



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO.165 OF 2014**

**ANNA WACHEKA MAINA.....APPELLANT**

**VERSUS**

**JAMES MAINA KAIRU.....1<sup>ST</sup> RESPONDENT**

**WILLIAM KAROKI GATUHA.....2<sup>ND</sup> RESPONDENT**

**HUDSON MWANGI NJOROGE.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT ON APPEAL**

***(Appellant being wife of 1<sup>st</sup> respondent who sold land to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents; appellant contending that the sale was illegal as she did not give consent; facts showing that the appellant permitted the sale; sale aimed at settling a debt that the 1<sup>st</sup> respondent had; 1<sup>st</sup> respondent selling only half portion of the land; no illegality in the sale; appeal dismissed).***

1. This appeal arises from the judgment of Hon. L. Komingoi delivered on 6 November 2014 in respect of the suit Nakuru CMCC No. 898 of 2012. In the said judgment, the learned trial magistrate dismissed the plaintiff's suit hence this appeal.

2. The suit itself was commenced by way of a plaint which was filed on 9 August 2012 at the Chief Magistrate's Court at Nakuru. The appellant, as plaintiff, pleaded that she is the wife of the 1<sup>st</sup> defendant in the suit (1<sup>st</sup> respondent in this appeal), having been married under Kikuyu Customary Law in the year 1985. She averred that out of their union, they were blessed with two issues namely Elijah Kairu Maina and Nancy Njeri Maina. She further averred that she and the 1<sup>st</sup> respondent owned the land parcel Solai Ndogire Block 3/592 (Wanyororo B) (hereinafter referred to as "the suit land") although the title was registered in the name of the 1<sup>st</sup> respondent. She contended that the title of the 1<sup>st</sup> respondent was held in trust for her and their children for reasons that they have been in occupation of the suit land for over 15 years and that they have always enjoyed quiet and peaceful occupation of the same. It was further asserted that the 1<sup>st</sup> respondent's registration of the suit land was subject to the overriding interest of the appellant as a person in possession and occupation of the suit land but without the legal title, and that the appellant's equitable rights are binding on the suit land. What prompted the appellant to file suit is that the 1<sup>st</sup> respondent sold the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents through sale agreements entered into on 22 July 2009 and 30 February (sic) 2010. The appellant averred that the properties were sold through fraud and that a caution that she had placed on the land was mysteriously lifted to allow the sales. She pleaded the following particulars of fraud :-

*(a) Causing title deed Solai/Ndogire Block 3/592 (Wanyororo B) to issue.*

*(b) Subdividing Solai/Ndogire Block 3/592 (Wanyororo B) without the plaintiff's authority.*

*(c) Conspiring to unlawfully take away the plaintiff's land.*

*(d) Attempting to take away the plaintiff's land unlawfully.*

3. In her suit, the appellant sought the following orders :-

*(a) A declaration that the agreements for sale dated 22 July 2009 and 30 February 2010 (sic) or any other agreement in respect of the suit premises between the defendants as being unenforceable, null and void having been entered into without the plaintiff's knowledge and consent.*

*(b) A declaration that the 1<sup>st</sup> defendant holds parcel title Solai Ndogire Block 3/592 Wanyororo B in trust for the plaintiff and the 2 issues of the marriage.*

*(c) An order of perpetual injunction restraining the defendants by themselves, agents or servants from interfering, selling or transferring the suit premises.*

*(c) Costs of this suit.*

4. The 1<sup>st</sup> respondent entered an appearance in person and did not file any defence. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents appointed counsel and filed a joint statement of defence. They pleaded in their defence that they purchased some portions of the suit land openly and legally from the 1<sup>st</sup> respondent, took possession and hold title deeds in respect of thereto. It was pleaded that only a portion of the land was sold to them, and that the appellant and her family, are in occupation of the remaining portion of the suit land where the matrimonial home stands. It was denied that the land was held in trust for the appellant and her children or that the land was sold fraudulently to them.

