



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HCC NO. 312 OF 2011

JOYCE CHEPKEMOI NG'ENOPLAINTIFF

VERSUS

SAMUEL KIPKORIR NG'ENO1ST DEFENDANT

JEMORORAN CONSTRUCTIONS CO. LTD.....2ND DEFENDANT

ORIENTAL COMMERCIAL BANK LTDINTERESTED PARTY

JUDGMENT

(Plaintiff being wife of 1st defendant; 1st defendant selling suit property to 2nd defendant; property then charged to interested party; plaintiff claiming that she was not aware of the sale and did not approve of it; transaction entered into before new land laws which provide for spousal consent; evidence showing that plaintiff must have been aware of the sale and must have approved of it or at least gave the impression that she approved of it; no need therefore in the circumstances to determine whether or not consent was a requirement before new land laws of 2012; plaintiff's suit dismissed; counterclaim by 2nd defendant for possession of premises allowed)

PART A: INTRODUCTION AND PLEADINGS

1. This suit was commenced by way of a plaint that was filed on 25 October 2011. In her pleadings, the plaintiff has described herself as the deserted wife of the 1st defendant and she avers that she has brought this suit for her own benefit as a deserted wife and for the benefit of her deserted family members specifically herself and her children, namely JKK, JCC, IRN and FCN (identities withheld). She has pleaded that sometimes in the year 1995, she solely contributed towards the purchase of the land parcel number Nakuru Municipality Block 7/608. Pursuant to demands of custom and due to the then blossoming relationship with her husband, she caused the certificate of lease to be registered in the name of her husband, the 1st defendant, for him to hold the same for himself and the rest of the family. She has pleaded that she then obtained financial help from her employer and constructed a storey house where the family moved in. She has pleaded that unknown to her, and the children, the 1st defendant without consultation, clandestinely and in breach of trust, sold the suit property together with the family house to the 2nd defendant. She has pleaded that this has rendered them homeless and destitute and that the 1st defendant has since then deserted the family. In this suit, the plaintiff has sought the following orders :-

(a) That the sale agreement between the defendants entered into on 5 October 2010 be rescinded or cancelled and that the certificate of lease dated 6 June 2011, issued to the 2nd defendant in

respect of Nakuru Municipality Block 7/608 be revoked or nullified and that this Honourable Court directs a fresh certificate of lease for Nakuru Municipality Block 7/608 be re-issued to the plaintiff to hold in trust for herself and her four children.

(b) A permanent injunction restraining the defendant from interfering, dealing with or in any way howsoever dealing with Nakuru Municipality Block 7/608.

(c) Costs of this suit be borne by the defendants.

2. The 2nd defendant filed a defence and counterclaim. In its statement of defence, the 2nd defendant refuted all the claims of the plaintiff. It is pleaded that nowhere in the title documents was it indicated that the suit land was held in trust for the plaintiff and her children. It is pleaded that the plaintiff was employed as a clerk at the Municipal Council of Nakuru and could not have earned such an income to enable her develop the suit property as alleged. It is pleaded that the plaintiff was consulted and was involved in the agreement where she signed as a witness. It denied that the sale was fraudulent. It is contended that the aim of the plaintiff is to defraud the 2nd defendant as she also enjoyed the fruits of the sale of the land. In the counterclaim, it is pleaded inter alia that various payments for the purchase price were made to the plaintiff and that she was present when the agreement was made. It is pleaded that the 2nd defendant secured a loan from Oriental Commercial Bank Ltd to fund the purchase and that the full purchase price was paid. It is pleaded that the plaintiff and 1st defendant have been living together as man and wife on the suit property and it is only after the sale that they started causing confusion. It is pleaded that the plaintiff and her husband are working in collusion to deny the 2nd defendant access to the property. As a result the 2nd defendant has been forced to rent premises at the sum of Kshs. 25,000/= and that the rental income from the suit property is assessed at Kshs. 62, 000/=.

3. In the counterclaim, the 2nd defendant has asked for the following substantive prayers which are noted as prayers b, c and d :-

(i) An order of mandatory injunction to have the plaintiff and all his agents, servants, children and all who claim under or through him be removed from the suit property.

(ii) Kshs. 25,000/= per month from August 2011 to the date which the 2nd defendant will be placed in possession of the suit property.

(iii) Mesne profits based on the rent payable for the premises.

4. The 2nd defendant has also sought interest and costs.

5. The 1st defendant entered appearance and filed defence. He admitted selling the suit land to the 2nd defendant but denied that the sale was fraudulent or in breach of trust. He pleaded that the plaintiff has filed this suit with the sole aim of vexing him as he was the sole registered owner and he did not have to consult any person when selling the same.

