



It is the defendants' submission that since the plaintiff was aware of the sale agreement, the sub-divisions are deemed to be in accordance with the law. It is the 1<sup>st</sup> defendant evidence that the plaintiff is in occupation of part of the land that sub-division has not been done. The purchaser's interests have to be protected as they are purchasers for value and plaintiff has no claim whatsoever.

DW2 the 2<sup>nd</sup> defendant's evidence was that he bought land from the 1<sup>st</sup> defendant who approached him that he could be arrested because of the loan taken by the plaintiff. The plaintiff was aware of the sale agreements and has since sold the land to DW3. DW3, the 3<sup>rd</sup> defendant's evidence is that he bought land from the 2<sup>nd</sup> defendant and has since developed the said land and has a copy of the title deed. DW4, the 4<sup>th</sup> defendant stated that she bought land from the plaintiff and 1<sup>st</sup> defendant. The plaintiff was one of the signatories in the sale agreement. DW4 has since sold the land to one Samuel Wagura. DW5, the 5<sup>th</sup> defendant bought land from the 1<sup>st</sup> defendant and the plaintiff was aware.

The plaintiff submitted that she is the wife of the 1<sup>st</sup> defendant which fact was not disputed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. Under section 28 (a) of the Land Registration Act No. 3 of 2012 the plaintiff's rights to land parcel number EAST [Particulars Withheld] /3019 is an overriding interest on the parcel of land. Since she is the wife of the 1<sup>st</sup> defendant any transaction undertaken in respect of the parcel of land without her consent is null and void abinitio. Under section 93 (3) (a) (b) and (4) of the Land Registration Act No. 3 of 2012 any transaction undertaken without the consent of a spouse shall be void at the option of the spouse who didn't consent to the transaction.

That in the above circumstances the transaction undertaken by the defendants jointly and severally in respect of land parcel number EAST [Particulars Withheld] /3019 without the consent of the plaintiff are void. The plaintiff is entitled to restrain the defendants from dealing with the suit land in any way since her consent was not obtained. She prays for judgment for the plaintiff and further order that the sub-divisions of land parcel number EAST [Particulars Withheld] /3019 into land parcels number 3195 to 3202 be cancelled.

It is the Defendants' submission that from the facts there is no need of the consent as the plaintiff took part in the said land transactions. Spousal consent is a requirement under section 28 (a) land Register Act 2012. It is their submission that spousal consent was not a requirement while the registered land Act was still operative. All the sale transactions occurred before the enactment of the Land Act 2012, therefore the requirement of spousal consent is inoperative. On the issue of injunction the defendants relied on the following authorities;

1. Giella v Cassman Brown & Company Ltd 1973 EA 353
2. Rose Chepkurui Mibei v Jared Mokuia Nyariki & 2 Others ELC No. 24 of 2015
3. Joyce Chepkemoi Ng'eno & 2 Others (2016) eKLR

This Court has carefully considered the instant case and the Court record in totality. The Court has also considered the relevant provisions of law, the written submissions, and the cited authorities. It is not disputed that the plaintiff is a wife to the 1<sup>st</sup> defendant who was the registered proprietor of Land Parcels Number East [Particulars Withheld] /3019 measuring 10.32 Hectares. It is also not disputed that 1<sup>st</sup> defendant caused the subdivision of the said parcel to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. The issues now to be determined are as follows;

1. Whether or not the plaintiff was aware of said sale agreement?
2. Whether the sale of land to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants is null and void for lack of consent?
3. Whether or not the sub-division was done in accordance with the law?

On whether or not the plaintiff was aware of said sale agreements and whether or not she gave approval, be it explicitly or by implication, in the alternative whether or not her consent was required at the material time, the plaintiff submitted that she is the wife of the 1<sup>st</sup> defendant which fact was not disputed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. Under section 28 (a) of the Land Registration Act No. 3 of 2012 the plaintiff's rights to land parcel number EAST [Particulars Withheld] 3019 is an overriding interest on the parcel of land. Since she is the wife of the 1<sup>st</sup> defendant. That any transaction undertaken in respect of the parcel of land without her consent is null and void abinitio. Under section 93 (3) (a) (b) and (4) of the Land Registration Act No. 3 of 2012 any transaction undertaken without the consent of a spouse shall be void at the option of the spouse who didn't consent to the transaction.

On perusal of the sale agreements I find that the original sale took place before the enactment of the Land Act, 2012 and Land Registration Act, 2012, that is. In 2004, 2009 and 2010 and therefore spousal consent was not a requirement. The proprietary interest lay with the 1st defendant and he was able to dispose of his interest. I referred to the cases of *Elizabeth Nthenya Wambua vs Philip Wambua Masila & 3 Others (2013) eKLR* and *Barclays Bank of Kenya Ltd vs The Hon. Attorney General & Another (2015) eKLR*.

*Be that as it may and without prejudice to the forgoing* the plaintiff stated in evidence that she was not aware of the sale of the land and that the same was done in secret. It is her contention that she only became aware of the sale when in 2008 she found the 2<sup>nd</sup> defendant there. The 1st defendant on the other hand, states that the plaintiff was aware of the sale of the land. I believe the 1<sup>st</sup> Defendant, DW1 came through as a forthright and honest witness. He explained in detail how he sold the land to bail the plaintiff out of financial difficulties and to educate his children when he sold the land to DW2 in 2009. DW4 was introduced to him by the plaintiff who signed the sale agreement way back in 2004 but is now saying that her signature was forged. I find that it has been demonstrated on a balance of probabilities that the plaintiff was expressly and by implication aware of the agreements. It is the 1<sup>st</sup> defendant evidence that the plaintiff is in occupation of part of the land that sub-division has not been done. DW5 bailed them out and bought the piece of land when their cows had been taken for auction after the plaintiff defaulted in paying her debt in 2010. The plaintiff is therefore estopped by her actions from claiming she is not aware of the transactions. See *Joyce Chepkemoi Ng'eno v Samuel Kipkorir Ng'eno & 2 others [2016] eKLR*. Hence I find that the sale of land to DW2, DW4 and DW5 was in order.

This matter being one that seeks a permanent injunction, has to be considered within the principles set out in the case of *GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A. 358* and which are:-

- 1. The applicant must show a prima facie case with a probability of success at the trial***
- 2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,***
- 3. If in doubt, the Court will decide the application on a balance of convenience.***

It must also be added that an injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity.

The plaintiff has not established a prima facie case and has not shown the court that she could suffer irreparable loss. It has come out in evidence that the plaintiff is in occupation of part of the suit land with her children which subdivision is yet to be obtained. For the above reasons, the court finds that the plaintiff has failed to prove her case and the same is dismissed. Each party is to bear its costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 12<sup>TH</sup> DAY OF JULY 2017.**

**N. A. MATHEKA**

**JUDGE**