.

This court has carefully considered the plaintiff's and the defendants' cases. The background is that, the 1st Defendant and the Plaintiff began cohabiting as husband and wife sometime in the year 1971. They later on solemnized their union in the year 1986 in accordance with Luhya Customary Laws and their union was blessed with four children.

Sometime in the year 1986 they jointly bought Land Parcel Number N/KABRAS/MATSAKHA/772 and established their matrimonial home therein. The 1st Defendant lived in Nairobi with his second wife while the Plaintiff herein, first wife remained in the said parcel of land with the children of the union tilling and residing therein. Sometime in June 2012 the Plaintiff had discovered that the 1st defendant had fraudulently disposed off and transferred all Land Parcel Number N/KABRAS/MATSAKHA/772 to the 2nd Defendant without involving her as the spouse and in actual possession and use of the said land. The plaintiff states she did not give her consent to the sale.

“Matrimonial home” is defined by the Land Act, 2012 to mean “any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.”

The Plaintiff later learnt that the 2nd Defendant had fraudulently sought eviction orders via Butali PMCC No. 70 of 2012 William Saiya vs Livingstone Shikumba Shikuyu and even proceeded to willfully and intentionally demolish the Plaintiff's house. The said orders were set aside by this Court as per the orders issued on the 8th of November 2012.

The court finds that, Land Parcel Number Kakamega/Matsakha/772 is an Agricultural Land therefore a controlled transaction that required consent from the Land Control Board before sale and/or transfer. On the 11th of February 2015, PW2 Mr. John Fundia Mumasi the Deputy Land Registrar Kakamega County testified in this Court that Land Parcel Number Kakamega/Matsakha/772 is an Agricultural Land thus required consent from the Land Control Board.

The 2nd Defendant claims to have bought the said Land Parcel from the 1st Defendant as per the sale agreement on the 18th of February 2012 but failed to produce in this Court consents from the land control board and/or proceedings from the said Board.

Section 8 of the Land Control Act, Chapter 302 Laws of Kenya (now repealed) sets down procedures of how to obtain the said consents and particularly the six months grace period between the sale agreement and making the application for consent. The 2nd Defendant filed in this Court a title deed dated 21st February 2012 while the sale agreement was signed on the 18th of February 2012. The defence has failed to produce any evidence of consent by the plaintiff.

I concur with the plaintiff's submissions that the Defendants knew that Land Parcel Number Kakamega/Matsakha/772 constitutes Matrimonial Property. It is not indispute that the said land was registered in the 1st Defendant's name and the Plaintiff and 1st Defendant had established their matrimonial home therein. The alleged sale of land between the 1st Defendant and the 2nd Defendant happened in the year 2012 when the Plaintiff and the 1st Defendant were still married as husband and wife. The defence confirmed to have known that the Plaintiff and the 1st Defendant were married and were residing in the suit land parcel with their children.

Section 28 of the Land Registration Act No. 3 of 2012 categorizes spousal interest over matrimonial property as an overriding interest in land which need not be noted on the register. Further Section 93 (2) of the Land Registration Act No. 3 of 2012 provides:-

“If land is held in the name of one spouse only but the other spouse(s) contributes by their labour or other means to the productivity, upkeep and improvement of the land, that spouse (s) shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by spouse(s) shall be recognized in all cases as if they were registered”

Section 93 (3) (b) then provides that:-

“Where a spouse who holds land or a dwelling house in his name undertakes individually a disposition in that land the transferee shall if that disposition is a transfer of land be under a duty to inquire of the transferor of whether the spouse(s) has consented to that transfer...”

Consent under Section 79(3) of the Land Act and Section 6(1) of the Land Control Act is mandatory see the cases of **Joseph Nyaga Njagi & 2 Others v Michale Muchira Nduma & Another (2014) eKLR**, **Elijah Kipkorir Barmalel & Another v John Kiplagat & 3 Others (2010) eKLR**, **Samuel Miki Waweru v Jane Njeri Richu (2007) eKLR** and **Kariuki v Kariuki (1983) KLR 225**.

In the case of **Kadzo Mkutano v Mukutano Mwamboje Kadosho & 2 others [2016] eKLR** the Judge held that;

“Section 28 of the Land Registration Act recognizes spousal rights over matrimonial property as an overriding interest. Spousal consent, is therefore required before a spouse can sell matrimonial property. In the absence of such a consent, the sale becomes null and void”.

Be that as it may, the Land Registration Act No. 3 of 2012 was assented to on the 27th April, 2012 and the commencement date was 2nd May 2012. The agreement for sale in this matter was dated 18th February 2012 and the title deed issued on the 21st February 2012. This means that at the time of the purchase spousal consent was not a requirement.

Section 6 of the Land Control Act, Chapter 302 Laws of Kenya (now repealed) provided that disposal or dealing with agricultural land situate in a control area is void unless consent from the Land Control Board was obtained as was the holding in **Samuel Kirubi NJuki v Margaret Wangari Macharia [2014] eKLR**.

There were no records produced in this Court by the said Defendants of any transfer documents that allegedly transferred the said parcel from the 1st Defendant to the 2nd Defendant, a fact which PW2 the Land Registrar confirmed. In this matter it is clear that the consent by the land board to transfer the suit land was mandatory. The Agreement for sale of Land Parcel Number Kakamega/Matsakha/772 is therefore void thus incapable of giving good title.

On Section 35 of the Land Registration Act No. 3 of 2012 provides that every document purporting to be signed by the Registrar shall in all proceedings presumed to be so signed unless the contrary is proved. PW2 clearly demonstrated to this court that he did not sign or stamp either the title deed or File Register (green card).

The 2nd defendant submitted that he was an innocent purchaser for value and without notice of the domestic issues between the families, and the plaintiff having chosen to keep quiet when prospective buyers visited to view the property, the claim as presented should be disallowed in its entirety and the plaintiff be ordered to vacate and render vacant possession to the 2nd defendant.

This court shall not authorize illegalities since the transactions in respect to the suit property was void for want of the consent of the Land Control Board to dispose of matrimonial property. Section 107 of the Land Registration Act, 2012 gives this court power to order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. I find that the plaintiff has proved her case on a balance of probabilities and grant the following orders;

- a. Revocation of title deed issued on 21st February 2012 and rectification of the register by cancelling entries made to the suit property pursuant to the transfer of 20th February 2012 and entries of 21st February 2012; and a new title be re-issued in the name of 1st Defendant and the Plaintiff's interest be registered on the suit property.
- b. An injunction restraining the defendants through themselves their agents and or servants from interfering with the Plaintiff peaceful user and occupation of the suit property.

It is not disputed that the 2nd defendant did pay full purchase price for the said suit land. The 1st Defendant sold the property to William Sayia – 2nd defendant through property dealers, M/s. Gachegu Commercial Agencies. The 1st Defendant stated that prior to offering the parcel of land for sale, he consulted his family members who all agreed to the sale. The 2nd defendant in the counter-claim claims against the Plaintiff and 1st Defendants (alternatively), a refund of the purchase price Kshs 1, 920,000/= conveyance fee as well as mesne profits and general damages. I therefore make the following orders;

- a. An order for refund of the entire purchase price Kshs 1,920,000/= to the 2nd Defendant by the 1st defendant and interest till payment in full.
- b. Each party to bear its own costs.

Conveyance fee as well as mesne profits and general damages have not been proved and the same will not be granted.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE