



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 32 OF 2017

M W K.....PLAINTIFF

VS

S K K.....1ST DEFENDANT

JAMES IRUNGU KANYUGA.....2ND DEFENDANT

JOSECK IKAI MUKUHA.....3RD DEFENDANT

UNAITAS SACCO SOCIETY.....4TH DEFENDANT

LAND REGISTRAR MURANG'A.....5TH DEFENDANT

THE HON. ATTORNEY GENERAL.....6TH DEFENDANT

JUDGMENT

Background

1. The Plaintiff avers that she is the wife of the 1st Defendant. The 1st Defendant is the registered owner of the land Loc. 12/SUB-LOC.1/GAKIRA/T [Particulars withheld] measuring 0.025 Ha. The Plaintiff seeks the following orders;

a) A declaration that the transfer, registration and charge of title of the suit property known as LOC.12/SUB-LOC.1/GAKIRA/T [Particulars withheld] by the Defendants was fraudulent and therefore null and void.

b) An order compelling the 5th Defendant to cancel the transfers and titles of the suit property known as Loc.12/SUB-LOC.1/GAKIRA/T.[Particulars withheld] issued to the 2nd and 3rd Defendants and for the same to be registered in the joint names of the Plaintiff and the 1st Defendant.

c) An order compelling the 5th Defendant to cancel the charge registered against the title of the property known as LOC.12/SUB-LOC.1/GAKIRA/T [Particulars withheld].

d) An order for permanent injunction restraining the 1st, 2nd, 3rd and the 4th Defendants, their agents or servants from interfering with the property known as LOC.12/SUB-LOC.1/GAKIRA/T [Particulars withheld].

e) Costs and interests of this suit.

f) Any other relief that this Honourable Court may deem fit and just to grant.

2. The Plaintiff's case is that the suit land is matrimonial property acquired during the subsistence of the marriage between the 1st Defendant and the Plaintiff which marriage subsists to-date. The suit land is developed with a 4 storeyed building with rental income of Kshs 2.160 Million p.a. That she contributed towards construction of the building of the suit land.

3. She averred that without her spousal consent and knowledge 1st Defendant transferred the suit land to the 2nd Defendant on 1/7/14. On 24/7/14, the 2nd Defendant transferred the suit land to the 3rd Defendant who on 6/8/14 charged the suit land to the 4th Defendant for Kshs 12 million. She pleaded that all the transactions were carried out irregularly, in collusion and fraudulently for the following reasons; firstly, there

existed a caution on the property which was removed without her knowledge; the transfers were registered without Land Control Board consents and thirdly without spousal consent. She has pleaded particulars of fraud against the Defendants.

4. The 1st Defendant denied the Plaintiff's claim that the property was matrimonial and averred that the suit land has been acquired and developed through the effort of a second wife. In specific he denied the particulars of fraud.

5. The 2nd and 3rd Defendants denied the Plaintiff's claims and sought to put her to strict proof. They specifically denied any fraud in the manner in which the property was transferred to the 2nd and 3rd Defendants. The 3rd Defendant claimed that he is servicing a loan from the 4th Defendant and denied that the property was grossly undervalued.

6. The 4th Defendant denied the Plaintiffs claim and averred that it charged the suit land after conducting due diligence, satisfying itself that the 3rd Defendant was the registered owner and that relevant statutory consents were obtained. The amount charged was in accordance with the 3rd Defendant's request and denied undervaluing the land.

7. The 5th and 6th Defendants denied the allegations of fraud and sought to put the Plaintiff to strict proof. In any event, they averred that they undertook statutory duties in processing the transfer documents and issuance of land title deeds therefrom. They denied that the Plaintiff has suffered any loss or damage as a result of the processing of the transfers and registration.

8. The Plaintiff was amended to allow the substitution of the 1st Defendant with K K K. It was filed on 21/4/2017.

The Plaintiff's Evidence

9. The Plaintiff testified that she is the wife of the 1st Defendant having been married on 21/2/1959 in the then Fort Hall District (currently, Murang'a County). She produced a marriage certificate No. [Particulars withheld] to support her averment. She informed the Court that she is still married and lives with the 1st Defendant to-date. The suit land was registered in the name of the 1st Defendant. That it was ancestral land, it having been inherited from her father in law. In cross examination she informed the Court that she found the land when she got married. She and her husband lived on the suit land for almost 10 years, raised their children thereon, before moving to Nairobi where they engaged in business. Later they built a permanent house on the suit land. In Nairobi they live at Garden estate with the 1st Defendant since 1988.

10. She informed the Court that she contributed to the development of the suit land. On it stands on a 4-storey building with rental returns in the sum of Kshs. 2.160m annually. The storeyed building is used for commercial purposes and on it are shops.

11. She informed the Court that she and her husband have 8 children. That they jointly bought the Garden estate house. That they jointly invested and managed a retail business at South C Nairobi (among other businesses) from which they jointly invested and acquired and developed properties and assets between them. The suit property is one of those developed with joint funds.

12. Asked whether she was still married to the 1st Defendant she responded in the affirmative. She informed the Court that she has not deserted her marriage nor divorced her husband of many years. She categorically refuted knowledge of an alleged 2nd wife called E W K. That if there were other women in her husband's life they may have been merely drinking companions or girlfriends and were not married to her Husband.

13. She informed the Court that sometime in June 2014 she learnt from reliable sources that the 1st Defendant intended to dispose the suit land. She confronted the 1st Defendant about it who told her that he was selling the suit land to build her another house. That on further prodding he was hostile and refused to heed to her plea to stop the sale. On 26/6/14, through her children she caused a caution to be registered on the title preventing any dealings in the property without her knowledge and consent. That notwithstanding, it is her evidence that the suit land was transferred by the 1st Defendant to the 2nd Defendant on 1/7/14 who in turn transferred it to the 3rd Defendant on 24/7/14 who then charged it on 6/8/14 to the 4th Defendant for a sum of Kshs.12m, a gross undervaluation as in her estimation the suit land was valued at Kshs. 17m. She informed the Court that all the transfers were fraudulent and urged the Court to cancel them and order the title to be registered in the joint names of the Plaintiff and the 1st Defendant.

14. Challenged to confirm if the caution was lodged and a search to confirm the same was obtained, she informed the Court that she instructed her children to so register the caution, which she believed was done. She stated categorically that her interest in the case is the title to the suit land and not the share of the proceeds of sale. She indicated that she did not receive any proceeds of sale. She similarly refuted the 2nd Defendants claim that the sale proceeds from the suit land could be part of the proceeds/assets being managed under a guardianship order in respect to the estate of the 1st Defendant. She informed the Court that she did not table before the Court any valuation report to prove her assertion that the property was undervalued. She reiterated her claim that she did not give consent to the transfer of the property to the 2nd Defendant who happens to be her Husband's nephew.

15. She testified that on learning that the 3rd Defendant had charged the property, she caused, through her lawyer, a letter of protest to the 4th Defendant stopping the loan disbursements to the 3rd Defendant. That notwithstanding, the 4th Defendant allegedly did release the funds to the 3rd Defendant.

1st Defendant's evidence.

16. The 1st Defendant did not lead any evidence during the hearing. The case against the 1st Defendant is therefore undefended.

2nd Defendant's Evidence

17. The 2nd Defendant stated that he bought the suit land from the 1st Defendant. Prior to that, he sought and obtained an official search from the lands office, which confirmed the suit land was free from all encumbrances. That he later sold the property to the 3rd Defendant after obtaining the requisite Land Control Board consent to transfer. That in respect to the transfer from the 1st Defendant, he entered into an agreement before a lawyer, namely Kiriba Advocate. That the 1st Defendant was accompanied by an alleged 2nd wife, namely E K at the Land Control Board when consent to transfer was obtained. That he bought the land at Kshs 8m.

3rd Defendant's evidence.

18. The 3rd Defendant testified that he purchased the suit land from the 2nd Defendant and became registered owner on 24/7/14. Prior to the purchase he carried out due diligence and established that the title belonged to the 2nd Defendant and was free from any encumbrance. That he approached the 4th Defendant for a loan in the sum of Kshs.12m which was advanced following proper and due process by the 4th Defendant which loan was for a term of 120 days and which he is still servicing to-date. He informed the Court that he could not remember the date of the loan application nor when the said loan was disbursed to him. The 3rd Defendant did not produce any documents by way of any application for such loan, disbursement and/or appropriation of the loan to the 3rd Defendant nor evidence for any repayment of the loan.

19. Further, he stated that he does not know the 1st Defendant as he bought the suit land from the 2nd Defendant. He informed the Court that he paid the last purchase price on 11/8/14 when he had become the registered owner of the suit land. He relied on the agreement of sale dated the 5/7/14 between himself and the 2nd Defendant. The purchase price is stated as Kshs 13 million. The deposit payable was Kshs 500,000/- with the balance to be sourced from Unaitas SACCO. Secondly, he relied on an acknowledgement dated 11/8/14 in which the 2nd Defendant acknowledged receipt of Kshs 12.4 Million as full and final settlement of the sale. He however could not produce any loan application forms in respect to the loan facility neither could he account for how Kshs. 100,000/- allegedly paid to the 2nd Defendant was made, save to state that it was a set off against goods sold to the 2nd Defendant. That he obtained the Land Control Board consent to charge the suit land and his wife gave the spousal consent in respect to the charge. That he did not collude with anyone in respect to the transaction. When challenged why the letter of consent of the Land Control Board bore the same serial numbers, he stated that save for the different minute numbers and dates which could be taken to differentiate them he could not take responsibility for any discrepancies and or illegalities if any as the same were issued by the Land Control Board through their chairman.

4th Defendant's evidence

20. Evans Kyalo Mwema informed the Court that he is a Credit Administrator at Unaitas SACCO at Kangema branch. That he handled the processing of the loan facility in favour of the 3rd Defendant. He testified on behalf of the 4th Defendant and stated that the 3rd Defendant applied for a loan facility from the 4th Defendant. After going through the 4th Defendant's appraisal system, the 3rd Defendant was found to be creditworthy. Due diligence was carried out on the title intended to secure the loan which showed that the 3rd Defendant was the registered owner. He was given an offer letter, which he executed and was advised to appear before the 4th Defendant's lawyers for execution of the charge document, which was registered on 5/8/14. Thereafter the loan was disbursed to the 3rd Defendant. That the money was deposited in the account of the 3rd Defendant. He confirmed to the Court that the cash was transferred from the 3rd Defendant to the 2nd Defendant. He informed the Court that he did not table any documents to show that the monies were ever released to the 3rd Defendant's account. He also could not table documents evidencing membership of 3rd Defendant in the SACCO. Mr. Mwema curiously stated in evidence that the 4th Defendant did not have records of an application for a loan by the 3rd Defendant, disbursement of the loan to the 3rd Defendant or repayment of the loan by the 3rd Defendant. He informed that Court that the 4th Defendant had no prior knowledge of any dispute relating to the suit land. The 4th Defendant did not produce any documents by way of any application for such loan, disbursement and/or appropriation of the loan to the 3rd Defendant nor evidence for any repayment of the loan.

5th and 6th Defendants evidence

21. Nancy Nyambura Njenga stated that she is the District Land Registrar Murang'a. She took the Court through the process of registration of a transfer of title in land. She informed the Court that Land Control Board consent, spousal consent, executed transfer, Identity Cards details, inter-alia, are mandatory documents required before a transfer is registered. She confirmed that the Plaintiff lodged a caution on the land but the same was rejected for non-conformance with the requirement of registration of a caution. She informed the Court that a rejected caution is returned to the presenter. If the caution were registered, the transfer would have been rejected. She informed the Court that she did not produce documentary evidence of anything in writing or endorsement evidencing rejection of the caution or communication of such information to the Plaintiff. At the time the land was transferred to the 2nd Defendant, it was registered in the name of 1st Defendant. She informed the Court that there was a spousal consent in respect to the transfer of the suit land from the 1st Defendant to the 2nd but she did not produce any to support her testimony. She denied any wrongdoing on the part of her office in the manner in which the transfers were done.

22. Asked about the Land Control Board consents with different dates and serial numbers she opined that there was nothing questionable about the consents. She explained that during that period, the Land Control Board booklets were in short supply from the offices of the Government Printer and she allowed the Land Control Boards under her jurisdiction to use photocopies of consent forms.

The Submissions

23. The Plaintiff submitted that the transfer, registration and subsequent charging of the suit property was irregular and fraudulent and intended to defeat and deprive her of her interest in the suit land. It is stated that the whole scheme was a collusion between the 1st to the 5th Defendants jointly and severally.

24. As to whether the Plaintiff and S K were legally married as husband and wife, The Plaintiff testified that she got married in 1959 and produced a copy of marriage certificate in Court. The 2nd Defendant confirmed that the Plaintiff was the wife of the 1st Defendant, his Uncle, corroborated this. She submitted that even though there were allegations that the 1st Defendant had another wife called E K, she does not know her and was never called to testify in Court. She submitted that she had acquired an overriding interest in the property by virtue of marriage in accordance with section 28 (b) of Land Registration Act No 3 of 2012. That vested with an overriding equitable and unregistered interest in the suit property at the time and prior to transfer to the 2nd Defendant, the 1st Defendant could not sell the land without her express authorization and consent.

25. She submitted that the suit land was acquired during the subsistence of their marriage. That the 1st Defendant inherited the land from his father. They built a matrimonial house on it and lived together as they raised their family. They conducted business together and invested the proceeds jointly which they used to develop the suit property among other properties which they acquired along the way. She did run a family retail business at South C in Nairobi. Later they settled at Garden Estate, one of the other family homes where they both live in to-date. Even then, she submitted that she never lost control of her matrimonial home. She submitted that her evidence is unchallenged by the 1st Defendant who choose not to contradict it. She relied on the case of **Mugo Muiru investments Ltd vs EWB & 2 Others (2017) eKLR** which cited inter alia the case in **Gissing vs. Gissing (1970) 2 ALL ER 780** in which the Court held that the Appellant's interest in the matrimonial home was an overriding and unregistered interest which interest entitled her to remain in the property.

26. As to whether the transfers done by 1st Defendant to 2nd, 3rd & 5th Defendants were fraudulent, the Plaintiff submitted that indeed fraud was present for the following reasons; no proper instruments, agreements and documents were used in the process of transfer; no agreement of sale was produced between the 1st Defendant and the 2nd Defendant; there was no spousal consent from the Plaintiff for the sale of the suit land in accordance with the Land Registration Act 2012; the 5th Defendant refused to register her caution on the title and that fraudulent letters of consent from Land Control Board were used.

27. As to whether the 3rd Defendant is a bonafide purchaser for value without notice, she submitted that the 3rd Defendant does not qualify as such because the 2nd Defendant did not receive a good title entitling him to legally convey to the 3rd Defendant. That the title was tainted with illegalities and irregularities and relied on the case of **Richard Oduol Opole vs Commissioner of Lands & 2 Others (2015) eKLR** where the Court of Appeal held that where there is a tainted and irregular procedure leading to the registration of title, one cannot be a bonafide purchaser for value without notice.

28. Was the property rightly charged? The Plaintiff submitted that the charge was riddled with discrepancies and illegalities such as the time the 3rd Defendant became registered owner of the land; acquisition and date of Land Control Board and the contradictions in respect to the Chief's letter.

29. The 1st Defendant did not testify nor file any written submissions.

30. The 2nd and 3rd Defendants submitted that the Plaintiff did not demonstrate that the suit property was matrimonial property. They contended that the Plaintiff admitted in evidence that she maintained a matrimonial home in [Particular withheld], Nairobi. That the suit property was ancestral and fell outside the ambit of matrimonial property. That she did not table any evidence to prove her contribution to the development of the land.

31. Further, they submitted that the Plaintiff did not prove fraud in the case as particularized in the amended plaint against the Defendants. That the transactions were done within the law and nothing could be further from the truth.

32. They further submitted that the 2nd and 3rd Defendants were bonafide purchasers for value without notice. They relied the case of **Lawrence Mukiri vs Attorney General & 4 Others (2013) eKLR and Katende vs. Haridar & Co. Ltd** that enunciated the principles applicable to a bonafide purchaser for value without notice. That the titles were transferred with full due diligence thereby acquiring a good title at both stages of the transfer process. That the Plaintiff did not lead any evidence to demonstrate any fraud on the part of the 2nd and 3rd Defendants. They submitted that the charge document, which in law constitutes a contract between the chargor and chargee, could not be vitiated by external factors. Finally, that the Plaintiff has not established a prima-facie case to warrant issuance of the orders sought.