5. In her evidence before the trial court, the appellant inter alia testified that she has two children with the 1<sup>st</sup> respondent, the first Eric Kairu Maina, born in the year 1990 and the other, Nancy Njeri Maina, born in the year 1993. She testified that in the year 2007, her husband, the 1<sup>st</sup> respondent, beat her up and chased her away as he had another woman. She then went and registered a caution on 12 August 2009. Thereafter, her daughter called her and informed her that some people were fencing the land. She proceeded to the land and found the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who informed her that they had bought the land and had title deeds. She made a report at Bahati police station and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents made appearance armed with their title deeds. She then proceeded to the lands' registry to make inquiries. She was told that the 1<sup>st</sup> respondent had revoked her caution but she stated that the 1<sup>st</sup> respondent denied doing so. She also looked at the transfer forms which she stated were forged and contended that the signature therein did not belong to the 1<sup>st</sup> respondent. She also stated that the photograph in the transfer form was not his. The transfer form was produced as an exhibit. She went to the ground and removed the fence that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent had put up and she was arrested, charged and convicted of the offence of malicious damage to property. She testified that she was not involved in the sale of the land to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and neither were her children. She stated that her children were on the land and she was the one using the land as family land. She was of the view that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents procured their title deeds irregularly as her caution was illegally removed, and that the photograph in the transfer form was not of her husband.

6. On cross-examination, she did affirm that when she reported to the police, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents appeared with their title deeds. She also affirmed that they have since taken possession and are cultivating crops. She was not aware whether the 1<sup>st</sup> respondent took a loan and whether there was consent of the Land Control Board issued.

7. The 3<sup>rd</sup> respondent testified on behalf of himself and the 2<sup>nd</sup> respondent. He testified that he came to know both appellant and 1<sup>st</sup> respondent when they were his pupils in the year 1982. In the year 2009, the 2<sup>nd</sup> respondent informed him that the 1<sup>st</sup> respondent's land was going to be auctioned because of a loan and that the 1<sup>st</sup> respondent wanted to sell a portion of it so that he could pay off the loan. At that time the appellant had been separated from the 1<sup>st</sup> respondent and was living in Mau Narok. The 1<sup>st</sup> respondent came with his wife (presumably the appellant) and his son Kairu and they met at Nakuru town. He testified that they agreed that they would sell a portion of the suit land, which was half acre, to pay off the loan and a half acre portion where there was a house and rental rooms would remain for the family. He stated that the appellant wanted Kshs. 40,000/= so that her son could be employed in the army. They also met a Mr. Ngumi who was to sell the land by public auction. They paid the money and the title was released. They then did a sale agreement at an advocate's office and they got a surveyor who carved out ¼ acre each for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents with a ½ acre portion remaining to the 1<sup>st</sup> respondent. They took possession of their respective portions of land and planted crops, but the appellant later came and damaged their fence, which incident was reported at the police station, and the appellant charged and convicted, of the offence of malicious damage to property. He testified that the land parcel No. 592 (the suit land) does not exist as it was subdivided into three portions resulting in their land parcels NO. 2127, 2128. He denied that there was a caution registered and asserted that when they purchased the land the appellant was present. He stated that she commenced this case because she was not given the Kshs. 40,000/= that she demanded. He testified that the 1<sup>st</sup> respondent signed the transfer forms of his own volition and that the surveyor was appointed by the 1<sup>st</sup> respondent. He did not know what photograph the 1<sup>st</sup> respondent used in the transfer form. He produced a consent from the Land Control Board and official search.

8. Cross-examined, he asserted that the appellant was present when they first met to discuss the sale, but when the agreement was drawn, the appellant and her son were not present. He stated that the 1<sup>st</sup> respondent owed one Ngumi the sum of Kshs. 82,000/= and he had threatened to sell the land to get back his money. He acknowledged that the photograph placed in the transfer form was not of the 1<sup>st</sup> respondent.

9. In her judgment, the learned trial magistrate, held that there was no indication in the title that the same was held in trust. She held further that the titles of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents cannot be defeated merely on the appellant's claim that the land was held in trust for her and her children. She understood the law as being that the 1<sup>st</sup> respondent, as absolute proprietor, would dispose of the land in whatever manner he wished. She also held that the appellant had only claimed to have purchased the land jointly with the 1<sup>st</sup> respondent but did not prove what her contribution was. She held that there was no duty placed upon the purchasers to obtain consent from the appellant since the law in existence in the year 2009 did not provide for this. She held the opinion that the appellant was aware of the sale and that the claim that the transfer form was not signed by the 1<sup>st</sup> respondent was "neither here nor there" as they were never subjected to analysis by an expert. She was not convinced that the appellant had proved any fraud. She was categorical that if the sale was fraudulent, nothing prevented the 1<sup>st</sup> respondent from saying so in court. She further held that the land parcel No. 592 does not exist and that the appellant had not challenged the titles held by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. She dismissed the case of the appellant.

