



REPUBLIC OF KENYA

IN THE E.L.C COURT OF KENYA AT EMBU

E.L.C. 107 OF 2014 (ORIGINATING SUMMONS)

(FORMERLY 116 OF 2014)

**IN THE MATTER OF SECTION 28, 71, 72, 73, 76, 77 80 OF THE LAND REGISTRATION ACT
2012**

J N N.....APPLICANT

VERSUS

E W K.....1ST RESPONDENT

H M N.....2ND RESPONDENT

JUDGEMENT

1. By an originating summons dated 7th May 2014 and filed on 9th May 2014 2014, under Order 37 Rules 1, 7 and 8 of the Civil Procedure Rules and section 38 of the Limitation of Actions Act (Cap 22) the Applicant sought determination of the following questions;

- a. *Whether at all material times land parcel No. [particulars withheld] was matrimonial property jointly owned by the Applicant and the 1st Respondent.*
- b. *Whether the Applicant had spousal rights over land parcel No. [particulars withheld] prior to its sale by the 1st Respondent to the 2nd Respondent on 13th March 2014.*
- c. *Whether the 1st Respondent ought to be deemed to have been registered as the proprietor of land parcel No. [particulars withheld] in trust for the Applicant prior to the said sale on 13.03.14.*
- d. *Whether the restrictions and/or caution placed against land parcel No. [particulars withheld] by the Applicant were wrongly and/or fraudulently removed to pave way for the sale dated 13.03.14.*
- e. *Whether the sale of land parcel No. [particulars withheld] to the 2nd respondent by the 1st Respondent was fraudulent.*
- f. *Whether the said sale and all consequential transactions thereto should be declared unlawful.*
- g. *Whether the Applicant had otherwise acquired a beneficial and registrable interest against land parcel No. [particulars withheld] by virtue of adverse possession.*

h. *Whether the honorable court should order the rectification of the register by cancellation of the 2nd Respondent as the registered owner of land parcel No. [particulars withheld] and registration of the Applicant as the lawful owner thereof.*

i. *Whether the Applicant had acquired any other interest over land parcel No. [particulars withheld] by any other rights provided under written law.*

2. The said originating summons was supported by the Applicant's own affidavit sworn on 7th May 2014 and one annexure which is a copy of the green card for *Title No. [particulars withheld]* (hereinafter known as the "suit property"). It was stated in the said affidavit that the 1st Respondent was his wife and that they had jointly purchased the suit property in 1999 even though it was registered solely in the name of the 1st Respondent. It was further stated that they jointly built a matrimonial house thereon where they resided together until 2013 when the 1st Respondent moved out of the house.

3. It was the Applicant's case that although the 1st Respondent had agreed to have the suit property registered in their joint names, she failed to do the needful with the consequence that he placed a caution against the property in 2013. He stated further that the said caution was illegally removed by the Land Registrar in consequence of which he lodged a complaint with the Registrar. A restriction was consequently entered in the register on 27th November 2013 which was later on illegally removed on 11th March 2014 in consequence of which the suit property was transferred to the 2nd Respondent.

4. The Applicant further stated that he had lived on the suit property for over 12 years and extensively invested in it. He asserted that he had acquired a beneficial and equitable interest in the suit property by virtue of his contribution towards its acquisition and by reason of adverse possession. He asserted that the 1st Respondent's initial registration as sole proprietor in 2000 was fraudulent and that the 2nd Respondent had not acquired a good title because he was privy to a fraudulent conspiracy to effect change of ownership.

5. The 1st Respondent filed a replying affidavit sworn on 17th June 2014 and a further replying affidavit sworn on 31st October 2014 in opposition to the Applicant's said originating summons. It was the 1st Respondent's case that she solely purchased the suit property from her own resources and later on obtained a loan to enable her develop the said property. She denied the existence of a marriage between her and the Applicant and stated that they only had a relationship which resulted into the birth of her second born child. She further stated that this relationship ended when the Appellant failed to provide for the maintenance of the child.

6. The 1st respondent stated that she was a Public Officer working as a Livestock Officer and that she had obtained a loan and sold some other property (i.e. *Title No. [particulars withheld]*) in order to finance and develop the suit property. She annexed to her further affidavit copies of her pay slip, a letter of offer of a bank loan and documents of membership of Aembu Farmers' Co-operative Society among other documents to demonstrate that she had the resources to acquire and develop the suit property. She also annexed copies of the sale agreement and title deed for the suit property.

7. It was the 1st Respondent's case that she moved out of the suit property and later on sold it to the 2nd Respondent after constant harassment by the Applicant. She further stated that the caution and restriction placed against the suit property were lawfully removed after the Applicant failed to respond to the relevant notice from the Land Registrar. She annexed to her further affidavit a copy of a notice dated 20th January 2014 from the Land Registrar.

8. The 1st Respondent further stated that upon removal of the restriction in 2014 she transferred the suit property to the 2nd Respondent who had bought it for Kshs 1,000,000/- in consequence of which he was issued with a title deed. She also denied that the Applicant was permanently in occupation of the suit property and stated that he would only visit from time to time for the purpose of harassing her. She

therefore urged the court to dismiss the originating summons dated 7th May 2014.

9. On the other hand, the 2nd Respondent filed a replying affidavit sworn on 17th June 2014 and a further replying affidavit sworn on 28th October 2014. He stated that he was the current registered proprietor of the suit property having lawfully bought it from the 1st Respondent for valuable consideration on 23rd August 2013. He further stated that he took possession in April 2014 and that he evicted the Applicant from the suit premises in May 2014 after he failed to heed an eviction notice he had issued earlier on.

10. The 2nd Respondent denied that his acquisition of the suit property was fraudulent. He stated that the Respondents followed due process including obtaining consent to transfer from the relevant Land Control Board. He annexed to his further affidavit copies of the relevant sale agreement, title deed and the notice to vacate issued to the Applicant. He, therefore, urged the court to dismiss the Applicant's said originating summons as lacking merit.

11. When the Applicant's said originating summons was listed for hearing on 29th May 2017, the parties agreed to dispose of the same through affidavit evidence and the witness statements on record. It was further agreed that the Applicant would be at liberty to file witness statements in addition to the supporting affidavit already on record within 21 days. It was also agreed that the parties would file and exchange their respective written submissions within 45 days. The matter was then fixed for mention on 13th July 2017 to confirm compliance and fix a judgement date.

12. When the suit was listed for mention on 13th July 2017, none of the parties had filed written submissions. The Respondent's counsel informed the court that she could not file her submissions because the Applicant had not filed and served his submissions to enable her respond thereto. The Applicant's advocate was absent on that day. The court thereupon extended the time for compliance by a further 30 days and fixed the suit for further mention on 20th September 2017 to confirm compliance and fix a date for judgement.

13. Come 20th September 2017, again none of the parties had filed their submissions. The Respondent's advocate again requested for more time to file her submissions. The Applicant's advocate was absent once again. The court thereafter fixed the matter for further mention on 11th October 2017.

14. On 11th October 2017, the Respondent's counsel confirmed having filed her written submissions. However, the Applicant's counsel was absent once more. The court, therefore, fixed the suit for judgement on 7th December 2017 and directed the Respondent to serve notice of judgement upon the Applicant's counsel.

15. The court has considered the Applicant's supporting affidavit, the Respondents' replying affidavits and further replying affidavits and the witness statements filed on behalf of the Respondents herein. The court has also considered the Respondents' written submissions herein.

16. The Applicant framed ten (10) questions for determination in his originating summons dated 7th May 2014. The court shall proceed to determine each of those questions in light of the affidavit evidence and other material on record. The 1st and 2nd issues are closely related in that they deal with the question of whether or not the suit property was matrimonial property and if the Applicant had acquired any spousal rights thereon. The court shall deal with the two questions together.