33. The 4th Defendant submitted that the Plaintiff has failed to prove fraud against the 4th Defendant in respect to the execution and registration of the charge of the suit land by the 3rd Defendant. It contended that both the 2nd and 3rd Defendants followed the laid down procedures in so far as they conducted due diligence in the lands office and being satisfied that there were no encumbrances proceeded to acquire the suit land properly. It submitted that the 3rd Defendant is protected by section 26 of the Land Registration Act and the charge does not fall for cancellation as no fraud has been proved. It contended that no evidence was produced in Court to prove that the Plaintiff alerted the 4th Defendant of any fraudulent activity in respect to the suit land.

34. The 5th and 6th Defendants did not file any written submissions.

Determination

35. 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 2nd and 3rd Defendant and finally the charge in favour of the 4th Defendant was done. She has enjoined the 5th and 6th Defendants for allegedly facilitating the fraud in the whole gamut of the transaction. The particulars of the said fraud has been sufficiently particularized under Para 14 and 15 of the Plaint.

36. It is on record that the 1st Defendant who had initially been sued did file a defence but on the 20/1/2017, the High Court sitting in

Kiambu Petition No. 6 of 2016 issued an order declaring the 1st Defendant to be suffering from mental disorder to the extent that he was incapable of managing his affairs. Consequently, J W K, K K K and G N K were appointed to act jointly as the guardians of the 1st Defendant with authority to receive and manage the 1st Defendant's estate. K K K substituted the 1st Defendant following this development. It is to be noted that the new substituted 1st Defendant neither filed any defence nor led evidence in Court despite him being present during the hearings in Court on the 25/5/18, 16/7/18 and 24/7/18. The case against the 1st Defendant therefore is undefended.

37. It is not in dispute that the Plaintiff and S K K are married as wife and husband. The Plaintiff led evidence that she got married to S K K in 1959 and produced a marriage certificate to support her averment. There is no evidence that the couple ever divorced and it is in evidence that they live together at their Nairobi City home at [Particulars withheld] Estate. Though the 2nd Defendant alluded to the said S K K as having a second wife called E K, he too acknowledged the Plaintiff as the wife of the 1st Defendant. The Plaintiff who dismissed the assertion refuted this. She informed the Court that she did not know the said E K. Other than the evidence tendered by the 2nd Defendant that the said E accompanied the 1st Defendant to the Land control board, no evidence was presented to Court to prove that E K was married to the 1st Defendant. The finding of the Court is that the Plaintiff and the 1st Defendant are legally married and that E K is not married to the 1st Defendant. There is no evidence of estrangement or divorce between the two. It is instructive that the order for guardianship issued in High Court Petition No 6 of 2016- Kiambu equally provided for the financial care of the Plaintiff in the same extent with S K, her husband.

Whether the Plaintiff has proven a matrimonial, overriding and/or beneficial interest in the suit land.

38. In this suit, the substantive claim of the Plaintiff is against the 1st Defendant. She alleges that the 1st Defendant acted fraudulently and illegally in respect of the suit land. The particulars of fraud as against the 1st -5th Defendants are set out in para 14 and 15 of the Amended Plaint. The Plaintiff's claim against the 1st Defendant arises out of their relationship in marriage as husband and wife. They are even as at the time of writing this judgment. They are and living together. The relationship is common ground to the parties.

39. The Constitution of Kenya under Article 45 (3) underscores the fundamental place of the family in our society. It provides that 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.

40. Before the enactment of the Matrimonial Properties Act, the Land Registration Act 2012 under section 28 (a) provided that spousal rights over matrimonial property were overriding interests. Section 2 of the said Act provided that matrimonial property means any interest in land or lease that is acquired by a spouse or spouses during the subsistence of the marriage.

41. 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...”

42. Is the suit land matrimonial property? *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.”

43. 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”.

44. It is the evidence of the Plaintiff that the suit land was both matrimonial and ancestral having been inherited by the 1st Defendant from his father. She informed the Court that they settled on the suit land upon marriage and raised their family therein. That a permanent house was built for the family on the land where they both lived. She informed the Court that she and her husband owned and managed several businesses whose proceeds were employed in developing the suit land which has a 4 storeyed building with rentals of Kshs. 180,000/= per month. She managed a retail shop at South C in Nairobi in addition to other business. That they jointly developed the land and in particular, that she contributed more than 50% towards development of the suit land. She informed the Court that in addition to the suit property, she and her husband acquired other properties using their business profits, including the [Particulars withheld] Estate house where they currently live. It is not in dispute that even though the suit land was inherited from the 1st Defendant's father the uncontroverted evidence is that they jointly invested their money time and effort to develop the suit land thus improving its value.

45. According to preceding paragraphs, the Court draws the irresistible conclusion that the Plaintiff had acquired spousal rights under the Land Registration Act 2012 which are overriding interests in land and therefore the 1st Defendant could not sell the land without the consent and knowledge of the Plaintiff. In any event there was no consent from the 1st Plaintiff and none at all.

46. The Matrimonial Property Act became law on 16/1/2014. The transactions complained about commenced on the 1/7/2014 after the law became operational thus applicable to the suit. The Matrimonial Property Act No. 49 of 2013 in its preamble states that it is an Act of Parliament to provide for the rights and responsibilities of spouses in relation to Matrimonial property and for connected purposes. Section 2 of the Matrimonial Property Act defines Matrimonial home as follows;

“means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property;”.

47. Section 6 (1) provides as follows;

“For the purposes of this Act, matrimonial property means—

- (a) the matrimonial home or homes;
- (b) household goods and effects in the matrimonial home or homes; or
- (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

48. My reading of section 6(1) (a) is that a couple may have 2 matrimonial homes. It is common for Kenyans to have matrimonial homes in the city or towns as well as homes in their rural homes. I disagree with the 2nd and 3rd Defendants contention that the suit property fails to be a matrimonial home on account that the couple had another home at [Particulars withheld] Estate.