6. In the course of the suit, Oriental Commercial Bank Ltd were enjoined into the suit as interested party. The reason for their joinder is that the 2nd defendant charged the suit land to the said bank.

PART B : EVIDENCE OF THE PARTIES

7. In her evidence, the plaintiff testified that she previously used to work with the Municipal Council of Nakuru and is now retired. She was working as an education officer. She got married to the 1st defendant in the year 1978 and they have 4 children. They are now aged 38, 36, 32 and 29 years. When they got married, they were living in Bomet. They later moved to Nairobi and then to Nakuru in the year 1994. They purchased the suit property as a vacant plot in the year 1995. They commenced construction and built a 5 bed roomed house as their matrimonial property. They finished construction in the year 1998 and started living in it. The property was registered in the name of her husband. She testified that in their Kalenjin custom, everything is entrusted to the husband. She testified that her husband held the property

in trust for her and the children and therefore had to discuss with them on matters relating to it.

8. She testified that in the year 2010, they were living together with her husband but he left around November 2011. She did not know where he went as he did not inform her or the children. In October 2011, some auctioneers came to the property seeking to attach her valuables for non payment of rent. Prior to this, she stated that she had no information that the house had been sold. She went to investigate and carried out a search and it is then that she discovered that the house is in the name of the 2nd defendant, having become registered as owners on 6 April 2011. She later managed to get a copy of the sale agreement through a friend who approached her husband. She got two agreements from her emissary, both dated 5 October 2010. In one, the purchaser was David Cheruiyot, and in another, the purchaser was Jemororan Construction. The two agreements contained similar terms. She contended that her consent was not sought and she was never consulted.

9. Cross-examined, she testified that she is not separated nor divorced from her husband. It also came out that at some point, her husband was working as the Town Clerk of the Municipal Council of Nakuru. The plot in issue was previously owned by the County Council of Nakuru. The purchase agreement was between her husband and the County Council. She however asserted that she contributed to the purchase, although she had no documentary evidence to support this. She admitted that there was no custom which prevented her from being registered as proprietor of the property. When the sale was done in the year 2010, she had no problems with her husband. She denied knowing Mr. David Rono, a director of the 2nd defendant and denied that he has been to the house, and that he even took tea. She was shown two cheques of Kshs. 100,000/= and Kshs. 30,000/= written in her name but denied ever receiving them. She agreed having visited her children in Australia, accompanied by her husband, in the year 2010 but denied that she purchased the ticket with part of the purchase price. She stated that it is her children who bought for her the tickets. She testified that the children also complain of the sale although they have not filed suit. She blamed the purchaser because he knew that there was a family.

10. She stated that she was not aware that the property was charged to Oriental Bank. She denied that she has now colluded with her husband to defeat the interests of the bank. She denied being aware of the transactions at hand.

11. The 1st defendant opted not to testify and did not call any witnesses.

12. DW-1 was David Cheruiyot Rono. He testified that he used to operate a petrol station and in the course of his business, he was introduced to the 1st defendant, around September of 2010. It was mentioned to him that the 1st defendant is selling a house and he got interested. The following day, the 1st defendant showed him the suit property but they did not discuss much that day. The next day, he went to the property with his wife, the person who introduced him to the 1st defendant, and the Branch Manager of Oriental Commercial Bank. He testified that the 1st defendant explained to them that he needed to sell the property because his wife (the plaintiff) had run into some financial difficulties over a loan she had taken to operate a college. He stated that the plaintiff was present on that day and she even served them tea. She was however not involved in their discussion as she spent most of the time in the kitchen. He however assumed that she knew why they were present. The purchase price and the modalities of payment were then agreed and the Branch Manager assured DW-1 that they would finance the purchase. On 5 October 2010, they drew two agreements. One showed the name of DW-1 as purchaser, and the other the name of Jemororan Construction, the 2nd defendant. He explained that this latter agreement was done because the financial facility to be obtained from the bank would be under the name of the company. The agreement was drawn by Advocate L.R Kipsang, who was the lawyer of the 1st defendant. He did a search which showed that the property was registered in the name of the 1st defendant. There was no caution on it and the plaintiff did not raise any objection to the sale. Subsequently, they went to the property several times and at some point accompanied by a valuer. All this time, the plaintiff was present. During this time, he came to learn that the 1st defendant had an earlier agreement for sale with another party, and the 1st defendant instructed him to make payment of Kshs. 1.15 Million, to this third party as refund for the deposit that he had made. This was done. In total, he deposited Kshs. 2 Million and obtained financing of Kshs. 7 Million from the bank. The same house was transferred to Jemororan Construction and offered as security for the loan. After all the money was paid,

DW-1 sought vacant possession. The 1st defendant asked to be given 3 months so as to allow him some time to renovate a house that he has in his 10 acre farm in Olenguruone. He offered to pay Kshs. 30,000/= per month as rent during this period. This money was not paid, and that is when he sent auctioneers to distress for rent. Vacant possession is yet to be given.

