



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO. 284 OF 2017

E N M.....PLAINTIFF

-VERSUS-

S M N1st DEFENDANT

S M.....2nd DEFENDANT

JUDGEMENT

By an *Amended Originating Summons* dated on *3rd November 2014*, the Plaintiff/Applicant herein *E N M* has sued the Defendants, *S M N* and *S M* seeking various declarations. The Plaintiff has sought for these orders:-

1) That the house that has been the matrimonial home of the Applicant and the 1st Respondent situated at plot No.LR. [particulars withheld] (previously known as LR. [particulars withheld] and registered in the name of the 2nd Respondent herein is matrimonial property held in trust by the 1st Defendant for both of them and that it does not belong solely to the 1st Respondent.

2) That the Applicant enjoys 50% right and interest in the aforementioned property.

3) That a permanent injunction do issue restraining the Respondents whether by themselves, their servants, employees, agents or through any one deriving title through them from disposing by way of sale, mortgage or otherwise or in any other way interfering with and/or having any dealing with the land parcel situated in Thome 5 Estate known as Plot No.LR/[particulars withheld] (previously known as LR [particulars withheld] in any way that the Plaintiff's beneficial interest therein.

4) That this Court do order the Defendants to jointly and/or severally to furnish the Plaintiff under Article 35 of the Constitution with the following:-

- a) The title or the documents of ownership of the matrimonial property.*
- b) Sale Agreement between them.*
- c) The Valuation Report*

- d) *The Stamp Duty receipts*
 - e) *The Land Transfer Forms.*
 - f) *The proof of payment of the consideration.*
 - g) *The Spousal Consent to sell the suit property.*
- 5) *That the Sale Agreement between the Defendants of the matrimonial property being plot No.LR. [particulars withheld] (previously known as LR. [particulars withheld] be declared null and void.*
- 6) *That an order that the matrimonial property do revert to the Plaintiff and the 1st Defendant.*
- 7) *That the 1st Defendant be compelled to deposit the sale proceeds in the Court forthwith.*
- 8) *That an order do issue to the effect that the sale proceeds be shared equally between the Plaintiff and the 1st Defendant in the alternative.*

This **Originating Summon** is based on the grounds stated on the face of the said summons and the annexed affidavit of *E N M*. The grounds are:-

- i. *The suit property comprises of the matrimonial home of the Plaintiff and the 1st Defendant/Respondent.*
- ii. *The 1st Defendant has categorically stated in his Defence and on Oath in an affidavit that he entered into a Sale Agreement for the sale of the suit property to the 2nd Defendant without the Plaintiff's consent.*
- iii. *The 1st Defendant has failed and/or refused to disclose the particulars and the price at which he sold the property.*
- iv. *The 1st Defendant has failed to pay attention and/or comply with the order of the Honourable Court issued on 12th June 2013, restraining him from transacting with the suit property.*
- v. *The Defendants have failed to heed the contents of the Caveat Emptor dated 2nd July 2014.*
- vi. *The Defendants have failed to do a diligence check as to establish that the Plaintiff and the 1st Defendant herein were at the time of the entry into the Sale Agreement legally married.*
- vii. *Interim Orders were issued on 3rd June 2013 and extended on 21st Jun 2013, and further extended on 25th July 2013 restraining the 1st Defendant whether by himself, his servants, employees, agents or through anyone deriving title through him from disposing by way of sale, mortgage or otherwise or in any other way interfering with and/or having any dealing with the land Parcel situated in Thome 5 Estate known as plot No.LR. [particulars withheld] (previously known as LR. [particulars withheld]).*

In her Supporting Affidavit, the Plaintiff/Applicant had averred that she got married to the 1st Respondent on **6th September 1980**, as is evident from the **Marriage Certificate annextrue EM-1**. It was her further averments that they have four issues of marriage as evidenced by the annexures **EM-2 (a), (b), (c) and (d)** being **Birth Certificates**. Further that on **7th April 1987**, the 1st Respondent and herself jointly bought the property then known as **LR.No. [particulars withheld]**, now **LR/[particulars withheld]**, a part of **Thome No.5 Limited** for **Kshs.78,000/=** and they started construction of their matrimonial home. She

annexed **EM 3**, the **Sale Agreement**. She also averred that they completed the construction of their matrimonial home in **1991** and moved in the same year and they have lived there since then. She also stated that since she got married, she held jobs in various places until **2006**, when she resigned and relocated to **United States of America**. Therefore from her earnings, she supported the family and contributed financially for the purchase of the suit plot where they constructed their matrimonial home.