49. Section 5 of the Matrimonial Property Act, provides that subject to section 6 interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the Matrimonial Property. The Plaintiff led evidence that she got married to the 1st Defendant in 1959 and that she found the land there. They lived on the suit land for about 10 years and created their home raising children and going about building their young family before moving to Nairobi. She informed the Court that they continued to have control and management of their rural home. On 3/1990 the suit land became registered in the name of Gachigi Wanjemba. According to the copy of the green card available on record the 1st Defendant was registered as owner in 2010. On a balance of probability, the Court finds that the 1st Defendant inherited the suit land after the marriage to the Plaintiff. Accordingly, I find that the suit land is a matrimonial property.

50. Further Section 9 of the said Matrimonial Property Act provides as follows;

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

51. Section 2 of the Matrimonial Property Act defines contribution as follows;

“**contribution**” means monetary and non-monetary contribution and includes—

- 1. domestic work and management of the matrimonial home;
- 2. child care;
- 3. companionship;
- 4. management of family business or property; and
- 5. farm work;

“**family business**” means any business which—

- (a) is run for the benefit of the family by both spouses or either spouse; and
- (b) generates income or other resources wholly or part of which are for the benefit of the family;

52. It is claimed that there was a period when the Plaintiff and the 1st Defendant were estranged however, no evidence was led to support it but it is on record that they now live in Garden estate. The guardianship order issued on 20/1/2017 provided for the two from the assets of the estate of the 1st Defendant. I am prepared to accept that the Plaintiff contributed in the sphere of domestic work and management of their matrimonial home, children, companionship, management of family business (south C shop) or property and in farm work. She led evidence that they employed their joint resources to develop the land and acquired other properties. This cannot be wished away. The 1st Defendant or his substitute did not controvert this evidence. It is not challenged and taken on a balance of probability, I find it plausible and accordingly find that the Plaintiff by virtue of her contribution through her toil and sweat resolutely established her matrimonial entitlement to the suit land.

53. Did the Plaintiff prove beneficial interest in the property? It is not in dispute that the suit land was registered in the name of the 1st Defendant. The Plaintiff pleaded in Para 10 of the Plaint that she contributed more than half of the resources utilized in the construction of the 4 storeyed building erected on the suit property. In her evidence in chief she informed the Court that she and the 1st Defendant were blessed with 8 children. That they lived on the suit property where they built a permanent house for 10 years and later moved to Nairobi where they conducted businesses. She informed the Court that she managed a retail shop in South C in Nairobi, which together with their other business pooled their resources to develop the suit land and acquired other assets. The 2nd and 3rd Defendant has faulted the Plaintiff for not producing evidence of contribution to support her claim. This evidence read against section 2 of the Matrimonial Property Act is a

clear testament of the contribution of the Plaintiff in the suit land by way of development so much so that the character of the suit land changed as a result of the said development and improvements thereon. In my view, it is not disputed that she offered contributions in all aspects described under section 2 of the Matrimonial Property Act and therefore has firmly established an entitlement to a beneficial interest.

54. In the case of **Mugo Muiru Investments Limited v E W B & 2 Others (2017) EKL**R, the Court of Appeal held as follows at paragraph 50-51;

“The Appellant did not regard the issue of trust imposed on the charger, S.B. and its effect on the sale and transfer by HCFK as significant. As stated above, even though the matrimonial property was registered in the name of S B alone, he held the title and legal estate in trust for both himself and Elizabeth jointly. This proposition is buttressed by the decision in **Gissing v. Gissing (1970) 2 All E.R. 780, (1971)AC 886**. See also **Falconer v. Falconer (1970) 3 All E R 449, (1970) 1 WLR 1333**; and **Hazell v. Hazell (1972) 1 All ER 923; 1 WLR 301**. Lord Diplock in **Gissing v. Gissing (supra) at pg 906 in (1971) AC 886** held that:-

“in nearly all these cases, the inexorable inference is that the husband is to hold the legal estate in the house in trust for them both, for both to live in for the foreseeable future. The couple does not have in mind a sale, nor division of proceeds of sale, except in the far distance.”

55. Further in the **Mugo Muriu** case aforestated the Court went on as thus;

“Elizabeth’s interest in the matrimonial home was an overriding, equitable and unregistered interest. Such interest entitled her to remain in the property. It was an interest in the property. It follows that a purchaser of the matrimonial property even without notice that Elizabeth was in possession would take the property subject to Elizabeth’s interest. The evidence in this appeal shows that the Appellant either did not do due diligence, or was unconcerned with the occupation of the property by Elizabeth and her interest in it. The Appellant took the property subject to Elizabeth’s overriding interest in it and Elizabeth being a part owner could not be removed from the property. Even before the Land Registration Act came into force on 2nd May 2012, the equitable beneficial interest of spouse in a matrimonial home occupied by such spouse was an overriding interest and therefore transfer of the title to the matrimonial home was subject to such overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property. In this appeal, the Appellant acquired the title registered in the name of S.B subject to the interest of Elizabeth. In effect, the Appellant neither obtained legal title of the property as notionally it was overridden by Elizabeth’s overriding interest nor was the Appellant entitled to possession. The transfer to the Appellant was subject to Elizabeth’s unregistered overriding encumbrance”.

56. The suit land was acquired by the 1st Defendant and the Plaintiff during their marriage and registered in the name of the 1st Defendant. Guided by the cases of **Mugo Muriu Investments Limited Vs EWB and 2 others (2017) eklr, Gissing Vs Gissing (1970) 2 ALL E.R 780, (1971) AC 886, Falcona Vs Falcona (1970) 3 ALL E.R .449, (1970) 1 WLR 1333 and Hazel Vs HAZEL 1 ALL ER 923**, it is clear to conclude that the inexorable inference in this case is that the 1st Defendant held the legal title of the suit land for both himself and the Plaintiff. It is so held because the couple lived in the premises so much so that their occupation does not have in mind a sale, nor division of proceeds of sale in their lifetime unless it is so consented by both.

