



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 123 OF 2014 (FORMERLY H.C.C.C NO. 17 OF 2009) NBI

S W.....PLAINTIFF

VERSUS

F K.....1ST DEFENDANT

KENYA KAZI SERVICES LIMITED.....2ND DEFENDANT

J U D G M E N T

BACK GROUND:

1. The Plaintiff S W and Defendant F K were husband and wife, having gotten married on 07:04:06 via a Civil Marriage. They were blessed with a child called A M K.
2. The marriage has since broken down culminating in a litany of assorted litigation affecting the two parties. The fall out was around August, 2009. By then the parties were staying at a place called MAGNOLIA HILLS in Nairobi. A children's case no. 513 of 2009 Nairobi, appears to have been the first one to be filed by defendant (K) against Plaintiff (S) in August 2009. Plaintiff, (S) then filed the present suit as NO 131 of 2009 on 02:09:09, (later renamed HCCC NO.17 OF 2009 and finally it became ELC NO.123 OF 2014 NAIROBI). Defendant then filed a divorce cause No.141 OF 2009 on 02:09:09. In the mix were Criminal Cases against the Plaintiff the same being No. 5030/09 and 4589/09 both at Kibera law Court.
3. At the heart of this dispute is the **house No. 2 at Kitusuru, Magnolia Estate on property LR NO. [...] (here in after referred to as the suit property)**. Who owns this house and how the house should be utilized is the bone of contention. The acquisition of the suit property appears to have been initiated via a land sale Agreement dated 16:09:05 between Magnolia Hills Limited on one hand and plaintiff and 1st defendant on the other hand. This is the house where the two parties were residing before their fall out in August 2009. The second defendant is a company that was providing security services in the estate (Magnolia hills).

THE PLEADINGS:

4. The plaint was filed on 02:09:09, and there in, it is pleaded that on or about the year 2007 Plaintiff and the First Defendant acquired all that property known as L.R No. [...] Nairobi, Magnolia Estate, Kitusuru, House No. [...], Nairobi , that the same was registered in the joint names of the Plaintiff and the 1st Defendant and that this became their matrimonial home where they lived with their Son A K.

5. Plaintiff has further pleaded that being the wife of first Defendant, she is entitled to joint possession, access, use and quiet enjoyment of the suit property. She claims that she has been denied access and the use of the matrimonial home. Plaintiff has sued second defendant apparently because 2nd defendant has been contracted by the First Defendant to deny the Plaintiff access and use of the matrimonial home.

6. The orders being sought by the plaintiff are;

- i. A declaration that the Plaintiff is entitled to unlimited use, free access in and out of the suit property.
- ii. A mandatory injunction compelling the Defendants to give the Plaintiff free access to and use of the suit property.
- iii. A permanent injunction restraining the Defendants from harassing, evicting or in any other way interfering with the Plaintiff's free into and use of the quiet possession of the suit property.
- iv. Costs of the suit.

7. 1st Defendant filed his statement of defence and a counter claim on 11:12:12. He contends that while the Sale Agreement in respect of the purchase of the suit property was in the joint names of the Plaintiff and the 1st Defendant, the 1st Defendant solely paid the purchase price of the said property and that the property is yet to be legally transferred to the 1st Defendant. He avers that he is entitled to be registered as the sole owner of the suit land.

8. 1st defendant seeks the following orders;

- a. That the Plaintiff's suit against the 1st Defendant be dismissed with costs.
- b. A declaration that the suit land is not part of the matrimonial property of the Plaintiff and the 1st Defendant.
- c. A Declaration that the Plaintiff has no proprietary interest whatsoever in the suit property.
- d. A Declaration that the 1st Defendant is entitled to be registered as the sole owner of the suit property.
- e. Costs of the Counterclaim.

9. The 2nd Defendant filed its statement of defence on 05:10:09, where it is pleaded that the 2nd defendant had a security contract with Magnolia Hills Management, and not with the 1st Defendant.

2nd defendant has further pleaded that they were to provide security to magnolia estate which had 40 housing unit within a perimeter wall.

10. Such services were confined to manning the perimeter wall, the compound generally and the main gate and did not involve guarding the individual housing units or manning their gates doors and compounds. 2nd defendant also states that each housing unit, including the 1st defendant's house, have their own separate security arrangements within their fences/ enclosures which do not involve the 2nd Defendant.