Further that while in the **USA**, she sent monies to the 1st Respondent to finalize payments and transfer of the suit property. She annexed **EM 4**, a bundle of **Money Transfer Receipts** to support her allegations. It was her further allegation that she believed as a husband and wife and since she contributed towards the purchase of the family property, the same would be registered in their joint names.

She also stated that though she came home in November 2012, and stayed in their said matrimonial home, the 1st Respondent did not mention to her that he had intentions of selling the same. It was her further allegation that she was shocked to learn in **April, 2013**, from a reliable source that the 1st Respondent/Defendant had put up their matrimonial home for sale and she also learnt that the 1st Respondent had caused the suit property to be registered in his name as the **sole proprietor**.

She alleged that the 1st Respondent had taken advantage of her absence to dispossess her of their family home. It was her further allegation that she is about to retire and return back home, but without a place to call home. She therefore urged the Court to declare the suit property a matrimonial property and also restrain the Respondents from selling and/or transferring the suit property as the 1st Respondent holds it in trust for the Applicant and cannot transfer without her consent.

The **Originating Summons** is contested by the Defendants/ Respondents.

The **1st Respondent** filed his **Statement of Defence** on **8th July 2013**, and averred that he bought the suit property in **1987**, and he personally paid the purchase price and the Plaintiff/Applicant did not make any contribution whatsoever towards the said purchase. Further that as the head of the family, he had to make the best decision for the interest of the family as a whole since the Plaintiff had relocated to USA with the children. He therefore sold the suit property in order to convert the proceeds to an income generating property. It was his further averments that since the Plaintiff went to USA, she has only sent **Kshs.128,000/=** which money was meant for their son who wanted to move out of home. He also alleged that the Plaintiff was aware of the sale as he had discussed the same with her and their children when she visited Kenya. He urged the Court to dismiss the Originating Summons as it was bad in law since the sale had taken place.

The Plaintiff/Applicant filed a further affidavit on **30th August 2013**, and reiterated the contents of her earlier affidavit and further restated that the property was bought jointly by herself and the 1st Respondent as shown by the **Sale Agreement**. She also reiterated that she had continuously sent money to the 1st Respondent to support the family and process the title of their matrimonial property. It was her contention that the 1st Respondent dishonestly and/or mischievously registered the property in his own names in total disregard of the Sale Agreement and contributions made by the Applicant towards purchase and development of the suit property. She also contended that she did not give the **Consent for Sale** of the suit property as provided by **Section 93(4)** of the **Land Registration Act**. Further that the transfer of the suit property is not yet completed and it should be stopped in the interest of justice. She further averred that the purchaser herein proceeded to occupy the suit property even after the 1st Respondent had been served with **Court Order** and existence of **Caveat Emptor** placed in the **Daily Nation Newspaper** of **3rd July 2013** as per **annexture L 2**.

After the 2nd Respondent herein **S M** was enjoined in the suit, he filed his **Replying Affidavit** on **13th March 2015**, and averred that he had been informed by his advocate that the whole suit is bad in law, unfounded and an abuse of the process of the Court. He averred that he did purchase the suit property together with his **wife, E M M**, from 1st Defendant. However, the said **E M M** is not a party to this suit (was not enjoined). It was his contention that when they carried out a search, they confirmed that the suit

land was registered in the name of 1st Respondent as a **sole proprietor** and there was no **Caveat** or other overriding interests. Further that one **A N G**, gave consent for sale of the said house. That **A N G** was introduced as the wife to the 1st Respondent herein. He contended that they discussed the purchase price and agreed at a sum of **Kshs.20,000,000/=** which was paid fully after **signing** of the **Sale Agreement** dated 19th February 2013. It was his contention that the title is already registered in his name and that of his wife, **E M M**. The 2nd Respondent further contended that long after registration of the title in his name, he saw in the **Daily Nation Newspaper** of 3rd July 2013, a **Caveat Emptor**, regarding the suit property. He further contended that they are innocent purchasers for value without notice of the Plaintiff's claim and that they did all that they were required to do in law to determine ownership. He urged the Court to dismiss the Plaintiff's claim.

The 2nd Defendant, **S M** filed a further affidavit dated 27th March 2015, and annexed copies of **certificate of title, spousal consent** and **agreement for sale** to support his allegations.

Parties took directions and agreed to proceed by way of viva voce evidence and each of the party herein gave evidence for self and called no witnesses.

The hearing commenced on 23rd February 2016, wherein Plaintiff/Applicant gave evidence for herself and called no other witness.

Plaintiff's evidence

PW1 – E N M, testified that she lives in **USA** and that the 1st Defendant is her husband and they got married on 6th September 1980, as shown by the **Marriage Certificate Exhibit 1**. She also testified that their marriage is blessed with **four children** as per the **Birth Certificates** produced in Court as **exhibits 1(a), (b), (c) and (d)**. She also stated that their matrimonial home was in **Thome 5**, wherein they had purchased the property in the year **1987**. It was her testimony that she had worked in various places and she contributed towards the purchase of the suit property as can be discerned from the **Sale Agreement exhibit no.3**. It was her further testimony that their matrimonial property was **LR NO. [particulars withheld]** which was bought for **Kshs.78,000/=** as evident from the various receipts produced as exhibits.

PW1 further testified that she relocated to **USA in the year 2006**, and left her husband, 1st Defendant and the children living in the said house. Further that she used to send monies to her husband for family upkeep and payment of the final purchase price as was evident from the bundle of receipts **exhibit no.6**.

It was her further testimony that the 1st Defendant sold the matrimonial property without her consent and knowledge. This property was sold to **S M**, without her consent as is evident from the certificate of title **exhibit no.5**. She also stated that the 1st Defendant sold the property in secrecy and did not inform her or asked for her consent. It was her further testimony that **A N G**, who allegedly gave consent as a wife is **not known to her** and she is **not her co-wife**. Further that she is still married to the 1st Defendant and she was not aware of the new purchaser. She also testified that the purchaser of her home is not related to her. She urged the Court to allow her claim.

1st Defendant's Case

DW1 – S M N, testified on 28th April 2016, and averred that the Plaintiff is his wife and they got married in **1980**. Further that he purchased the suit property in **1987** for **Kshs.78,000/=** and he was issued with receipts. He also testified that he purchased the suit property alone as the Plaintiff's income was meager and was only for her upkeep. He admitted that the Plaintiff relocated to **USA** in the year **2006**, but came to visit in the year **2012**. That they discussed about the sale of the suit property. He further testified that they agreed to sell the suit property and purchase a commercial property and that is what he did. He further testified that the suit property was registered in his name and he did not need the consent of the Plaintiff. It was his testimony that he thereafter purchased a **commercial plot** in **Kitengela** wherein he put up a **commercial building** which fetches **Kshs.115,000/=** per month. Further that the said **Kitengela**

building is registered in his name and that he benefits from the income. He further testified that the Plaintiff refused to send him documents so that the commercial building could be registered in their joint names.

2nd Defendant's Case

DW2 – S M gave evidence on 30th June 2016, and stated that he is a Civil Servant and that he knows the 1st Defendant herein, S M. He also stated that he did not know the Plaintiff herein. He relied entirely on his affidavit that he had sworn on 15th December 2014. It was his testimony that the property is registered under his name and that of his wife E M M who is not a party to this suit. He relied entirely on his Replying Affidavit and confirmed that the suit property was sold to him and his wife by the 1st Defendant. He also testified that before he purchased the suit property, he visited the suit property and found the 1st Defendant and his wife, A N G but not the Plaintiff. That he purchased the suit property as he did not doubt the 1st Defendant and his wife, A N G who, according to her identity card was born in 1973, though the affidavit of marriage showed that she was married in 1985 and at the time of marriage, she would have been 12 years old. It was his testimony during cross examination that the 1st Defendant informed him that was a mistake and that indeed A N G was married in 1995. He further confirmed that the suit land was transferred to him and his wife though he did not produce the said transfer in court.

After the close of the case, the Court directed the parties to file and exchange their Written Submissions. In that regard, the Law Firm of **Chigiti & Chigiti Advocates** for the Plaintiff filed their submissions on 2nd August 2016, and submitted that the Plaintiff has proved her case on a balance of probabilities. The Plaintiff relied on various provisions of the Matrimonial Property Act and the Land Registration Act. Specifically the Plaintiff relied on Section 93(2) of the Land Registration Act which states that:-

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

Further the Plaintiff relied on Section 93(4) of the same Act which provides that:-

“If the spouse undertaking the disposition deliberately misleads the lender or the assignee or transferee by the answers to the inquiries made in accordance with subsection 3(a) and 3(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.”

The Plaintiff also submitted that for a party to be accorded the defence of innocent purchaser for value without notice, then the party must have carried out proper due diligence. For this, the Plaintiff relied on the case of Esther Ndegi Njiru & Another...Vs...Leonard Gatei (2014) eKLR, where the Court held that:-

“Whereas the law respects and uphold sanctity of title, the law also provides for situation here the title shall not be absolute and indefeasible..... The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search.”

On whether the amended **Originating Summons** required a **Verifying Affidavit**, the Plaintiff relied on various authorities among them the case of Silvano Corsaro..Vs..Luigi Fomica & Another (2010) eKLR, where the Court held that:-

“Ordinarily where there is a valid complainant verifying affidavit in support of the Original Plaintiff, then the amended Plaintiff need not have another accompanying affidavit.”

This was also the position adopted in the case of ***Said Swaleh Ghaita Sannith..Vs..The Commissioner of Lands & 5 Others (MSA) HCC NO.227of 2002***, where the Court held that:-

“In my opinion therefore an amended Plaintiff need not be accompanied by a verifying affidavit... it is not necessary and not definitely important that an amended Plaintiff should be accompanied by a Verifying Affidavit.”

The Plaintiff urged the Court to allow her ***Amended Originating Summons*** entirely.

The ***Law Firm of Kamau Kinga & Co. Advocates*** for the 1st Defendant filed their written submissions on ***22nd September 2016***, and urged the Court to dismiss the Plaintiff's ***Amended Originating Summons*** dated ***3rd November 2014***. The 1st Defendant submitted that the suit property is already registered under the 2nd Defendant and his wife's names who have already taken possession of the same and therefore, the Originating Summons has been overtaken by events. Further that the suit property cannot revert back to being a matrimonial property as the proceeds from the sale were used by 1st Defendant to purchase another commercial property which is generating income and reverting the suit property would be a futile exercise. Further that the proceeds of the sale cannot be deposited in court as they have already been utilized in purchase of another income generating property for the benefit of the family. It was also submitted that the sale proceeds cannot be shared equally between the Plaintiff and the 1st Defendant as matrimonial property can only be divided once the parties are divorced. Further that in the instant case, the Plaintiff and 1st Defendant are still legally married and therefore, there can be no division of matrimonial property.

On the part of the 2nd Defendant, the ***Law Firm of J. Ngaii Gikonyo & Co. Advocates*** submitted at length and cited various provisions of law and decided cases. He urged the Court to dismiss the Plaintiff's Originating Summons and also finds that the 2nd Defendant and his wife were innocent purchasers for value without Notice and that their title should not be disturbed. The 2nd Defendant relied on the case of ***Lawrence Mukiri..Vs...Attorney General & 4 Others (2013) eKLR***, which describes what amounted to bona-fide purchase for value as follows:-

“...a bonafide purchaser for value is a person who honestly intend to purchase the property offered for sale and does not intend to acquire it wrongly.... A bonafide purchaser of a legal estate without notice has absolute unqualified answerable defence against of any prior equitable owner.”

The 2nd Defendant urged the Court to dismiss the Plaintiff's case with costs to the Respondents.

The Court has now carefully considered the available evidence, the exhibits produced thereto, the written submissions, the cited authorities and the relevant provision of law and the Court makes the following findings:-

There is no doubt that Plaintiff herein ***E N M*** and 1st Defendant, ***S M*** got married on ***6th September 1980***, as is evident from the certificate of marriage marked as ***EM-1***. It is also evident that the two have four issues of marriage as is evident from the Certificates of Birth marked as ***EM 2(a), 2(b), 2(c)*** and ***2(d)***. It is also not in doubt that during the subsistence of their marriage, the Plaintiff and 1st Defendant did enter into an agreement for purchase of ***[particulars withheld]*** in Nairobi. The two purchased the said parcel of land from one ***Samuel Njenga Masai***, vide the Sale Agreement dated ***7th April 1987***. The said property was purchased at ***Kshs.78,000/=*** and the suit property is ***LR No. [particulars withheld]***. There is also no doubt that the Plaintiff herein later relocated to United States of America on or about the year ***2006*** where she lives todate. There is also no doubt that the 1st Defendant herein ***S M N***, sold this suit property in the year ***2013***, without the consent of the Plaintiff herein. Though a spousal consent was given during the

transfer of the sit property, it was not given by the Plaintiff herein but by one **A N G**, whom the Plaintiff disputed as her co-wife. It is evident that the suit property was sold to **S M**, the 2nd Defendant herein and his wife **E M M**. There is also no doubt that **S M** is the registered owner of suit property wherein he was registered on **30th April 2013**, and as provided by Section 26(1) of the Land Registration Act, he is deemed to be the absolute and indefeasible proprietor of the said parcel of land, though there are exceptions provided on when such registration can be challenged.

Further, there is no doubt that as a proprietor of the suit property their rights are protected under Sections 24 and 25 of the Land Registration Act. Section 24(a) of the said Act states:-

24. Subject to this Act:-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

Further the rights acquired by the said proprietor are not liable to be defeated except as provide by this Act. The said Section 25(1) provides as follows:-

25.(1) The rights of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-

a) to the leased, charges and other encumbrances and to the conditions and restrictions if any, shown in the register; and

b) to such liabilities, rights and interests as affect the same and are declared by Section 28 and to require noting on the register, unless the contrary is expressed in the register.

There is also no doubt that the 2nd Defendant has alleged in his Defence that he is an innocent purchaser for value without notice and the Plaintiff's suit should be dismissed.

The above being the undisputed facts, the Court finds that the issues for determination are:-

i. Whether the Plaintiff is legally married to the 1st Defendant.

ii. Whether the suit property is a matrimonial property.

iii. Whether the suit property was sold to the 2nd Defendant legally or whether the 2nd Defendant and his wife **E M M are innocent purchasers for value without notice.**

iv. Is the Plaintiff entitled to the orders sought in the Originating summons.

v. Who should bear the costs.

i) Whether the Plaintiff is legally married to the 1st Defendant.

From the available evidence there is no doubt that the Plaintiff and the 1st Defendant got married on **6th September 1980**, under the African Christian Marriage and Divorce Act Cap 151 as is evident from the certificate of marriage produced as exhibit No.1 by the Plaintiff. By virtue of the said marriage solemnized on **6th September 1980**, the Plaintiff and 1st Defendant are legally married. Their marriage being statutory marriage under Cap 151 is deemed to be a monogamous marriage and none of the party herein can contract another marriage before the dissolution of the existing marriage. Therefore, the

Plaintiff is the legal wife or spouse of the 1st Defendant and the 1st Defendant had no capacity to contract another marriage during the existence of his statutory marriage to the Plaintiff herein. Indeed both the Plaintiff and the 1st Defendant have acknowledged in their testimony in Court that they are, and still are husband and wife, and their marriage has not been dissolved.

ii). Whether the suit property is a Matrimonial Property?

There is no doubt that the suit property herein was purchased in **1987**. The Plaintiff herein produced an Agreement of Sale dated **7th April, 1987** between one **Samuel Njenga Masai** as the vendor and **S M N** (1st Defendant) and **E N M** as purchasers of parcel of land **LR No. [particulars withheld]**.

The 1st Defendant did acknowledge that indeed the suit property herein was purchased on **7th April 1987** for **Kshs.78,000/=**. The Plaintiff and 1st Defendant having married in **1980**, were still legally married in **1987**. The **1st Defendant** alleged that he purchased the suit property solely without the contribution of the Plaintiff. However, the Plaintiff in her testimony stated that after her marriage to 1st Defendant, she continued to work in various institutions among them **Farmers Choice** and was earning approximately **Kshs.15,000/=** per month and contributed to the purchase of this suit property. Indeed, the sale agreement shows that the purchasers were 1st Defendant and the Plaintiff herein. The Plaintiff and 1st Defendant also testified and acknowledged in their testimony in Court that after the purchase of the suit property, they put up a home on the suit property wherein they lived as a family. It is evident that the couple herein has four children. Therefore the house that was built on the suit property was their matrimonial home and the suit property herein is a matrimonial property. Section 2 of the Land Act defines '**matrimonial home**' to mean any property that is owned or leased by one or both spouses and occupied by the spouses as their family home. It is indeed not in doubt that the Plaintiff and 1st Defendant lived in the house built on the suit property from **1995**. The house on the suit property was therefore their matrimonial home. Though the Matrimonial Property Act came into effect in **2013**, it defines 'matrimonial home' as any property that is owned and leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property.

Further Section 6 of the said Act defines matrimonial property as follows:

“For the purpose 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 movable property jointly owned and acquired during the subsistence of the marriage.

There is no doubt that the suit property was acquired during the subsistence of the marriage between the Plaintiff and the 1st Defendant herein. As the Court observed earlier, the Sale Agreement shows that the suit property was purchased by both the 1st Defendant and the Plaintiff. Therefore, for all practical purposes, the suit property herein is a matrimonial property and the house erected on it was a matrimonial home.

Though the 1st Defendant denied that the suit property was a matrimonial property and that he acquired it solely without the contribution of the Plaintiff, it is not in doubt that at the time of purchase of the suit property the Plaintiff was his wife and she must have contributed to the well being of the family which is non-monetary and the Court has to take consideration of the same. The Court in the case of **C.M.N... Vs...A.W.M, ELC Nairobi No.208 of 2012 (2013) eKLR** held that:-

“However the legal landscape has since changed so that it is no longer a question of how much each spouse contributed towards the purchase of the matrimonial property which matters.

Essentially the foregoing legal provisions seek to change the previously prevailing positions in which the Court considered the level of financial contribution made by each spouse. The legal provision in force now require the Court to apply the principle of equality instead.....”