10. In this appeal, the appellant has challenged the judgment on the following grounds :-

*(i) That the learned trial magistrate erred in law and fact in dismissing the plaintiff's suit with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.*

*(ii) That the learned trial magistrate erred in law and fact in failing to find the subdivision of Solai/Ndugire Block 3/592 (Wanyororo B) was not fraudulent though the 1<sup>st</sup> respondent never signed the transfer forms.*

(iii) That the learned trial magistrate erred in law and fact in finding that the 1<sup>st</sup> respondent legally sold the land to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent without the consent of the family.

(iv) That the learned trial magistrate erred in law and fact in making a finding that the 1<sup>st</sup> respondent being the registered owner of the parcel Solai/Ndugire Block 3/592 (Wanyororo B) could do as he wished without considering that the 1<sup>st</sup> respondent held the land in trust for himself and the rest of his family.

(v) That the learned trial magistrate erred in law and fact in failing to make a finding of the trustee relationship that existed between the plaintiff and the 1<sup>st</sup> respondent.

(vi) That the learned trial magistrate erred in law and fact in taking into consideration extraneous matters and more specifically the proceedings in criminal case No. 1561 of 2011.

(vii) That the learned trial magistrate erred in law and fact in failing to put into consideration evidence by a land registrar, Mr. Sungu (PW3) who confirmed the title for Solai/Ndugire Block 3/592 (Wanyororo B) was cautioned when the same was illegally transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

(viii) That the learned trial magistrate erred in law and fact in recognizing subdivision that had taken place from Solai/Ndugire Block 3/592 (Wanyororo B) fraudulently without consent from the 1<sup>st</sup> respondent whose passport photo in the transfer form was confirmed to be misrepresentation by the Land Registrar.

(ix) That the learned trial magistrate erred in law and fact in failing to take into consideration the plaintiff's evidence and or her submissions.

11. In her submissions, Ms. Nancy Njoroge, learned counsel for the appellant, submitted inter alia that the appellant's appeal is mainly based on two grounds; the first being that the transfer forms were fraudulently obtained and the second that there was a caution when the land was sold. She submitted that it is admitted that the transfer forms were not signed by the 1<sup>st</sup> respondent and that the photograph in the transfer form was not his. She submitted that the lifting of the caution is challenged.

12. Mr. Rubua Ngure, for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, inter alia submitted that there was no evidence of any caution ever having been registered. He further submitted that the appellant did not prove any trust as there was no evidence of her contribution towards purchase of the land. He submitted that spousal rights were not recognized as overriding interests in the regime of the Registered Land Act (now repealed). He submitted that no fraud was proved against the purchasers and pointed out that the transfer forms said to have been forged were never submitted for document examination. He admitted that the wrong photograph was used but he attributed this to a mix up. He submitted that the signatures in the transfer forms were not questioned. He further submitted that the land in the pleadings was not in existence as the same had already been subdivided. He pointed out that the appellant was not rendered homeless as only half the land was sold and she was left with the developed portion.

13. I have considered the matter. I think the appellant's case is hinged on two broad grounds, the first being that the subdivision and subsequent transfer of the suit land was done fraudulently because of three reasons being :-

**(i) That she had a caution which was illegally removed.**

**(ii) That the transfer forms were never signed by the 1<sup>st</sup> respondent.**

**(iii) That the photograph used to transfer the land was not that of the 1<sup>st</sup> respondent.**

14. The second broad ground is that the suit land was subdivided and sold without her consent yet she is the wife of the 1<sup>st</sup> respondent. She has claimed that she had an overriding interest which ought to be considered.

15. On the first broad ground, that the land was transferred fraudulently, I see no substance. On the allegation that the land was sold despite a caution having been lodged, that is not supported by the documentary evidence tabled. What the appellant produced as an exhibit was only an application to lodge a caution. There is absolutely no evidence that any caution was ever registered. I have looked at the certificates of official search that were produced in evidence and they do not show any registration of any caution. The appellant could not be heard to argue that she had a caution which was irregularly lifted to allow for the subdivision of the suit land, for there was no caution that was ever registered in the first place, so that same could be lifted. The appellant in the same vein cannot be heard to argue that the suit land was sold despite there being a caution. There was no caution and nothing to inform the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that there was a restriction on the suit land. The argument that the land was subdivided and sold despite there being a caution holds no water at all.