13. DW-1 testified that the 2nd defendant company was purchasing the house as a residential house for its director and the servant quarters was to be used as company offices. At the moment they have been forced to lease a house at Kshs. 25,000/= . He also claimed rent of Kshs. 30,000/= per month from the plaintiff. As a result of the plaintiff's occupation of the house, the loan has fallen into arrears and incurred penalties of about Kshs. 4 Million. He asked the plaintiff to meet these penalties.

14. In cross-examination, he testified that from the visit of the premises, it did appear as if the 1st defendant lived there with his family. He thought that the plaintiff was aware of the sale all along and he even paid her the two cheques of Kshs. 30,000/= and Kshs. 100,000/=, the latter of which, he said was collected by the plaintiff herself. He was of the view that the plaintiff knew about the sale as he saw them going round the house. He stated that the plaintiff was aware that this money was being given as part payment for the house.

15. The interested party called Celine Waweru, its Assistant Branch Manager, Kitale as its witness. She testified that the bank did create a charge over the suit property to secure the sum of Kshs. 5 Million. There has however been default, and at some point, the bank moved to sell the property but the bids fell below the reserve price. In cross-examination, she stated that there were no encumbrances registered on the property before the charge and that they did send a valuer to the property. No suit has been filed against them with respect to the charge.

16. With the above evidence, the respective parties closed their case.

I invited counsels to file submissions and they did.

C. SUBMISSIONS OF COUNSEL

17. Mr. Karanja Mbugua for the plaintiff, submitted inter alia that the plaintiff's misfortune is that she is married under the Kalenjin traditional customs where the wife is only to be seen but not to be heard, and where the husband has the first and last say in everything in the family and cannot be questioned; where a wife is lumped together with children and cannot question anything the man of the house does. He submitted that this practice is repugnant to justice and morality and that under Article 45 (3) of the Constitution, a spouse is given equal rights in the ownership, running, managing and in decision making in all matters relating to the matrimonial properties. He submitted that the sale occurred after the Constitution of 2010. He submitted that the plaintiff as spouse, had an overriding interest and the sale and subsequent charge cannot stand. He relied on a host of authorities, namely *William & Glyn's Bank Limited vs Boland & Another (1980) 2 All ER 408*; *Lucy Muthoni Njihia vs Barclays Bank of Kenya Ltd & Others* ; *Lalitaben Kantilal Shah vs Southern Credit Bank Corporation*; Nakuru HCCC No. 88 of 2010, *Eunice Kibe vs Edward K. Maina & Others*; Nakuru HCCC No. 296 of 2011, *Lucy Waihiga Wanjohi vs Johnstone Gikandi Theuri* ; *Kitale vs Kitale (2001) 1 EA 90*; *National Provincial Bank Ltd vs Hastings Car Mart & Others (1964) 1 All ER 688*; *Bendal vs McWhirther (1952) All ER 1307*. He submitted that under Section 30 (1) (g) of the Registered Land Act, which was operative then, but now repealed, granted an overriding interest to a person in actual possession.

18. On the part of the 1st defendant, it was submitted inter alia that the 1st defendant has admitted in his defence, that he did not consult or obtain any consent from the plaintiff to sell the suit property. Counsel submitted that the sale took place before the enactment of the Land Act, 2012 and Land Registration Act, 2012 and therefore there needed not be any spousal consent. He submitted that the proprietary interest lay with the 1st defendant and he was able to dispose of his interest. He relied on the case of *Elizabeth Nthenya Wambua vs Philip Wambua Masila & 3 Others (2013) eKLR* and *Barclays Bank of Kenya Ltd vs The Hon. Attorney General & Another (2015) eKLR*.