The Court has noted that the suit property was registered in the name of the 1st Defendant on **23rd October 2012**, long after the purchase. However the purchase of the same was done during the subsistence of the marriage. The Defendants submitted that the Plaintiff did not prove that she contributed by her labour through **productivity, upkeep and improvement or financially** to the acquisition of the property. It was the Defendants submissions that the Plaintiff did not acquire any spousal right over the suit property. However, this Court finds that the suit property was acquired during the subsistence of their marriage. Even if the Plaintiff financial contribution could not be quantified, being a wife, she must have contributed to the upkeep and well being of the family. As was held in the case of **C.M.N...Vs...A.W.N(supra)**, the Court will apply the principle of equality and finds that her contribution was equal to that of her husband and that is why her name featured in the Sale Agreement. Therefore the suit property is matrimonial property.

This Court therefore holds and finds that as provided by Section 93(2) of the Land Registration Act, even if the suit land was registered in the name of the 1st Defendant on **23rd October 2012**, it was still a matrimonial property and Plaintiff has spousal interest over the same. Section 93(1) provides:-

(1) Subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or, all the spouses—

(a) there shall be a presumption that the spouses shall hold the land as joint tenants unless

(i) a provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in, his or her own name only, or that the spouses are taking the land as joint tenants; or

(ii) the presumption is rebutted in the manner stated in this subsection; and

(b) the Registrar shall register the spouses as joint tenants.

Further, the 2nd Defendant submitted that the suit land herein is not the same as the suit property that was purchased by the 1st Defendant and Plaintiff in **1987**. However, the 1st Defendant did confirm in his testimony that the suit property is the same as the property he allegedly purchased in **1987** vide the Sale Agreement produced in Court by the Plaintiff. It however changed from **LR.No. [particulars withheld] to LR. [particulars withheld]**, after the issuance of the Title Deed. It is evident that the Sale Agreement stated that the purchaser had purchased a piece of land in **LR.No. [particulars withheld]**, but not the whole of **LR.No. [particulars withheld]**. It is possible that **Thome No.5 Ltd** sold the suit land to **Joreth Ltd** which subdivided the land into various parcels of land and these parcels of land acquired their district land references and thus the variance in the Reference number referred to in the Sale Agreement and the certificate of title issues in the **year 2012**. Indeed the certificate of title shows at the bottom that it is issued under Section 70 of Cap 281(now repealed) and is part substitution of Grant registered as **IR [particulars withheld]**. Then it is possible that the certificate of title herein was issued after subdivision and substitution of the grant **IR [particulars withheld]**. The 1st Defendant did not dispute in his evidence that this suit property is the one that was initially purchased in the year **1987**

ii) Whether the suit property was sold to the 2nd Defendant legally and/or whether the 2nd Defendant and his wife E M M were innocent purchasers for value without Notice.

The Court has found and held that the suit property herein was a matrimonial property. That being the case, the Plaintiff herein acquired an interest in that land in the nature of ownership in common of the land with the 1st Defendant herein. The Plaintiff's rights over the suit property were recognizable as if

they were registered. (Section 93(2) of the Land Registration Act.)

Further Section 28(a) provides that spousal rights over matrimonial property is an overriding interest which subsists and affect the land even if not noted on the register. Therefore, even if the Plaintiff was not registered as a proprietor, her spousal right was an overriding interest and the suit land was subject to the said interest. For that reason, any transaction on the suit property needed to have the consent of the Plaintiff. Section 93(3)(b) of the Land Registration Act provides as follows:-

“the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment”.

That being the position in law that before any disposition, the spousal consent was required, the Court will now have to determine whether the Plaintiff herein did give the said consent. It is not in doubt that the 1st Defendant did sell the suit property to the 2nd Defendant and his wife **E M**. Indeed the said 2nd Defendant and his wife are now the registered proprietors of the suit property. The Plaintiff alleged that as a spouse of the 1st Defendant, she did not give her consent for the sale of the suit property. The 1st Defendant did admit that the Plaintiff herein did not give her spousal consent but the same was given by one **A N G** *alias* **A N M**, who is allegedly married to the 1st Defendant. As the Court held, the marriage between the Plaintiff and 1st Defendant has never been dissolved and so the 1st Defendant had no capacity to contract another marriage. Certainly, **A N G** could not have been a legal wife to the 1st Defendant for purpose of giving spousal consent for disposition of a matrimonial property. Even if **A N G** gave spousal consent, that was deception on the part of the 1st Defendant as the said spousal consent was not given by his legal spouse. Therefore, the 1st Defendant disposed the suit land without the requisite spousal consent as envisaged by Section 93(3)(b) of the Land Registration Act.