11. 2nd Defendant contends that they were not involved whatsoever in the events complained of by the Plaintiff within or around the 1st defendant individual housing unit, which house was apparently being guarded by Securex Agencies Limited.

12. 2nd Defendant has avers that the suit against it is misconceived and misplaced, that they were

wrongly sued and that plaintiff's suit should be dismissed.

THE RECORD

13. I have found it necessary to capture the history of the dispute in the litigation arena as this will in the final analysis enable the court to frame the issues. It will also give a preview of how the dispute came to land before the Environment and land court.

The record of the Court is voluminous. It tells of the acrimonious nature of the relationship and the dispute between Plaintiff and 1st defendant. For the last 8 or so years, the trial has never taken off, but there have been applications and Counter applications filed by either of the parties though mostly filed by the plaintiff.

14. The Plaintiff was filed along with a notice of motion on 02:09:09. In that application, plaintiff was essentially praying to be restored back into the suit property. The orders sought are set forth as follows;

***“That an interlocutory mandatory injunction do issue compelling the Defendants and/or their employees and/or agents and/or assigns and/or anybody to grant the Plaintiff free access in and out of the matrimonial home situated on L.R No. [...] Nairobi, Magnolia Estate, Kitusuru, House No.[...], and that an interlocutory injunction do issue restraining the Defendants and /or their employees and/or agents and/or assigns and/or and/or anybody from evicting, harassing, intimidating or otherwise interfering with the Plaintiff's free access to, use and quiet enjoyment and possession of the matrimonial house situated on L.R No. [...] Nairobi, Magnolia Estate, Kitusuru, House No. [...], Nairobi pending the hearing and determination of this application inter-partes.*”**

15. Two days later on 4/9/2009, ex parte injunctive orders were given in favour of the plaintiff which orders read as follows;

“It is hereby ordered that interim injunction be and is hereby granted restraining the Respondents , their employees, agents ,or anybody from interfering with plaintiffs access to enter use and have quiet and full enjoyment of the matrimonial house as well as full access to the child of the spouse.”

16. By this time, the 1st Defendant had filed the children’s case No. 513 of 2009 at Nairobi as a plaintiff, whereas the plaintiff in the present suit was the defendant. The 1st defendant obtained Ex parte orders to the effect that:-

“the Status Quo as regards the child's custody be maintained until 02:09:09 and that Defendant Respondent (present Plaintiff) was restrained from removing the child from the plaintiff's custody and jurisdiction of this Court”.

17. In quick response Plaintiff herein had filed an application of 28:08:09 to stay the Ex parte orders from the Children’s Court given a 04:08:09.

18. Plaintiff filed another application of 25:09:09 in this suit. This time round, she was praying for mandatory injunction to issue compelling the Defendants and/or their employees and/or agents and/or assigns and/or anybody to grant the Plaintiff free access onto the suit land.

19. It appears that the three application in this case (the one of 02:09:09, 10:09:09 and that of 25:09:09) were dealt with simultaneously in a ruling written by Judge Dulu on 20:05:10. The Judge dismissed the application of 02:09:09 and stated that the dismissal had rendered the other applications superfluous.

20. Plaintiff was back in Court via an application of 022:06:10 where on 25:06:10 she obtained orders of;

“a temporary injunction restraining defendant by themselves or employees, servants, agents

or otherwise from interfering with Plaintiff's free access in and out of the matrimonial home situated on L.R No. [...] NBI Magnolio Estate Kitusuru home No. 2 for 14 days".

21. Plaintiff had intimated to the Court that she wanted to appeal against the decision to dismiss her two applications, the one of 02:09:09 and the one of 25:09:09. A notice of appeal had been filed on 3:06:19. Interim orders were extended thereafter and Judge Dulu J delivered his ruling in respect of that application of 22:06:10, where he stated thus:

"Having considered the facts and circumstances of this matter which is between family members, I am of the view that an interim injunction is justified pending appeal. It will avert undue hardship to the Plaintiff, and will also avoid the possibility of the decision in the appeal being rendered nugatory.

In the result, I allow the application and grant prayer 4 and 5 pending appeal, provided the Plaintiff remains peaceful and avoids being violent to the 1st Defendant or their child. In default of the above condition the injunction hereby granted will automatically lapse and be of no effect".

22. It is quite apparent that the orders from the children's court and the ones issued herein were at variance. On one hand the status quo given by the children's court meant that the child was in custody of the 1st defendant whereas the injunctive orders given herein had authorized the plaintiff to go back to the suit property pending an appeal. It is not surprising that the situation and the relationship between the plaintiff and first defendant became more volatile and this was manifested in the emergence of more litigation.

23. 1st defendant filed divorce proceedings on 25/09/09 in Divorce Cause No. 14 of 2009 Nairobi. This case has been finalized with a decree nisi being issued on 22:12:14 whereby the Court ordered inter alia ;

- 1. "That the marriage between petitioner and Respondent celebrated on 07:04:06 is dissolved.**
- 2. That the Petitioner do provide Ksh. 50,000 per month to cater for decent place for the Respondent to see the child until the parties file affidavit of means in Court on application of parties to determine alimony."**

24. The divorce Court had noted that;

"the issue of the child of the marriage has been the subject of the children's Court case No. 513 of 2009 where custody of the child is with Petitioner, and Respondent is to have visitation Rights ."

25. The children's Court in case No. 513 of 2009 did make final orders on 10:08:10 to the effect that:

- 1. "Plaintiff be and is hereby granted custody care and control of A M K.**
- 2. That the Defendant do have access in the alternative weekends on Saturday between 10: 00 am to 5:00 pm and Sunday 10:00 am to 5:00 pm and Sunday 10:00 am to 5:00 pm during school days.**
- 3. That during holidays, the defendant do have the first and the last week access between 12:00 am to 5:00 am everyday ".**

26. Plaintiff herein was arraigned in a Kibera Court Case No. 5030 of 2009 whereby she was charged with offence of assault C/Sec. 251 P.C The offence had apparently been committed on 10:10:09, whereby the complainant is the present 1st defendant. Plaintiff was convicted on 19.11.10 and was sentenced to serve 2 months imprisonment for the offence of assault in count one. There was also another count of

resisting arrest (count two), where she was fined Ksh. 10,000 or 30 days imprisonment. It also emerged during this trial that the plaintiff had also been convicted in Kibera court criminal case no. 4589 of 2009 for a similar offence of assault. It has emerged that these criminal cases arose while plaintiff was trying to access the suit property as per the court order.

27. This matter was mentioned before Judge Waweru on 06:02:14 for Pretrial directions. It is then that Mr. Ouma appearing for the Plaintiff addressed the Court stating as follows: -

"This is a land dispute between a wife and a husband (Plaintiff and 1st defendant but with divorce proceedings pending".

Khaleke for 1st Defendant was in agreement.

The Judge then transferred the matter to the ELC and that is perhaps how the matter came to acquire another number ELC NO 123 OF 2014.

28. The trial commenced with each side giving a brief opening statement. Mrs Oduol for the Plaintiff set out Plaintiff's case stating that on 16:09:05 a lease agreement was signed with Plaintiff and 1st Defendant as lessee for the suit property. That on 07:04:06, Plaintiff and Defendant got married. That in year 2009, a dispute arose between the Plaintiff and the 1st Defendant regarding plaintiff's access to the house and hence the suit was filed on 02:09:09. Mrs Oduol stated that they were seeking to enforce the rights of the plaintiff as a lessee since the property was a joint Tenancy."

29. On the side of 1st Defendant, Mr. Hasake stated that the issue in dispute is with regard to the use and ownership of the suit property, whether Plaintiff became a joint tenant by virtue of her being a wife of 1st defendant. 1st defendant contends that this was not matrimonial property as the purchase price was fully paid by 1st defendant. Further, Mr. Haseke stated that the property had not yet been registered in the joint names of the two parties and that 1st Defendant was to be registered as the sole owner.

30. For the 2nd Defendant, it was stated by Mr. Kimeru that 2nd Defendant has no interest in the suit property and that 2nd Defendant only had a contract with Magnolia ltd where the suit property is located.

PLAINTIFF'S CASE.

31. Plaintiff testified that she got married to defendant on 07:04:06 through a Civil marriage. She was 19 years old. She states that defendant bought for her the suit property as a gift for her in order to convince Plaintiff's grandfather that defendant was a suitable suitor. She says that they entered into a sale agreement and they bought the house long before they were married. She then added that she is the one who scouted for the land to build the house and so they constructed the same stone by stone.

32. They stayed in the house (suit property) for 3 years then everything went awry. On 25:08:09 she went to their house only to find that the entry was blocked by employees of 2nd defendant who were apparently holding her photograph. They said they had instructions not to allow her into the estate. She had been running a business and so she decided to check on it. It was closed. Then Police swarmed on her claiming that the vehicle she had was a stolen one and that she was required to surrender it at the Gigiri Police Station.

33. From then onwards, it became very difficult for her to access the house even with a Court Order. When she finally managed to access the house by virtue of a court order, she found that defendant had hired guards and other men. She could not access the Master Bedroom. She had to occupy her son's room.

34. Plaintiff further testified that after she was charged in the Kibera Court, she was in fear of going back to the suit property. She maintains that her and 1st defendant both own the suit property and so she should not be stopped from accessing the house. Her statement dated 19:05:15 was treated as her evidence in chief in addition to the oral evidence she gave before the Court.

1ST DEFENDANT'S CASE.

35. 1st Defendant states that the genesis of the acrimony is a trip his wife (Plaintiff) went to Watamu, a holiday destination in Kenya's coastal area. Plaintiff had gone with the couple's son and the Nanny. While at Watamu, Nanny alerted 1st defendant that Plaintiff was plotting to kill him (1st Defendant) and that Plaintiff was staying with another man. Defendant then travelled to Watamu and somehow managed to retrieve their Child (A). From henceforth things took a turn for the worse. Defendant immediately filed a child custody case in Nairobi (No. 513 of 09). 1st defendant also prevented plaintiff from accessing the suit property.

36. 1st defendant avers that the basis of barring Plaintiff from accessing the suit property was because he felt that him and the child were in danger. The danger became real on 4: 09:09 when 1st defendant allowed her entry into the suit property. Plaintiff threatened to decapitate the Nanny. She also threatened defendant with Mungiki. She then assaulted a guard and eventually she assaulted defendant hence the Kibera Criminal Cases. He further stated that Plaintiff brought witchcraft into the home, that she at some point disappeared with the child and there is a time she removed property from the house.

37. 1st defendant further stated that they are now divorced and in the divorce case, he was required to make a monthly payment of Ksh 50, 000 for plaintiff to get a decent place to live and for the child to visit her there. He also says that since 2012, Plaintiff has never gone back to the house.

38. 1st defendant states that he is the one who bought the suit property and that Plaintiff never contributed anything. He also says that the house was constructed by a developer whereby in June, 2007 he was given possession of the house.

39. 1st defendant avers that in light of the restricted access to the child order, that they are now divorced and in view of the fact that Plaintiff has demonstrated violent behavior, then the Court should not compel him to receive her in the suit property.

40. 1st defendant is seeking for orders to be allowed to register the house in his name.

2ND DEFENDANT CASE

41. Mr. Henry Bwire testified for and on behalf of 2nd Defendant, where his position is that of Cooperate Affairs Manager. He adopted his statement recorded on 24:04:15 as his evidence. He says that 2nd defendant had no contract with Plaintiff and that each house unit was separate from the others. He further stated that 1st defendant had engaged his own security called K.K. 1st Defendant had apparently written to 2nd Defendant requesting that Plaintiff be barred from entering the premises because 1st defendant felt his life and that of the child were in danger. Nevertheless, plaintiff had forcefully gained entry.

42. He concluded his testimony by stating that 2nd defendant has no interest in the suit property but that clients do express their security concerns to them.

ANALYSIS AND DETERMINATION

43. I have considered all the evidence tendered herein, the submissions and cited authorities, and I find it necessary to frame the issue as follows;

44. Issues not in dispute.

a. It is not disputed that Plaintiff and Defendant were married in a Civil Marriage on 07:04:06 that they lived as husband and wife for some time on the suit property, that they have a son called Adam and that their fall out occurred sometime in August, 2009.

b. The existence of the Sale Agreement dated 16:09:05 is also not disputed and that 1st defendant is

the one who wholly financed the purchase of the suit property.

c. That the suit property is house no. [...] within a gated community known as magnolia estate in Kitsuru Nairobi and that the same is not yet registered.

d. Further, the existence of the divorce case, the children's case and the criminal cases at Kibera appear not to be disputed though Plaintiff states that she is not in agreement with the decision in the children's case and the Criminal Cases. She however respects the decision in the divorce petition.

e. It is also quite apparent that there exists an intense acrimonious relationship between the two parties, dating from August 2009 to date. The two parties Plaintiff and 1st Defendant are now divorced and they no longer stay together.

45. Issues in dispute;

1. Whether Plaintiff is entitled to joint possession access, use and quiet enjoyment of the suit property.

2. Whether plaintiff has a cause of action as against the second defendant.

3. Whether 1st defendant is entitled to be registered as the sole owner of the suit property.

46. **Is the Plaintiff entitled to joint possession, access, use and quiet enjoyment of the suit property?**

47. I find that plaintiff's claim is anchored on three pillars going by her pleadings, and her evidence:-

1. That the suit property was gifted to her by 1st defendant.

2. That the suit property is matrimonial property.

3. That by virtue of the Sale Agreement of 16:09:05, Plaintiff and defendant are joint tenants.

48. ***Was the property gifted to Plaintiff by 1st defendant?***

In her testimony, Plaintiff stated as follows: -

"K bought for me the house, Magnolia Hills to try to convince my grandfather that I was happy with the love of 1st defendant"

49. There is no tangible evidence to support this claim. The house had long been completed by the time the couple had a fall out in August 2009. The agreement to buy the house had been made four or so years earlier in September 2005. How comes that no steps had been taken to accomplish the transfer of the house to plaintiff if indeed the house had been gifted to her by the 1st defendant? I can only conclude that there was not the slightest intention on the part of 1st Defendant to gift the house to Plaintiff.

50. For one to acquire proprietary interest in the suit property as a donee from a donor, then there ought have been an instrument of registration to that effect. **Section 37** of the **Land registration Act** provides that;

“ a proprietor may transfer land, lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve. A transfer is completed by filing the instrument and registration of the transferee as proprietor of the land, lease or charge. ”

This current law echoes the law applicable at the material time which was section 85 of the Registered lands act, cap 300 (now repealed).

51. In Alice Waguama Muriithi & Another Vs. Allan Njue Rubicho ELC NO. 49 Of 2014 (Kerugoya) ,Judge Boaz Olao observed that;

“The respondent may have promised the appellants the suit land after he received money from them, however, he did not do anything towards fulfilling that promise as required in law.... It is clear from the evidence herein that even if there was an intention by the respondent to grant the

Appellants the suit land as a gift, which the respondent has denied, that intention or promise was not perfected as required in law. The appellants cannot therefore mount any valid claim on the basis of a gift.”

52. The Judge had gone ahead to quote *HALSBURY LAWS OF ENGLAND 4th EDITION at paragraph 67*, where it is stated as follows with respect to incomplete gifts:-

“Where a gift rests merely in a promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the Court will not compel the intending donor, or those claiming under him, to complete and perfect it except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise”.

53. This is a situation where even the 1st defendant is not the registered proprietor of the suit property. I conclude that plaintiff’s case cannot succeed on the basis that the suit property was a gift to her from the 1st defendant.

54. **Is the suit property a matrimonial property?**

The Sale Agreement is dated 16:09:05. The couple were married on 07:11:06. It follows that the acquisition of the house was before the couple got married. The undisputed fact is that 1st defendant paid the entire purchase price. Going by the decision in **Peter Mbura Gicharia V. Priscilla Njeri Gicharia [2007] e KLR**, then it is pertinent for a claimant for matrimonial property to show their actual contribution in acquisition of the property. Plaintiff has contributed nothing.

55. Further, I find that this is a case whether the two parties can no longer stay under one roof. They are divorced. There is a decree Nisi dated 22/12/2014 in the Petition No. 141 of 2009. One of the orders in the said decree is that:-

“The Petitioner do provide Kshs. 50,000 per month to cater for decent place for the Respondent to see the child until the parties file affidavit of means in Court in the application for determination of alimony.....”

This order envisaged a situation whereby the parties would not be staying under one roof but where the plaintiff would be able to get accommodation elsewhere. This court (the ELC) is a court of equal status as the High Court. I cannot therefore purport to grant orders that would not be in tandem with the orders in the divorce cause. It is not lost to this court that the havoc that befell the parties in the month of September 2009 which gave rise to criminal charges against the plaintiff were primarily occasioned by orders emanating from two different courts.

56. In the Children’s Case No. 513/09 the orders given on 12:08:10 were that the current 1st defendant was granted custody, care and control of the couple’s child and there is on elaborate procedure on how and when Plaintiff is to see the child. Again the Court's orders envisaged a situation where the two parties would not be staying under one roof.

57. This Court is alive to the fact that a children’s Court gives orders that are in the best interest of the child. So far, it appears the decision from the children’s court was not appealed. This Court would be hesitant to grant contrary orders or orders that would fly against the best interest of the child (A).

58. There is also the Criminal Charges in Kibera 5030/09. Plaintiff was convicted of assault charges having assaulted defendant herein. She had a previous conviction on assault charges in Criminal Case No. 4589/09. The trial Court in Cr. Case No. 5030/09 stated that:-

"The previous conviction and the current conviction of the accused in count 1 clearly manifest that the accused has a violent tendency....."

No appeal was lodged in respect of this judgment and the conviction thereof is still valid

59. The three cases (the divorce case, the children case and the criminal cases) as well as the acrimonious relationship between the plaintiff and 1st defendant are a clear indication that the parties cannot stay under one roof. It is therefore not tenable for the plaintiff to get the orders of access to and use of the suit property as prayed in the plaint.

60. *Is Plaintiff a joint tenant by virtue of the Sale Agreement of 16th September 2005?*

Who is a joint Tenant? Plaintiff's submissions are that she is entitled to the suit property as a joint tenant. The court has been referred to the first schedule on page 21 of the sale agreement where it is stated that **"F M K and S W (as joint tenants) for the purposes hereofThe lessee shall, where the context so admits include the Lessee's representatives, heirs and permitted assigns"**. It is further submitted that the Agreement itself made reference to plaintiff and the 1st defendants as the purchasers of the suit property.

61. In support of the joint tenancy claim, plaintiff has submitted the following authorities.

- ELC No. 915 Of 2012, Isabel Chelangat Vs. Samuel Tiro Rotich and Others where it was stated inter alia that **"the issue in this suit squarely touches on the rights of joint owners of land. The other numerous depositions which relate to the matrimonial and family differences are to me side shows not related to the issues in this suit. The matter herein boils down to the rights of joint tenants."**
- Nielson Jones vs. Feden 1974 (3) ALL E.R 343 where it was held that, **"severance could only be effected by a disposition by one of the joint owners amounting at law or in equity to an assignment of a share of that owner or by mutual agreement between the joint tenants"**.

62. The applicable law on joint tenancy as at that time the agreement was made was Section 101 of the Registered lands Act, Cap 300 (now repealed) where it was provided that:-

"An instrument made in favour of two or more persons and the registration giving effect to it shall show whether those persons are joint proprietors or proprietors in common...."

63. The features of what a joint Tenancy is were clearly set out in Isabel Chelanga case (supra) where Sila J stated that;

"the four unities that, must be present in a joint tenancy are;

- 1. The unity of possession**
- 2. The unity of interest**
- 3. The unity of title**
- 4. The unity of time".**

This decision has been widely quoted in plaintiffs submissions. The pertinent question to ask is, whether

the aforementioned features are found in the present case?

64. Page 11 clause 11 of the Sale Agreement is headed EXECUTORY AGREEMENT where it is stated;

“This agreement is an Executory Agreement only and shall not operate or be deemed to operate as a lease of the house”.

It follows that the sale agreement cannot form the basis of the claim for joint tenancy.

65. Going by the provisions of section 101 of the then applicable law (RLA), it is the registration of the lease where the aspect of joint tenancy ought to have been reflected. There is certainly no **UNITY OF TITLE** in the present case. I am therefore in agreement with the submissions of the 1st defendant that Isabel Chelanga case (supra) relied on by the plaintiff is distinguishable with the present case. In the Isabel Chelanga case, the plaintiff and her husband were already jointly registered as proprietors of the suit property.

66. I also find that the claim of joint tenancy via registration of the suit land is not pleaded by the plaintiff. All along plaintiff has been aware that the suit property has never been registered in favour of either herself or 1st defendant yet she didn't lodge a claim for such registration. What she has prayed for in the plaint is for joint possession and the unlimited access to the suit property as well as injunction to prevent defendants from evicting her from the suit land. Its trite law that evidence follow the pleadings. Whereas an interest in land may arise by virtue of possession, it is the registration of title that bestows upon a claimant the absolute and indefeasible rights of proprietorship in land in accordance with section 26 of the Land Registration Act.

67. Conclusion on plaintiffs claim against first defendant.

I find that the Plaintiff is not entitled to joint possession, access and use of the suit land, and her claim as against 1st defendant fails for the reasons aforementioned herein.

68. Does the plaintiff have a cause of action against second defendant?

The evidence on record is that second defendant was providing security services in magnolia estate, having been contracted to do so by magnolia hills management. This is evident from the documents produced as exhibits for second defendant, (copy of guard contract). Further, the person who was introduced to the 2nd defendant as owner of the suit land by the estate management is 1st defendant. I am therefore in agreement with the submissions made on behalf of 2nd defendant to the effect that it was not necessary to enjoin 2nd defendant as a party to this suit. Plaintiff's suit as against 2nd defendant fails.

69. Whether 1st defendant is entitled to be registered as the sole owner of the suit property.

The undisputed fact is that 1st defendant is the one who paid the entire amount for the suit property. He has given evidence to the effect that he is a foreigner and he was usually absent, that is why he decided to engage the plaintiff to take care of his interest.

70. The plaintiff's submissions are that 1st defendant is not entitled to the prayers in his counterclaim even if he is the one who paid the entire purchase price. It has further been submitted that plaintiff was not expected to contribute anything towards the purchase and that on the basis of joint tenancy, there should be no severance of the suit land.

71. Plaintiff has cited the case of Yogendra Purshotam Patel Vs. Pascalla Mireille Baksh and 2 Others (2011) Eklr where it was held that;

“where two or more persons purchase property in their joint names or transfer property into their joint names without making an express declaration as to their beneficial interests

and contribute the purchase money or property in equal shares,, they hold the property as joint tenants with benefits of survivorship both at law and in equity.....if they contributed purchase money or property in unequal shares, whether the property is purchased in the name of one or in their joint names, there is a tenant in common between them in equity”.

72. Three pertinent issues do arise from the Yogendra case;

1. Beneficial interest arising out of contribution in the purchase suit property.
2. Evidence of intention of the parties.
3. Circumstances surrounding the entire transaction.

73. On the issue of beneficial interest, plaintiff contributed nothing. The agreement did not provide on how the payments for the suit land were to be made. By virtue of having wholly paid the purchase price of the suit property, 1st defendant acquired a beneficial interest in the suit property. An agreement is hence not enough to accomplish purchase. The actual purchase has to be done through payment of consideration.

74. The court has had to infer the intention of the parties from what happened after the agreement was made. The agreement was made in September 2005, the couple were together peacefully for the next four or so years and they even got married. There is however not the slightest evidence to show that the parties attempted to have the property registered jointly in their names during this period of peace.

75. As for circumstances of this case, it is clear that 1st defendant is a foreigner. I have no reason to doubt that he was usually absent as he was working outside this country at some point.

76. There being no dispute as to who actually purchased the suit property, then I am inclined to find that 1st defendant ought to be registered as the proprietor of the suit property. His counterclaim hence succeeds.

77. **CONCLUSION**

I hereby make the following orders;

- 1. Plaintiff's suit as against both defendants is hereby dismissed with costs to both defendants.**
- 2. A declaration is hereby issued that the property known as L.R. [...] Magnolia estate, Kitusuru House no. [...] is not matrimonial property for plaintiff and 1st defendant.**
- 3. A declaration is hereby issued that plaintiff has no interest whatsoever in the above mentioned property.**
- 4. A declaration is hereby issued that 1st defendant is the sole owner of all that property known as L.R.[...] Nairobi Magnolia estate, Kitusuru House no. [...].**
- 5. An order is hereby issued for 1st defendant or his appointee to be registered as the proprietor of the property known as L.R.[...] Nairobi Magnolia estate, Kitusuru, House no. [...]**
- 6. No orders as to costs in respect of the counterclaim.**

DATED SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2017

HON. L.N. MBUGUA

ELC JUDGE

IN THE PRESENCE OF:-

- 1. Obuya for Plaintiff**
- 2. Kaseke for 1st Defendant**
- 3. Miss Kimaru for 2nd defendant**