57. Except that the 1st Defendant filed a Statement of Defense and a witness statement, he did not participate by way of evidence or submissions in the prosecution of his defense against the case of the Plaintiff. In the case of **Stephen Gachau Githiaga & Anor Vs AG (2015) EKL**R the Court 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 probability should tilt in favour of the Plaintiff or the party who has appeared and substantiated on his or her pleadings.”

58. Taking that into consideration the above decision, the 1st Defendant’s pleadings and witness statements remain mere allegations and therefore the balance of probabilities tilt in favour of the Plaintiff who appeared and substantiated her pleadings.

59. The Court answered the first issue in the positive. I find and hold that the Plaintiff has proven a matrimonial, overriding and beneficial interest in the suit land.

Whether the transfer registration and charge of the suit property was fraudulent.

60. Under this heading, the Plaintiff derives her claim from interest and rights acquired by reason of marriage to the 1st Defendant. Because of such relationship, the Plaintiff with regard to the suit property acquired matrimonial beneficial equitable and overriding interest. Due to such relationship the Plaintiff acquired among others, a right not to have the 1st Defendant dispose or encumber the suit property without her consent.

61. Going by section 93 (2) and (3) aforesaid, the 2nd Defendant was aware that the Plaintiff was the wife of the 1st Defendant. He was obligated in law in accordance with the above section to inquire whether the Plaintiff had given consent to the transfer. To the extent that that was not done, the transfer became null and void abinitio.

62. In the case of **Kadzo Mkutano v Mukutano Mwamboje Kadosho & 2 others [2016] eKL**R 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”.

63. Section 12 (1) Matrimonial Property Act states that;

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

64. It is the Plaintiff’s case, which has not been controverted by any of the Defendants that the 1st Defendant sold and transferred the suit land to the 2nd Defendant without obtaining the necessary consent of the Plaintiff. In view of the absence of the prescribed spousal consent of the Plaintiff, it is irresistible to conclude that the sale and transfer of the suit land by the 1st Defendant to the 2nd Defendant is illegal, null and void.

65. The 2nd Defendant gave evidence in the case in support of his defence. In the said evidence, the 2nd Defendant stated that he entered into a contract for sale of the suit land to the 1st Defendant at a consideration of Kshs 8 million. In the 2nd Defendant’s evidence, he was unable by himself or a third party to procure and produce in evidence the agreement for sale, or payment of any consideration to the 1st Defendant.

66. Even under section 93(4) of the Land Registration Act the 2nd Defendant was under a legal obligation to inquire of the transferor on whether the spouse or spouses have consented to the transfer. There is no evidence to show that any spousal consent was sought and obtained from the Plaintiff thus rendering the transaction contra to the law.

67. Section 38 of the Land Act 2012, states as follows;

“Other than as provided by this Act or by any other written law no suit shall be brought upon a contract for the disposition of an interest in land —

a) the contract upon which the suit is founded—

i. is in writing;

ii. is signed by all the parties thereto; and

b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party

68. In the case of **Alton Homes Limited & Another vs Davis Nathan Chelogoi & 2 Others (2018) eKLR**, at page 5 after considering section 3 of the Contract Act, the Court held as follows after founding that there was no written agreement for the sale of land;

“The 1st and 2nd Defendants alleged that they subsequently entered into a sale agreement for the sale of the suit property to the 1st Defendant by the 2nd Defendant. However, there was no sale agreement produced in Court and no evidence of payment of the purchase price. Apart from the Green Card, which shows that the suit property was registered in the name of the 2nd Defendant on 14/01/2010, there was no valid sale agreement produced in Court. This Court holds and finds that indeed the 1st and 2nd Defendants did not enter into a valid sale agreement for sale of the suit property herein or pass any consideration in respect thereof.”

69. It was upon the 2nd Defendant to proof that he, infact, had an agreement with the 1st Defendant and that he paid some consideration to the 1st Defendant. I say so because the 2nd Defendant in his evidence sought to rely on an agreement purportedly drafted by a lawyer namely Mr. Kiriba. No such agreement or evidence of payment of any consideration was produced; the evidence of payment of consideration to the 1st Defendant was not produced in Court. In the absence of the agreement for sale, the Court finds that there was no valid or any sale of the suit land by the 1st Defendant to the 2nd Defendant.

70. With regard to the 2nd and 3rd Defendants the Plaintiff alleges fraud and collusion by way of sale and transfer of the suit land to the 3rd Defendant. In his defence of the 3rd Defendant alleges that he is a bonafide purchaser for value without notice from the 2nd Defendant. The 3rd Defendant gave evidence in the case and stated that he carried out due diligence and found that the suit land was registered in the name of the 2nd Defendant and that he obtained the land control board consent and paid the purchase price to the 2nd Defendant.

71. The 3rd Defendant has claimed that he was a third party purchaser for value without notice. That he entered into an agreement for sale with the 2nd Defendant for the purpose of purchase of the suit land upon carrying out proper due diligence which ascertained that the registered owner of the property was the 2nd Defendant. In his evidence, the 2nd Defendant acknowledged knowledge of the Plaintiff as the wife of the 1st Defendant. The 3rd Defendant presented an agreement for sale between him and the 2nd Defendant. There were no transfer documents executed except the copy of title and the green card. How did he become registered titleholder? It is not clear: The Court will pronounce itself shortly on the Land Control Board consent relied by the 3rd Defendant in the transactions.. I associate myself with the Court of Appeal decision in **Richard Odual Opole vs Commissioner of Lands & 2 Others (2015) eKLR**, which held that **where there is a tainted and irregular procedure leading to the registration of the title**; one cannot be a bonafide purchaser for value without notice.

72. In the evidence of the 3rd Defendant, he stated that it had been agreed with the 2nd Defendant that the suit land be transferred and registered in the name of the 3rd Defendant to facilitate acquisition of a loan from the 4th Defendant. There was no document tendered to show that such agreement existed between the 2nd and 3rd Defendants. Even if it were, such action would amount to a collusion and a fraud on the 4th Defendant by the 2nd and 3rd Defendants in that the title to the suit land as presented to the 4th Defendant by the 3rd Defendant was not free from all encumbrances. It is like the interest of the 3rd Defendant in respect of the suit property was to take place later after the purchase price is paid. In this respect, section 44 of the Land Act states as follows;

“A transfer shall not be expressed to take effect on the happening of any event or on the fulfilment of any condition or at any future time.”

73. In the case of **Samuel Kamere Vs Land Registrar (2015) ECLR** the Court of Appeal held that;

“ in order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.” (emphasis is mine).

74. The 3rd Defendant failed in all the 3 measurements enumerated above. Firstly, The Court has held that the 2nd Defendant did not have a valid and legal title that he could transfer to the 3rd Defendant. Secondly due diligence by the 3rd Defendant ought to not only have been evidenced by a search but also an enquiry from the 2nd Defendant as to how the title to the suit land was obtained. In his evidence, the 2nd Defendant acknowledges that the Plaintiff was the spouse of the 1st Defendant and that the 1st Defendant was the 2nd Defendant's Uncle. Due diligence and inquiry therefore would have required the 3rd Defendant to search from the register of land and the relevant file in the registry to ascertain whether the consent of the Plaintiff was obtained on the sale and transfer of the suit land to the 2nd Defendant. Evidence in this regard is consistent from the 3rd Defendant's conduct in obtaining his wife's consent to the charge of the suit land by the 4th Defendant. The Court does not find any bonafides in respect of the 3rd Defendant's conduct relating to due diligence at the time of purchasing the suit land from the 2nd Defendant. Thirdly, the 3rd Defendant in his own evidence was not capable and did not produce any evidence to show that he paid any money to the 2nd Defendant on account of consideration for purchase of the suit property.

75. Having received no good title could the 3rd Defendant pass a good title by way of a charge to the 4th Defendant? The answer is in the negative. It is in evidence that no documents except the charge was produced to show if indeed the 3rd Defendant applied for any loan from the 4th Defendant, any monies were released to the 3rd Defendant; nor if indeed the 3rd Defendant was a member of the 4th Defendant; nor whether the loan is still subsisting, nor whether the loan is being serviced. There is no record on the disbursement and/nor acknowledgement of Kshs. 12.4 million dated 11/8/14 in favour of the 2nd Defendant. There is no evidence of the alleged deposit in the sum of Kshs. 500,000/-. During the hearing, the 3rd Defendant when put to task could not explain the circumstances of payment even casting more doubt on the transaction. The 3rd Defendant appeared evasive and distant from the proceedings. The 3rd Defendant cannot be said to have been a bonafide purchaser for value without notice.

76. The 4th Defendant in his defence stated that it acted bonafides in giving a loan to the 3rd Defendant and registering a charge against the title to the suit property. This was in response to the Plaintiff's allegation that the 4th Defendant acted in collusion with the 1st and 2nd Defendants to charge the suit land without conducting due diligence. Mr Mwema gave evidence for the 4th Defendant and stated that for one to get a loan he must be a member of the 4th Defendant. In his evidence under cross-examination, he stated that he processed the loan applied for by the 3rd Defendant. He stated as follows;

“I do not have any documents to evidence the release of the loan to the 3rd Defendant. I do not have any documents to show that the 3rd Defendant is a member of the 4th Defendant.”

77. The 3rd Defendant testified but did not show any evidence of membership in the 4th Defendant, receipt of the loan amount or any money at all or evidence of repayment of the loan, if any. Notwithstanding the foregoing, however, the 4th Defendant's witness expressly stated that the 4th Defendant did not possess records of disbursing the loans or any monies to the 3rd Defendant.

78. The 4th Defendant did not have any records to show that it in fact, disbursed the loan amount of Kshs 13 million or any monies to the 3rd Defendant. The 4th Defendant did not tender any evidence to show that since the registration of the charge on 6/8/14 the 3rd Defendant has made any repayments on account.

79. Guided by the case of **Samuel Kamere (supra)** on bonafides, it is clear that the defence of the bonafide acts does not fall in favor of the 4th Defendant.

80. The Plaintiff's claim against the 5th Defendant is that she fraudulently registered and transferred the suit land to the 2nd and 3rd Defendants without exercising due diligence and obtaining her consent as a prerequisite to the registration of such transfer. It is on record that there are three sets of Land Control Board consents from S K (1st Defendant) to the 2nd Defendant, from 2nd Defendant to the 3rd Defendant and from the 3rd Defendant to the 4th Defendant all bear the same serial number No. 651900. The one from the 1st Defendant to the 2nd Defendant is dated 17/6/14 while from 2nd Defendant to 3rd Defendant is dated 15/7/14. In her evidence, the 5th Defendant was taken to task because of her reliance on the Land Control Board consent in respect of the suit property and transfer from the 1st -3rd Defendants and the registration of a charge in favour of the 4th Defendant. The cause of disagreement is that all the consents bear the same serial number. The 5th Defendant explained in evidence that the serial numbers appear similar because it is a photocopy permitted by her office because the

Land Control Board had by then run out of the stock in respect of the printed letters of consent. She further explained that the differential noticeable, which would validate the consent for registration, is on the date and the Land Control Board minute number endorsed on the letter of consent. On examination, it is noticeable that the serial numbers bear the same number. The 2nd and 3rd Defendants seemed to have apportioned blame on the Land Control Board officials who issued the consents. The Court treats this as a furtherance of a fraud and collusion started by the 1st -3rd Defendants and facilitated by the 5th Defendant in allowing photocopies of the land control board consents which are statutory documents to be used to effect a disposition in land. Section 8 of the Land Control Board Act Cap 302 makes it mandatory for the consent of the Land Control Board to be obtained. This is a statutory obligation in default of which a sale is invalid null and void. The Court finds that there were no valid land control board consents in respect to the sale transfers and charge of the suit land.

81. In this case, there are no documents or instruments as described under the Land Registration Act in Section 37, 43 & 44 as stated in Paragraph 52 – 54 above were presented to Court to evidence the transaction. The Land Registrar, Murang'a County, namely Nancy Nyambura Njenga took the Court through the documents or instruments required to register a transfer in land which by and large is the process provided for in the Land Act, 2012. The Land Registrar was however evasive when she was asked whether she brought the file, which contained the transactions. She only claimed to have come with a copy of the green card. This position was interpreted by the Court as offhand or to the very best non-disclosure of a material fact especially that her office had been sued for a charge of fraud. Given the demeanor of this witness, I can only deduce that these documents were not present and that is why none was produced. I hold that in the absence of any instrument disposing the land in accordance to the provisions of the Land Act, there was indeed no disposition of any interest in land between the 1st Defendant and the 2nd Defendant.

82. Notwithstanding the explanation of the District Land Registrar, she completely failed to satisfactorily explain why a transfer of the suit land was done from the 1st Defendant to the 2nd Defendant without availability of all the documents necessary to facilitate such transfers namely; copy of the national Identity Card of the Plaintiff; consent of the Plaintiff and the passport size photographs of the Plaintiff; These requirements is set out in section 44 (5) of the Land Registration Act as follows;

“The transferee shall in addition to executing the instrument, attach the following—

- (a) a copy of an identity card or passport; and
- (b) a copy of a Personal Identification Number certificate;
- (c) passport size photographs;
- (d) where applicable, a marriage certificate;
- (dd) a copy of the certificate of incorporation, in the case of a corporate entity; or
- (e) such other identification documents as the Cabinet Secretary may prescribe”.

83. In totality, the Plaintiff alleged that there was collusion between the 1st to the 5th Defendants to deprive her of ownership or any rights relating to the suit property. However, the quick successive transfers and registration resting with the charge of the suit property in a span of 37 days commencing on 1/7/2014 to 6/8/2014 without appropriate documents, may be additional evidence of such collusion and fraud.

Whether the title to the 3rd Defendant should be cancelled and the land registered in the name of the Plaintiff and 1st Defendant.

84. The 1st Defendant was at the material time the registered owner of the suit property. Such registration is protected by law except in circumstances set out in section 27 and 28 of the now repealed Registration of Land Act and the current section 26 of the Land Registration Act as read together with Articles 40 (6) and 67 of the Constitution. Section 26 of the current Land Registration Act, 2012.

The Court has found in this judgement that the 2nd Defendant did not possess a valid legal title neither did the 3rd Defendant on account of proven fraud, illegality and procedural improprieties on the part of the 2nd, 3rd, 4th and 5th Defendants.

85. In the case of In **R. G. Patel v. Lalji Makanji** (supra), 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.”

From the preceding paragraphs it is the finding of the Court that the Plaintiff has proved fraud on a balance of probabilities.

86. Having determined that no title passed from the 1st Defendant to the 2nd Defendant through to the 3rd Defendant the Court in exercise of powers given under section 80 Land Registration Act, 2012 hereby cancels the title issued to the 2nd and 3rd Defendant and directs the 5th Defendant to rectify the register in respect thereof by registration of the 1st Defendant as owner of the suit property. The basis for the cancellation is the proved fraud in the preceding paragraphs.

Whether the charge of the 4th Defendant should be cancelled.

87. Given that the 3rd Defendant bought nothing from the 2nd Defendant, he too conveyed no interest to the 4th Defendant. It therefore follows that the charge in the favour of the 3rd Defendant was equally tainted by the irregularities and fraud that seeped from the 1st Defendant to the 3rd Defendant. The case of Samuel Kamwere above is referred to. It then follows that the 4th Defendants defense of bonafides is not available to it.

Who meets the costs.'

88. Cost shall follow the event.

89. Final orders;

a. It is hereby declared that the transfer, registration and charge of title of the suit property known as LOC.12/SUB-LOC.1/GAKIRA/T.[Particulars withheld] by the 1st, 2nd, 3rd and 4th Defendants is illegal, null and void.

b. The 5th Defendant be and is hereby ordered to cancel the transfers and titles of the suit property known as Loc.12/SUB-LOC.1/GAKIRA/T. .[Particulars withheld] issued to the 2nd and 3rd Defendants and for the title to revert to the 1st Defendant.

c. The 5th Defendant is ordered to cancel the charge registered against the title of the property known as LOC.12/SUB-LOC.1/GAKIRA/T.[Particulars withheld].

d. An order for permanent injunction is hereby issued restraining the 2nd, 3rd and the 4th Defendants, their agents or servants from interfering with the property known as LOC.12/SUB-LOC.1/GAKIRA/T. .[Particulars withheld].

e. The Plaintiff shall have the costs of the suit.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 8TH DAY OF NOVEMBER 2018.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ringera HB for Wafula for the Plaintiff

1st Defendant– Present in person

Ndegwa for 2nd and 3rd Defendant

Ndegwa HB for Gachao for the 4th Defendant

5th and 6th Defendant – Absent

Irene and Njeri, Court Assistants