That being the case, the consequence of such failure to have spousal consent is found in Section 93(4) of the said Land Registration Act which provides as follows:-

“If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3)(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition”.

Indeed the 1st Defendant deliberately misled the 2nd Defendant to believe that proper spousal consent had been given. Having found that the 1st Defendant misled the 2nd Defendant in believing that proper spousal consent had been given by 1st Defendant's spouse, then the subsequent disposition is void and the suit property was not legally sold to the 2nd Defendant.

Having now found that the suit property was not legally sold to the 2nd Defendant and his wife, are the two then innocent purchasers for value without Notice?

It is evident that the 2nd Defendant and his wife **E M M** purchased the suit property on **19th February 2013**, as is evident from the Sale Agreement attached to the Replying Affidavit of the 2nd Defendant. The suit property was purchased for **Kshs.20 million** and the purchase price was fully paid to the 1st Defendant. The 2nd Defendant is now the registered owner of the suit property as is evident from the Certificate of title produced in Court. The 2nd Defendant and his wife were registered as the proprietor on **30th April 2013**, before this suit was filed by the Plaintiff herein. Though the Plaintiff was granted some temporary orders by the Court, the suit property was already registered in favour of the 2nd Defendant by the time the said orders were issued.

The 2nd Defendant alleged that before the purchase of the suit property, he carried due diligence and noted that the suit property was registered in the name of the 1st Defendant and his wife and had no caveat

or encumbrances. Further, he visited the suit property and found the 1st Defendant and a lady introduced as **A N G**, the alleged wife of the 1st Defendant. The said couple confirmed that they were indeed selling the property and during the transaction, the said **A N G**, who had a waiting card for change of name to **A N M** gave her spousal consent. 2nd Defendant testified that he believed that the said **A N G** was the *bonafide* or legal wife of the 1st Defendant and had given the proper spousal consent. He therefore carried on with the transaction as a *bonafide* purchaser. After the payment of the purchase price and registration of the suit property to his name, he took possession of the property and that is where he lives with his family. Black Law Dictionary 8th Edition defines **bonafide ‘purchaser’** as:-

“One who buys something for value without Notice of another’s claim or property and without actual or constructive notice of any defects in or infirmities, claims or equities against the sellers title, one who has in good faith paid valuable consideration for property without Notice of prior adverse claims.”

As was submitted by the 2nd Defendant, a *bonafide* purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

From the available evidence, there is no doubt that the 2nd Defendant honestly intended to purchase the suit property which had been offered for sale by 1st Defendant. The 2nd Defendant paid the full purchase price and there was no evidence adduced that he intended to purchase it wrongly. As was held in the case of **Katende..Vs..Haridar & Co. Ltd by the Court of Appeal in Uganda**, for a purchaser to successfully rely on the *bonafide* doctrine, he must prove that:-

- a) **He holds the Certificate of title.**
- b) **He purchased the property in good faith.**
- c) **He had no knowledge of any fraud.**
- d) **The Vendor had apparent valid title.**
- e) **He purchased without notice of any fraud.**
- f) **He was not a party to any fraud.**

The Court has considered the exhibits produced by the 2nd Defendant and his Defence in Court. It is clear that he has a valid certificate of title and the 1st Defendant who sold the suit land to him had a valid title. It is apparent that the 2nd Defendant had no knowledge of the existence of the Plaintiff and that she had not given her spousal consent. Therefore the 2nd Defendant qualifies to be a *bonafide* purchaser for value without Notice. The 2nd Defendant is now the registered owner of the suit property and as provided by Section 26(1) of the Land Registration Act, he is deemed to be the absolute and indefeasible owner.

iv) Is the Plaintiff entitled to the prayers sought?

The Plaintiff had sought for various declarations. The Plaintiff had sought for a declaration that the suit property herein is a matrimonial property held in trust by the 1st Defendant for both of them. The Court had indeed found and held that the suit property herein was a matrimonial home held by the 1st Defendant and Plaintiff herein had spousal rights over the same which was an overriding interest as provided by Section 28(a) of the Land Registration Act.

In prayer no.2; that the Applicant enjoys 50% right and interest in the suit property. As a matrimonial property, the Plaintiff and the 1st Defendant were joint tenants or held ownership in common and the Plaintiff’s rights are protected by Article 45(3) of the Constitution which provides that:-

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

The Plaintiff and 1st Defendant are not seeking to dissolve their marriage. Be that as it may, their rights over the said property were therefore equal and the Plaintiff is entitled to prayer no.2.

Prayer no.3 of permanent injunction, it is evident that the suit land was sold to the 2nd Defendant who has been declared a *bonafide* purchaser for value without Notice. Therefore this prayer has been overtaken by events and Plaintiff is not entitled to it.