19. For the 2nd defendant, it was submitted inter alia that the allegation that a property forms part of matrimonial property does not automatically divest the interest of an innocent purchaser who was not apprised of the interest of the alleged spouse. Counsel relied on the case of **P. Mburu Echaria vs Priscilla Njeri Echaria, Civil Appeal No. 75 of 2001** ; **Gissing vs Gissing (1971) AC 888**; **Beatrice Bonareri Nyabuto vs Eldad Kanyanya Wapenyi (2006) eKLR**. Counsel submitted that the 1st defendant dealt with the property as the registered owner and there was no representation made to the 2nd defendant that the same was held in trust for and on behalf of the plaintiff. He submitted that a trust cannot be implied in this case. He submitted that contribution was key in determining the interest of the spouse. He submitted that the 2nd defendant was a bona fide purchaser for value and relied on the Ugandan case of **Katende vs Haridar and Obiero vs Opiyo (1972) EA 227**. He submitted that no fraud has been demonstrated in this case. He finally submitted that a suit such as this ought to have been predicated upon Section 17 of the Married Women Property Act and not by way of plaint. He relied on the case of **POM vs MNK (2013) eKLR**; **Paul Thuo Nganga vs Irene Wambui (2006) eKLR**; and **Charles Cherutich & Another vs Sally Towett & 10 Others (2008) eKLR**. He concluded by submitting that the suit herein is a result of collusion between the plaintiff and the 1st defendant to deprive the 2nd defendant the enjoyment of his investment. He sought for judgment to be entered in accordance with the counterclaim.

20. On behalf of the interested party, it was submitted that the plaintiff's consent was not a condition precedent for the sale and transfer of the land to the 2nd defendant. He relied on the provisions of Sections 27, 28 and 30 of the repealed Registered Land Act, and the cases of **Muniu vs Itotia (1984) KLR**; **Muchoki vs Mwangi (2005) eKLR** ; **Barclays Bank Ltd vs Attorney General (2015) eKLR**. He submitted that the law at the time of the transaction, did not require spousal consent. He further submitted that in any event, the plaintiff was aware of the transaction and that by her conduct she made the 2nd defendant believe that she had approved the transaction. He submitted that at no time did she raise any objection. He pointed out that there had been a previous sale agreement where the deposit was refunded and submitted that the property was not being sold in secret. He further pointed at the cheques written in the name of the plaintiff which were cashed. He submitted that having received the full purchase price and having used it to solve her financial problems, the plaintiff should not be allowed to allege that she did not give consent to the transaction. He was of the view that the principle of estoppels applies in accordance with Section 120 of the Evidence Act, Cap 80, Laws of Kenya, and the case of **Doge vs Kenya Cannery Ltd (1989) KLR 127** and **Muti vs Kenya Finance Corporation & Another (2004) 2 EA 182**. He submitted that the plaintiff cannot now allege fraud and has not placed anything to prove the existence of any trust or fraud. He relied on the case of **Ratilal Gordihanbhai Patel vs Laiji Makanji 91957) EA 314** on the test for fraud. Counsel also submitted that Anna Langat, the person who was claimed to have brought the agreements to the plaintiff, was never called as a witness. He also submitted that there was no proof tendered of any Kalenjin custom as alleged by the plaintiff and submitted that the inference ought to be drawn that the suit was aimed at achieving a collateral purpose.

D. DECISION

21. The single most important finding that I need to make is whether or not the plaintiff was aware of the sale of the suit property and whether or not she gave approval, be it explicitly or by implication. If I find that the transaction had her nod, then most of the other issues will actually be moot, and I need not make any determinate findings on them.

22. The plaintiff has of course asserted that she was not aware of the sale of the property and that the same was done in secret. It is her contention that she only became aware of the sale when auctioneers descended on the property to distress for rent. The 2nd defendant on the other hand, is of opinion that the plaintiff was aware of the sale of the property.

23. On my part, I do think that the plaintiff was aware of the sale transaction. I heard and saw the witnesses and DW-1 came through to me as a forthright and honest witness. The manner in which he explained how he met the 1st defendant, how they visited the premises in issue, and the encounter with the plaintiff while at the house, to me was candid evidence which did not seem to me to be made up. I opt to believe that DW-1 did visit the premises accompanied by the 1st defendant. They saw the premises and sat down for a discussion about the sale. It is admitted that the plaintiff was not present when the actual

negotiations were conducted but she was within the vicinity and one would presume that the visit would, if she was not already aware of its purpose, have put her into inquiry. Later, the property required to be charged and there needed to be a valuer to visit the premises. The premises was visited and valued, and that is how the charge came to be registered. I do not see how all these happenings took place without the plaintiff being in the know that the property was being sold. Moreover, this was not the first sale. The property had earlier been sold to another party but the transaction did not go through. I would think that even this previous buyer must have visited the premises before putting down a deposit. There was just too much movement of people in and out of the house which would obviously have made one be aware that something surely is going on about the suit premises. If the plaintiff indeed was not keen on the property being sold, then she should have acted promptly and stopped the same.