17. In order for the court to determine those questions in favour of the Applicant, the court must be satisfied firstly, that Applicant and 1st Respondent were spouses within the meaning of the law. Secondly, the court must be satisfied that the Applicant contributed either in a monetary or non-monetary manner towards the acquisition, development or improvement of the suit property. See *NBI Civil Appeal No. 75 of 2001, Echaria Vs Echaria [2007] eKLR*. In the said case, the Court of Appeal of Kenya held, *inter alia*, that;

“...In Kivuitu’s case, parole evidence was received which justified the finding that the contribution was equal. That case did not lay down any general principle of equality applicable to all property disputes between husband and wife as later confirmed in the case of *Essa V. Essa* (supra). Where the disputed property is not so registered in the names of the spouses but in the name of one spouse, the beneficial interest of each spouse would ultimately depend on their respective proportions of financial contribution either direct or indirect towards the acquisition by the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim “Equality is equity” while heeding the caution by Lord Pearson in *Gissing V. Gissing* (supra)...”

18. Under section 2 of the Matrimonial Property Act 2013, a spouse is defined to mean “a husband or a wife.” Further, section 7 of the said Act provides as follows regarding ownership of matrimonial property;

“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

19. So, has the Applicant provided sufficient evidence on record to demonstrate the existence of marriage between him and the 1st Respondent? The court has examined the Applicant’s supporting affidavit sworn on 7th May 2017. Apart from a bare statement that the 1st Respondent was his spouse, there is absolutely no evidence of the existence of any marriage between the two parties. There is no mention of when, where and how they got married. There is no indication of the whether the marriage was civil, customary, Islamic, etc. The mere fact that the Applicant sired the 2nd born child of the 1st Respondent is no evidence of a marriage. That may just have made him a sperm donor and nothing more. The court, therefore, finds no evidence of the existence of a marriage between the Applicant and the 1st Respondent.

20. The second issue relates to the Applicant’s contribution towards the acquisition of the suit property. Apart from a bare statement that the Applicant was employed as a driver in the PSV sector, there is no material evidence of his contribution. There is no disclosure of what he was earning as his income, how much his savings were and how much he contributed towards the acquisition and development of the suit property.

21. Section 2 of the Matrimonial Property Act, 2013 defines contribution as follows:

“Contribution means monetary and non-monetary contribution and includes:

a) Domestic work and management of the matrimonial home;

b) Child care

c) Companionship

d) Management of family business or property

e) Farm work

The court is far from satisfied that there is sufficient material on record upon which it may concluded that the Applicant made a “contribution” as contemplated in law.

22. There are other intriguing aspects of this case which make it highly improbable that the Applicant made a contribution towards the acquisition or development of the suit property. The Applicant does not indicate in his affidavit for how much and from whom the suit property was bought. He does not even appear to know the year in which the suit property was bought. Whereas the Applicant claimed that the suit property was purchased in 1999, the record indicates that the suit property was acquired about the

year 2000. The court is, therefore, not satisfied that the Applicant acquired any interest in the suit property. The 1st and 2nd questions are therefore answered in the negative.

23. The 3rd question is whether the 1st Respondent should be deemed to have been registered as proprietor of the suit property in trust for the Applicant prior to its sale to the 2nd Respondent. In view of the court's findings on the 1st and 2nd issues, there would be basis upon which a trust could be implied. The court has already held that the Applicant has failed to demonstrate the existence of spousal rights over the suit property. The court answers the 3rd question in the negative.

24. The 4th question is whether the caution and/or restrictions placed against the suit property were wrongfully and/or fraudulently removed. The court notes that the Applicant has alleged fraud in his replying affidavit but no particulars of fraud were specifically spelt out. The court also notes that the Land Registrar who is alleged to have wrongfully and fraudulently removed the caution and restriction was not made a party to these proceedings. The Registrar was therefore not accorded an opportunity to respond to the allegations of impropriety and fraud. In those circumstances, the Applicant could not establish any fraud as alleged in his supporting affidavit.

25. The 5th issue is whether or not the sale of the suit property to the 2nd Respondent was fraudulent. The court has examined the evidence on record and is unable to find any evidence of fraud as alleged by the Applicant. No particulars of fraud were pleaded and proved as against the 1st and 2nd Respondents regarding the sale of the suit property. On the contrary, the evidence on records shows that the 2nd Respondent was a purchaser for valuable consideration. The answer to this question is, therefore, in the affirmative.

26. The 6th issue is whether the said sale and all consequential transactions should be declared unlawful. There is no evidence on record to establish any illegality or fraud in the sale of the suit property to the 2nd Respondent. The court has found that the Applicant has failed to establish that the suit property was matrimonial property as contemplated by law. He has failed to establish any trust or breach of trust. In those circumstances, there would be no basis in law for holding that the sale of the suit property to the 2nd Respondent was unlawful.

27. The 7th issue is whether or not the Applicant had acquired the suit property through adverse possession as known to law. The Applicant stated in paragraph 20 of his supporting affidavit that he had lived on the suit property and extensively invested in it for over 12 years. There were no particulars of the kind of extensive investments he made.

28. The legal requirements of adverse possession were summarized in the case of **Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184** as follows:

“...And in order to be entitled to land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Saikwa No. 2 [1984] KLR 284”.

29. It must always be born in mind that possession must hostile and not with the consent or permission of the owner. According to the Applicant's own affidavit, he moved into the suit property in 2001 together with the 1st Respondent whom he claimed was his spouse. The 1st Respondent denied that they were spouses but conceded the existence of a relationship only. In those circumstances, it would be difficult to state that the Applicant had *exclusive* possession of the suit property regardless of the nature of relationship they had. It could also not be said that the Applicant's possession was hostile or adverse to the interests of the then registered owner, the 1st Respondent.

30. According to paragraph 8 of the Applicant's supporting affidavit, the 1st Respondent is said to have moved out of the suit property in 2013 although the month was not specified. If that averment were to be

taken as true, then by the time the Applicant filed the suit herein in 2014, he had not been in exclusive possession for a period of at least 12 years following discontinuation of possession by the 1st Respondent. The Applicant's claim for adverse possession cannot therefore stand the test of the law. It is grossly inadequate and the same is hereby rejected. The answer to the 7th issue is therefore in the negative.

31. The 8th issue is whether the court should order rectification of the register by cancellation of the 2nd Respondent's registration as proprietor and the registration of the Applicant as owner. As is evident from the court's determinations on the preceding issues, the Applicant has failed to establish his case against the Respondents. In those circumstances, it would follow that the Applicant is not entitled to the remedy of rectification sought. The answer to this question is therefore in the negative.

32. The 9th issue is rather vague. The Applicant is seeking a determination of whether or not he has acquired what he calls "any other interest" over the suit property by virtue of any other written law. It was the responsibility of the Applicant to point out what such "other" interest would be and to bring out material evidence to establish such interest. There being no material evidence on record to establish any other interest the Applicant may have acquired over the suit property, the answer to the 9th question must be answered in the negative.

33. The 10th issue relates to costs. Although costs are usually at the discretion of the court, the general rule is that costs follow the event. A successful party should normally be awarded costs of the action unless, for good reason, the court orders otherwise. The costs of this suit shall therefore be awarded to the successful parties.

34. The upshot of the foregoing is that all the framed issues for determination are decided against the Applicant. Consequently, the Applicant's originating summons dated 7th May 2014 is hereby dismissed with costs to the Respondents.

35. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this 7th **day** of **DECEMBER, 2017**

In the presence of Ms Muthoni for the Respondents and in the absence of Eddie Njiru & Co Advocates.

Court clerk Leadys

Y.M. ANGIMA

JUDGE

07.12.17