16. On the second allegation that the transfer forms were not executed by the 1<sup>st</sup> respondent, again there is no evidence of this, save for the bare allegation of the appellant which is absolutely unsupported. If the appellant thought that the transfer forms had not been executed by the 1<sup>st</sup> respondent, there would have been nothing easier than to subject them to a document examiner for a report. I have no report before me and nothing to show that the signature in the transfer form is not that of the 1<sup>st</sup> respondent. As correctly emphasized by the trial magistrate, the 1<sup>st</sup> respondent never came to refute that the signature in the transfer form was not his own. No issue therefore arises out of this argument.

17. The third ground led in trying to invalidate the transfer form was the photograph of the transferor. It is common ground that the photograph placed as being that of the seller was not the correct photograph. But can this alone, with no other claim of impropriety,

invalidate a transfer? I do not think so. Although it is not very clear to me how come the wrong photograph was implanted, I have no doubt in my mind that the seller intended to transfer the subdivided portions of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. It is not claimed that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents placed a wrong photograph so as to defraud the 1<sup>st</sup> respondent. In fact, the 1<sup>st</sup> respondent is not complaining at all about the wrong photograph having been placed. In as much as that was an irregularity, I am of the view that since the transfer is not contested by the 1<sup>st</sup> respondent, that is an irregularity that can be waived given the peculiar circumstances of the case.

18. I therefore find no fault in the holding of the trial magistrate that there was no fraud in the manner in which the suit land was subdivided and transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

19. I will now turn to the claim of trust. It has been a sticky point as to whether or not a spouse needed to give consent, or at least an authority, or go ahead, to the other spouse who wished to sell land that is registered solely in the latter's name. Before the trial court, counsel had placed reliance on the provisions of Section 28 of the Land Registration Act, 2012, which at Section 28 (e) recognizes spousal rights over matrimonial property as being an overriding interest and Section 28(f) which recognizes trusts including customary trusts. The trial court was correct in disregarding these provisions of the law as the transactions and transfer of the subdivided properties took place before the Land Registration Act, came into force. The titles of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were procured on 23 November 2010, under the Registered Land Act (now repealed) and thus, it is the provisions of the Registered Land Act, which were operative. The Registered Land Act, did not explicitly recognize spousal rights as overriding interests, although it did recognize under Section 28, that a title held may be held subject to a trust. I need not make any determinate findings on this point in the course of these proceedings for I find it unnecessary on the facts to do so.

20. Firstly, the trial magistrate, who heard and saw the witnesses, held the view that the appellant was present when it was agreed that part of the land could be sold to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to offset some debt that the 1<sup>st</sup> respondent had. I have no reason to disturb that finding. It was a question of fact which on the evidence tabled, the trial magistrate found that she was present. The appellant did not raise any objection to the sale by lodging a caution. Neither did she file any suit at that stage in time to stop the 1<sup>st</sup> respondent from subdividing and selling the suit land. There is evidence that the transaction got the approval of the Land Control Board who issued consent to subdivide and transfer but no evidence that the appellant raised any objection to the issuance of these consents before the Land Control Board. All these point to the conclusion that the appellant was aware of the sale and she raised no issue about it. It is now odd that she is complaining about the very sale that in all respects she gave tacit approval. She is now estopped from trying to claim that she never approved of the sale.

21. Now, even assuming that she had not approved of the sale, and that the land was held in trust for her, I do not think that the appellant could argue that she was entitled to the whole land to the exclusion of her husband. Her husband only sold half the land, and from the evidence, it appears that he was careful enough to sell the portion that was not developed so that the family could remain with the developed portion. I do not see any impropriety on his part.

22. From my above analysis, I am not persuaded that the trial magistrate was in error in dismissing the appellant's case. I affirm that decision and hereby dismiss this appeal with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

23. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 18<sup>th</sup> day of October 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Ms. Kabalika holding brief for Ms. Nancy Njoroge for the appellant.

Mr. Kanyi Ngure holding brief for Mr. Rubua Ngure for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

1<sup>st</sup> respondent acting in person: Absent.

Court Assistant : Nelima Janepher

Carlton Toroitich.