Prayer no.4 has also been overtaken by events as the Plaintiff did produce a copy of the certificate of title and the Defendants did declare that the suit property was sold for **Kshs.20,000,000/=** and 2nd Defendant paid the full purchase price. It was also admitted that spousal consent was given by one **A N G** who is not a legal wife of the 1st Defendant.

On prayer no.5, the Court has found and held that the 2nd Defendant was an innocent or *bonafide* purchaser for value without notice. Therefore the Sale Agreements between the Defendants herein cannot be declared null and void.

On prayer no.6, the Court has found that though the suit property was a matrimonial property and 1st Defendant illegally sold it to the 2nd Defendant, who is an innocent purchaser for value without notice and Section 80(2) of the Land Registration Act comes to his defence. The said Section provides:-

“The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

The 2nd Defendant is in possession of the suit land and he acquired it for valuable consideration.

On prayer no.7, the Plaintiff has asked the Court to compel the 1st Defendant to deposit the sale proceeds in Court forthwith. However, the 1st Defendant testified that after the sale of the matrimonial property, he purchased another commercial property in **Kitengela** where he earns **Kshs.115,000/=** per month. The 1st Defendant did not give the specifics of the commercial property that he purchased in **Kitengela**. It is evident that he purchased the said unspecified commercial property in **Kitengela** with the proceeds of the sale of matrimonial property which he sold illegally through deception that his legal wife had given spousal consent. The Plaintiff herein did not consent to the sale of the matrimonial property. Though this is not division of matrimonial property as the parties have not sought for dissolution of their marriage, the Plaintiff herein is equally entitled to the proceeds of the sale of their matrimonial property as provided by Article 45(3) of the Constitution. The Court therefore finds, holds and compels that monthly proceeds from the commercial property in Kitengela that was purchased by the 1st Defendant with the proceeds of sale of matrimonial property be deposited in Court forthwith until the

following conditions are met by the 1st Defendant.

i. 1st Defendant to forthwith disclose the particulars of the commercial property that he purchased in Kitengela without involving the Plaintiff herein and which he purchased with the proceeds from sale of the matrimonial property.

ii. After the said disclosure, the register wherein the said commercial property was registered be rectified to the effect that the said title shall now be held in the joint names of the Plaintiff and the 1st Defendant herein. The said rectification shall be in accordance with Section 80(1) of the

Land Registration Act as the current registration in the name the 1st Defendant solely was done through fraud.

On prayer no.8, since the Court has found and held that this suit is not dealing with dissolution of matrimonial property but protection of spousal interest, the Court will not order sale of the purchased commercial property in ***Kitengela***, but instead will direct that after the deposit in Court of the monthly rental income from the commercial property in ***Kitengela***, then the said proceeds be shared equally between the Plaintiff and 1st Defendant.

iv) Who should bear the costs of the suit?

Ordinarily, costs do follow the event. The Court has given several declarations herein. The Plaintiff and the 1st Defendant are husband and wife whose marriage has not been dissolved. The Plaintiff in her

Amended Originating Summons did not seek for any costs. As provided by Section 27 of the Civil Procedure Act, costs are granted at the discretion of the Court. Consequently, the Court finds that each party herein should bear his/her own costs.

On whether the Amended Originating Summons required verifying affidavit, the Court finds that the 1st Defendant did not submit on it. However, he had raised an objection during the hearing of this case. The Court will concur with the submissions made by the Plaintiff that an Amended Originating summons or Plaint need not be accompanied by a verifying affidavit.

Having now carefully considered the available evidence, the written submissions and the relevant provisions of law, the Court enters Judgement for the Plaintiff against 1st Defendant on the following terms: prayers:- ***No.1, 2, 7 and 8*** as elaborated in issue ***no.iv*** for determination.

However, the Court finds that prayers ***no.3, 4, 5 and 6 are not merited*** and the said prayers are ***disallowed*** accordingly. Further the Court finds that the Plaintiff has no claim against the 2nd Defendant and consequently, the Court dismisses the Plaintiff's claim against the 2nd Defendant accordingly with no orders as to costs. Further, the Plaintiff is at liberty to apply.

It is so ordered.

Dated, Signed and Delivered at Thika this 6th day of October 2017.

L. GACHERU

JUDGE

In the presence of

Mr. Mureithi holding brief for Mr. Chigiti for Plaintiff

No appearance for 1st Defendant

No appearance for 2nd Defendant

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Judgement read in open court in the presence of Mr. Mureithi holding brief for Mr. Chigiti for the Plaintiff and absence of the other advocates though served with Judgment Notice.

L. GACHERU

JUDGE

6/10/2017