24. I also found it curious that the plaintiff stated that she did not know of the agreements of sale yet she did have the sale agreements with her and tendered the same in evidence. She of course stated in cross-examination that she got the sale agreements from a friend called Ann Langat whom she sent to her husband to demand for the sale agreements. Ann Langat was never mentioned in the plaintiff's statement or in any of the affidavits that she deposed earlier in the suit when some interlocutory applications arose for determination. My view is that this was an afterthought on her part, otherwise, it is an important issue which one would expect to have come out early and consistently in the case.

25. The reason that DW-1 gave for being offered the property was that the plaintiff was having some financial difficulties in running her college. This was not denied by the plaintiff. There is also evidence of cheques being drawn in the name of the plaintiff. Although the plaintiff denied cashing these cheques, she did not bring any evidence to support this. The cheques bear the name of the plaintiff and they have a banking stamp, hence on the face of it, they must have been cashed by the plaintiff. I wonder how the plaintiff cashed cheques in her name, from a company she did not know, and for a payment that she had no idea about. It is not usual for one to receive money by way of cheque and proceed to cash it without being privy to the reasons why such cheque is offered to him or her.

26. I tend to think that the plaintiff knew what was happening. Her conduct would also have led one to no other conclusion but to believe that she was aware of the sale and that she approved of it. There was no protest from her, yet persons were visiting the premises and having a good look at it. I am of the view that the plaintiff is estopped from her very conduct from alleging that she was not conscious of the sale. She led everyone to believe that the sale had her tacit approval and it would be unfair for her to be allowed to now allege that she did not know of any sale.

27. I think it has been demonstrated, on a balance of probabilities, that the plaintiff was cognizant of the sale and that the same had her stamp of approval at the time it took place. At the time the transaction took place, it was not necessary for there to be a formal instrument of spousal consent as the law at that time did not require it. It was of course argued that the plaintiff benefited from having an overriding interest as she was in possession at the time, but I have already held that the sale was with her knowledge and approval, and the protection that may have been afforded under the doctrine of overriding interest does not therefore apply. I have not been persuaded that there needed to be any consent from the children of the plaintiff and 1st defendant, since to me they appear to be adults who are going on with their lives. They are either in college or working abroad and I have not been shown any law which requires parents to seek the consent of their children before selling what they have acquired during their lifetime.

28. Given my above holding, I find no reason to set aside the sale transaction. I have not been persuaded that the sale was done secretly or was clandestine. Neither have I been persuaded that the sale was fraudulent in any way. My holding is that the sale was above board and the same shall stand.

29. With this holding, the plaintiff's case automatically falls flat on its face. All I need to consider now is the counterclaim of the 2nd defendant. The 2nd defendant has asked for the plaintiff and her agents to give vacant possession of the property. I have no reason to deny the 2nd defendant this order. I hereby direct the plaintiff to give vacant possession no later than 30 days from the date hereof and in default the plaintiff may apply for her to be evicted. I also award the 2nd defendant mesne profits of Kshs.30,000/= per month, which is reasonable rent for the premises, and which is what the 1st defendant promised to

pay, for the 3 months that he sought permission to stay on the suit land while looking for alternative premises. There was attempt to claim what the 2nd defendant has been paying as rent in alternative premises which is the sum of Kshs.25,000/=, but to me, if I make an award on this, then the 2nd defendant will end up being compensated twice. He will only get what he would have got had he leased out the premises to a willing tenant. The said amount of Kshs.30,000/= to be calculated from August 2011 till the time that the plaintiff will give vacant possession together with interest at court rates from the date the counterclaim was filed.

30. There is the interest of the interested party, but I think this is covered in the charge instrument, for I have not vitiated the charge in any way. If there is default, it is up to the interested party to move as permitted by law. I need not make any finding on this.

31 The plaintiff has failed and the 2nd defendant has succeeded. The plaintiff will pay the costs of this suit and of the 2nd defendant's counterclaim. I make no orders for or against the 1st defendant and I also make no orders for or against the interested party.

32. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 13th day of October 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr. Karanja Mbugua for the plaintiff

Mr. Geoffrey Otieno holding brief for Mr. Morintat for 1st defendant

Ms. Gitau holding brief for Mr. Kahigah for 2nd defendant.

Ms. Chepngetich holding brief for Mr. Konosi for interested party.

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU