REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L CASE NO 96 OF 2017

Z J.....1ST PLAINTIFF

S J.....2ND PLAINTIFF

VERSUS

A I G.....DEFENDANT

JUDGMENT

By a plaint dated 7th March 2017 the plaintiffs herein sued the defendant seeking for the following orders:

a. A declaration that the 1st Plaintiff's is the legal owner of 1/8 of an acre comprised in L.R NO. ELDORET MUNICIPALITY/BLOCK 21 (KING'ONG'O) 4074.

b. A declaration that the transfer of the suit parcel of land by the 2nd Plaintiff to the 1st Plaintiff was legitimate.

c. That a permanent injunction against the Defendant, his agents, heirs and/or servants restraining them from dealing in any manner detrimental to the 1st Plaintiff's legal ownership of the suit parcel of land.

d. Costs of this suit and interest.

e. Any other relief this honourable court may deem just and expedient to grant.

The plaintiffs contemporaneously with the plaint filed an application seeking for orders of injunction restraining the defendant from interfering with the suit land which application was heard *inter partes* and dismissed by the court. The parties therefore set down the suit for hearing.

Plaintiff's case

PW 1 gave evidence and stated that the 2nd plaintiff is her daughter and sixth born and that the defendant is her ex son in law who was married to the 2nd plaintiff but they are divorced. She stated that the 2nd plaintiff was staying with her niece whom the defendant had a sexual relationship with.

PW1 also stated that she advanced the 2nd Plaintiff Kshs.500,000/ in the year 2007 when she was pursuing her further studies and the same was refundable. She stated the 2nd Plaintiff opted to give her the suit parcel of land instead of the money advanced. PW1 further testified that she is the legal registered owner of the suit parcel of land known as L.R NO. ELDORET MUNICIPALITY/BLOCK 21(KING'ONG'O)4074 of which she produced a copy of the title deed as PEXH 1.

PW 1 further stated that she is a widow the husband having passed on in 1974 and that they did not write a sale agreement between her and the 2nd plaintiff in respect of the suit land. It was also her evidence that she sold one of her parcels of land which money she advanced her daughter the 2nd plaintiff herein. It was her evidence that she followed due process in the registration of the suit land through an Advocates office, Birech & Company Advocates.

On cross examination PW1 stated that she does not know when the 2nd plaintiff and the defendant got married but she confirmed that they have 4 children out of the marriage. She further stated that she sold her parcel of land in Kipkaren and gave the 2nd plaintiff the money. It was her evidence that she does not know whether the 2nd plaintiff and the defendant bought or lived on the suit land together. She therefore stated that the suit land belongs to her.

PW2 gave evidence in support of her case and stated that she is a lecturer at Eldoret University. She stated that the defendant is her ex-husband and that the marriage was dissolved by the Kadhis court vide case No. 14 of 2016 of which she produced the ruling. It was her evidence that the marriage broke down due to the fact that the defendant was having an affair with her niece.

PW2 stated that she bought the suit land alone vide an agreement dated 27th June 2008 but the defendant's name was included due to the fact that he was the 2nd plaintiff's husband and by then the relationship was still good. She also testified that she got a loan from Mwalimu Sacco and Cooperative Bank whereby she withdrew Kshs. 310,000/ from Cooperative Bank on 28th June 2008 and a sale agreement was done on 27th June 2008. She also stated that she withdrew Kshs. 60,000/and paid Kshs. 40,000/ to the vendor as per the statement produced as an exhibit before the court.

PW2 further stated that she paid the balance of the purchase price as per the acknowledgment dated 5/7/08 produced as exhibit No. 5 paid through the son of the vendor Philemon Kipkoech as the vendor was not able to come to the advocates' office due to his old age and being sickly.

It was further PW2's testimony that the defendant did not contribute any money towards the purchase of the suit land and that at the time she bought the land she was working as a High School teacher and teaching on a part time basis at the university. She produced copies of her pay slips and bank statements for Cooperative bank and Equity Bank.

She finaly stated that the 1st plaintiff who is her mother had advanced her kshs. 500,000/ to pay for her Masters degree which she was to refund but instead she decided to transfer the suit land to her in lieu of the cash refund. She also stated the suit land is not matrimonial land and that the transaction was done legally.

On cross examination by Counsel for the defendant, PW2 stated that she got married to the defendant in 1998 and were staying at Kabiyet High School. She also stated that she bought the suit land in 2008, built a house and moved to stay on the suit land in 2012 with the defendant. The plaintiff was referred to the sale agreement and she admitted that the sale agreement indicates that they bought the land together with the defendant.

PW2 also confirmed that the acknowledgement of the last instalments indicated that they paid the money together with the defendant. It was her evidence that she constructed the house on the suit land alone and that the defendant did not contribute money.

She also stated that she transferred the suit land to the 1st plaintiff in 2016 when they had problems with the defendant and that the defendant did not participate in the transfer process of the suit land.

On reexamination she stated that the property was transferred directly from the seller to the 1st plaintiff as she is the one who bought the land. The plaintiffs therefore closed their case.

Defendant's Case

The defendant gave evidence and stated that he bought the suit land from Philemon Kipkoech as per the sale agreement dated 27th June 2008 which included the 2nd plaintiff who is his ex wife. He stated that the purchase price was kshs 340,000/ whereby they paid with the PW2 Kshs 300,000/ on execution of the agreement and the balance of Kshs. 40,000/ was paid on 5/7/08 vide an acknowledgment which was produced in court.

The defendant further testified that he took a loan of kshs. 1.5 million from KCB Bank and a further 1.2 million from Mwalimu Cooperative for construction of the house on the suit plot. He produced banks statements as exhibit No 3. It was his evidence that they moved into the house in 2012 with PW2. He also stated that he is not currently residing in that house as he was served with a restraining order from the Kadhi's court.

It was the defendant's evidence that it is not true that it is the 1st plaintiff who transferred the plot to PW2. He stated that he was not consulted when the land was transferred to PW1 and that the transaction was done fraudulently. He therefore prayed that the plaintiff's suit be dismissed with costs and his counter claim be allowed.

On cross examination by the plaintiff's Counsel, the defendant confirmed that he never challenged the restraining orders as a joint owner and that it is not true that the reason he did not appeal was because the suit land belonged to the plaintiff. The defendant admitted that he did not contribute any money towards the purchase of the suit land.

It was the defendant's evidence that he bought a plot in Kisii which he has developed but not complete but did not have proof of the amount that he used to construct the Kisii house. He also denied that he was included in the sale agreement due to love and affection by the 2nd plaintiff.

The defendant also stated that he reported the matter to the CID but the officer was transferred so he never followed up. That the plaintiffs have neither been arrested nor charged with any criminal offence of fraud. He further stated that he spent Kshs. 3.5 million for the construction of the Kisii house and that he was listed at the Credit Reference Bureau for failing to pay the KCB loan. The defendant therefore closed his case.

Plaintiffs' Submissions

Counsel for the plaintiffs reiterated their evidence and submitted that section 53 of the Land Registration Act, protects a person who acquires property in good faith. Counsel stated that the Defendant should have preferred criminal charges against 2nd Plaintiff for allegedly transferring the suit parcel of land fraudulently, which he failed to do.

It was further Counsel's submission that the 1st Plaintiff who is legally the registered owner of the suit parcel of land was not privy to how the same was acquired by the daughter, the 2nd Plaintiff and did not doubt her said daughter's financial ability to purchase the suit land, hence accepted to have the same transferred to her instead of the amount she had advanced to her to pursue her further studies. Further that the conveyancing process was undertaken by an advocate of the high court of Kenya, one Paul Birech of Birech & Company Advocates a demonstration of due diligence on the part of the Plaintiffs.

Counsel cited the provisions of Section 26 of the Land Registration Act which provides as follows;

> " (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances ,easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except;
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> a. On the ground of fraud or misrepresentation to which the person is proved to be party; or
>
> b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Miss Isiaho submitted that it is not disputed that the title deed of the suit land is registered in the names of the 1st Plaintiff and further that no evidence was adduced by the Defendant to demonstrate any fraud or misrepresentation on the part of the I St plaintiff in having the said title deed registered in her name. Counsel also submitted that the said firm of advocates

has not been enjoined in these proceedings as being the perpetrators of any alleged fraud and/or misrepresentation.

Counsel also submitted that where one a party intends to indict a title on the ground that the same has been obtained/procured by fraud or misrepresentation, such a party must prove on a balance of probabilities that the title holder was a party to the said fraud or misrepresentation and that in the current case the defendant failed to do so. Counsel therefore urged the court to enter judgment as prayed in favour of the plaintiffs and dismiss the defendant's counterclaim with costs to the plaintiffs.

Defendant's Submissions

The defendant filed a defence and counterclaim and alleged that the transfer of the suit land to the 1st plaintiff was fraudulent and that the land should be registered in the joint names of the defendant and the 2nd plaintiff.

Counsel listed the following issue for determination by the court

1 . Whether the 2nd plaintiff and the defendant were married.

2. Whether the 2nd plaintiff and the defendant jointly owned the suit land.

3. Whether the 2nd plaintiff obtained spousal consent from the defendant before the suit land was transferred to the 1st plaintiff.

4. Whether suit land forms part of a matrimonial property.

5. Whether the 2nd plaintiff and the defendant were entitled to equal rights during the subsistence of their marriage.

6. Whether the 2nd plaintiff fraudulently transferred the parcel of land.

Counsel reiterated the evidence of the parties and stated that it is not in dispute that the 2nd plaintiff and the defendant were husband and wife.

On the second issue as to whether the 2nd plaintiff and the defendant owned the suit land jointly counsel stated that the sale agreement dated 27th June 2008 and the acknowledgement of the payment of the balance of the purchase price confirmed that they bought the plot jointly.

On the third issue as to whether the 2nd plaintiff obtained spousal consent from the defendant before transferring the suit land to the 1st plaintiff, Counsel cited Section 93 (3) the Land Registration Act which requires an assignee or transferee to inquire whether the spouse of the transferee/assignee has consented to the transaction. **Counsel should note that this section was deleted.** She submitted that the transfer of the suit property without the consent of the defendant was null and void for lack of consent.

On the issue whether the suit land forms part of matrimonial property, Counsel relied on section 6 of Matrimonial Property Act which defines what matrimonial property is. Counsel also referred Section 2 of the Matrimonial property Act which provides that a matrimonial home means any property that is owned by one or both spouses and occupied or utilized by the spouses as their family home, and includes

any attached property.

Counsel further cited Section 14(a) of the Matrimonial Property Act which provides that where matrimonial property acquired during marriage is registered in the name of one spouse; there shall be a rebuttable presumption that the property is held in trust for the other spouse. Counsel also cited section 93 (2) which was also deleted by the Land Laws amendments 2016. It was therefore her submission that the suit lad forms part of matrimonial property hence the 2nd plaintiff and the defendant have equal right over the same. Counsel buttressed this position with Article 45 (3) states as follows,

"Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

On the issue as to whether the 2nd plaintiff fraudulently transferred the suit parcel of land, counsel submitted that the 2nd plaintiff and the defendant purchased the suit land during the subsistence of their marriage. Counsel relied on Section 26 of the Land Registration Act which states that ;

> "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except;
>
> a. On the ground of fraud or misrepresentation to which the person is proved to be party; or
>
> b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

It was counsel's submission that the title to the suit land was obtained illegally as the 2nd plaintiff did not involve the defendant despite the fact that he jointly owned the suit land with the 2nd plaintiff. Counsel therefore urged the court to dismiss the plaintiffs' suit and the defendant's counterclaim be allowed with costs.

Analysis and Determination

The issues for determination in this matter are as to whether the 2nd plaintiff and the defendant bought the land jointly and whether the suit land forms part of matrimonial property and if so whether the defendant contributed to the acquisition of the suit land. The other issue for determination is whether the plaintiff transferred the suit land fraudulently to the 1st plaintiff.

Both the plaintiff and the defendant produced the same agreement of sale and an acknowledgment of payment of the balance. The plaintiff stated that she is the one who solely paid the purchase price of the suit land but included the name of the defendant due to love and affection as a husband when their marriage was still intact. She produced evidence of bank statements ranging from March 2008 and more specifically 28th June 2008 when she withdrew Kshs 310, 000/ for the purchase of the plot. She indicated that she paid Kshs. 300,000/ leaving a balance of Kshs. 40, 000/ which she paid on 5/7/08 as per the statement indicating a withdrawal of Kshs. 60,000/

The 2nd plaintiff also produced her pay slips and letters indicating that she was working as a part time lecturer at various universities. The defendant however did not produce any evidence of payment of any money towards the purchase of the suit plot. The defendant had claimed to have contributed to the purchase of the suit land by the mere fact that his name was included in the sale agreement. He also stated that he had taken a loan but the statements produced in court relate to a period between 2011 and 2016 which was after the suit plot had already been purchased. He did not state whether he had given the plaintiff any money to purchase the plot.

The defendant on cross examination also admitted that he did not contribute any money towards the purchase of the suit land. He further confirmed that he bought a plot in Kisii which he has developed with the loan that he took from the bank. The money advanced to the 2nd plaintiff was not for buying the suit land but for further studies. This is the link between the 1st plaintiff and the suit land where she was refunded by a plot in lieu of cash.

From the defendant's own admission I find that he did not contribute any money towards the purchase of the suit plot. He also did not prove that he had contributed to the construction of the suit plot.

The second issue for determination is whether the suit land forms part of matrimonial property. Section 6 of the Matrimonial Property Act provides for the meaning of matrimonial property as

> (1) For the purposes of this Act, matrimonial property means—
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> (a) the matrimonial home or homes;
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> (b) household goods and effects in the matrimonial home or homes; or
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> (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

If a property falls under that description then it forms part of matrimonial property. Both the plaintiff and the defendant stated that the suit land was acquired during the subsistence of the marriage and they moved into the suit land in 2012. This would make the suit property to qualify as matrimonial property as they lived there from 2012 until their marriage irretrievably broke down. However there is more than just

a property being matrimonial property.

The court should be guided by section 7 of the Matrimonial Property Act which provides as follows:

> 7. Ownership of matrimonial property Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

It is trite law that ownership of matrimonial property vests in the spouses according to the contribution of either spouse. A spouse must prove to the court the level of contribution to the acquisition of such property. The contribution can either be monetary or non-monetary but the catch word is that the contribution must be proved. Non-monetary contribution is defined as including

> (a) Domestic work and management of matrimonial home.
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> (b) Child care.
>
> (c) Companionship.
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> (d) Management of family business or property, and
>
> (e) Farm work.

The defendant did not claim any of the above non-monetary contributions after failing to establish monetary contribution. A spouse cannot ride on the back of another claiming ownership on flimsy reasons that the property was acquired during the subsistence of the marriage therefore it is matrimonial property to be shared between the two.

On the issue as to whether the 2nd plaintiff sought the consent of the defendant to transfer the suit land to the 1st plaintiff, Counsel for the defendant cited section 93 (3) of the Land Registration Act 2012 which was deleted (*Co-ownership and other relationships between spouses)* and replaced with a single paragraph providing that if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act, 2013 (the "MPA").The property must be dealt with under the Matrimonial property Act which specifically provides that a spouse must prove contribution to the acquisition of the said property. In this case it is clear through documentary evidence and the defendant's admission that he did not contribute to the acquisition of the property.

Dealing with issues involving husbands and wives whose marriages have irretrievably broken down is very tricky. The acrimony involved during the hearing of the cases most of the time creates tension due to the emotions that run high. The court is alive of the constitutional provision of equality of spouses before, during and at the dissolution of marriage. The court is guided by the dictum of Kiage JA in PNN Vs. ZWN [2017] eKLR where he stated;

> "First, while I take cognizance of the marital equality ethos captured in Article 45(3) of the Constitution, I am un persuaded that the provision commands a 50:50 partitioning of matrimonial property upon the dissolution of a marriage. The text is plain enough;
>
> "45(3) Parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of the marriage."

To my mind, all that the Constitution declares is that marriage is a partnership of equals. No spouse is superior to the other. In those few words all forms of gender superiority – whether taking the form of open or subtle chauvinism, misogyny, violence, exploitation or the like have no place. They restate essentially the equal dignity and right of men and women within the marriage compact. It is not a case of master and servant. One is not to ride rough shod over the rights of the other. One is not to be a mere appendage cowered into silence by the sheer might of the other flowing only from that other's gender. The provision gives equal voice and is meant to actualize the voluntariness of marriage and to hold inviolate the liberty of the marital space. So in decision making; from what shall be had for dinner to how many children (if any) shall be borne, to where the family shall reside or invest all the way to who shall have custody of children and who shall keep what in the unfortunate event of marital breakdown, the parties are equal in the eyes of the law.

Does this marital equality recognized in the Constitution mean that matrimonial property should be divided equally. I do not think so. I take this view while beginning from the premise that all things being equal, and both parties having made equal effort towards the acquisition, preservation or improvement of family property, the process of determining entitlement may lead to a distribution of 50:50 or thereabouts. That is not to say, however, that as a matter of doctrine or principle, equality of parties translates to equal proprietary entitlement.

The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting or an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts. I would repeat what we said in FRANCIS NJOROGE Vs. VIRGINIA WANJIKU NJOROGE, Nairobi Civil Appeal No. 179 of 2009;

> "..... a division of the property must be decided after weighing the peculiar circumstances of each case. As was stated by the Court of Appeal of Singapore in LOCK YENG FUN Vs. CHUA HOCK CHYE [207] SGCA 33;

> "It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and by its very nature cannot be – a precise mathematical exercise."

The court is also aware of the provisions that require contribution in respect of acquisition of matrimonial property to be established and proved.

I will safely find that the defendant did not prove any contribution to the acquisition of the suit property either directly or indirectly. He is therefore not entitled to the suit property.

On the issue of the transfer of the suit land having been done fraudulently, the defendant made this claim but did not lead any tangible evidence to prove that the same was fraudulent. It is a requirement that if you allege fraud, then you must specifically plead the particulars and specifically prove it. The allegation of fraud is a serious allegation which is criminal in nature. If the defendant was serious with his allegation of fraud then he should have reported the matter to the police for investigation and preferred criminal charges against the plaintiffs. This never happened. The defendant stated that he had reported the matter to the CID but did not follow up as the officer had been transferred. This reasoning does not add up because the officer did not have property in the case. Any other officer at the station could have handled the matter. This is in other words that the defendant never reported the matter anywhere. He neither mentioned the case number nor the name of the alleged officer who was transferred.

The defendant was trying his luck after he realized that he had not contributed to the purchase of the suit land. He was trying to clutch on the ground of fraud which he did not prove. This case does not fall under section 26 of the Land Registration Act which provides that a title can be impeached if it can be proved that it was procured fraudulently or through misrepresentation. The 1st plaintiff is a bona fide registered owner of the suit land and there is no evidence before the court that she engaged in any fraud in respect of the transfer of the land.

I have considered the pleadings, the evidence, the supporting documentation, the judicial authorities cited together with counsel's submission and I come to the conclusion that the plaintiffs have proved their case on a balance of probabilities and enter judgment in their favour with costs of the suit. The defendant has failed to prove his counterclaim and the same is dismissed with costs to the plaintiffs. I therefore make the following orders:

a. A declaration that the 1st plaintiff is the legal registered owner of 1/8 of an acre comprised in LR.NO.ELDORET MUICIPALITY/BLOCK 21 [KING'ONG'O] 4074 measuring 0.0724 Ha.

b. A declaration that the transfer of the suit parcel by the 2nd plaintiff to the 1st plaintiff was legitimate.

c. A permanent injunction against the defendant, his agents, heirs and/or servants restraining them from dealing in any manner detrimental to the 1st plaintiff's legal ownership of the suit parcel of land.

d. Defendant's counterclaim is dismissed with costs.

Dated and delivered at Eldoret this 24th day of October, 2018

M.A ODENY

JUDGE

Judgment read in open court in the presence of Mr. Magut holding brief for Mr. Nyachiro for Defendant and in the absence of Miss Isiaho for the Plaintiff.

Mr. Koech: Court Assistant.