Murigi v Lutkeimer & 3 others (Civil Appeal E041 of 2021)
[2024] KECA 352 (KLR) (12 April 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E041 OF 2021

MSA MAKHANDIA, KI LAIBUTA & GV ODUNGA, JJA

APRIL 12, 2024

BETWEEN

LUCY WANGARI MURIGI ..... APPELLANT

AND

KLAUS WILLIS LUTKEIMER ..... 1ST RESPONDENT

PETER MICHAAEL GESSLER ..... 2ND RESPONDENT

ANNS SAUER ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Mombasa (C. K. Yano, J.) dated 7th July, 2020 in ELC Case No 432 of 2010)

JUDGMENT

1. This appeal arose from the decision of Yano, J. dated 7th July 2020 in the Environment and Land Court at Mombasa in ELC Case No. 432 of 2010. That suit was instituted by way of a plaint dated 6th December 2010, which was amended on 16th December 2011, re-amended on 1st April 2015 and further re- amended on 27th October 2015. According to the appellant, she got married to the 1st respondent, a German national, on 27th October 2005 under the *Marriage Act* and exhibited a copy of the marriage certificate in proof that fact. It was her case that, due to the 1st respondent's advanced age, the couple entered into pre-nuptial agreement, which she exhibited, and in which she was restricted from taking gainful employment in order to devote herself to taking care of the 1st respondent and the family. At that time, they were staying in a rental house at Mtwapa. However, on 12th October 2006, the couple purchased a vacant property known as subdivision no. 3336 (origin no. 1139/1) (the suit property) which was registered in the name of the 1st respondent. After constructing a house thereon, they moved in the year 2007. That they cohabited both in the country and in Germany till

2009 when they started experiencing marital problems leading to the filing of divorce proceedings by the 1st respondent against the appellant in the High Court of Kenya at Mombasa, being Divorce Cause No. 37 of 2010. The appellant lodged a caveat which was registered against the suit property on 24th April 2008 when the 1st respondent threatened to dispose of it.

2. In or about November 2010, the appellant contended that the 1st respondent informed her that he was in the process of procuring a buyer for the suit property and intended to donate a power of attorney to his daughter, the 2nd respondent, for that purpose. According to the appellant, her attempt to carry out a search in respect of the suit property was unsuccessful as the file could not be traced. The appellant was subsequently served with summons to enter appearance in Kilifi Civil Suit No. 641 of 2010 – Anna Sauer v Lucy Wangari Murugi - filed by the 2nd respondent against her, and in which it was disclosed that, following the signing of an agreement as well as a lease agreement between the 1st and 2nd respondent, a transfer was made on 17th May 2010 from the 1st respondent to the 2nd respondent, and that the caveat was removed/lifted on 18th May 2010, and the transfer registered the same day. However, the appellant disputed this contention on the grounds that, on 25th August 2010 when she conducted a search on the suit property, the 1st respondent was still registered as proprietor of the suit property.

3. It was the appellant's case that although the court issued an order of injunction in her favour against the 1st and 2nd respondents on 18th December 2010, and which she registered at the lands registry on 12th July 2013, the caveat was removed without her knowledge and without her spousal consent being sought and obtained, and the suit property transferred to the 2nd respondent on 18th May 2010. When the appellant visited the suit property, she found the 3rd respondent in occupation thereof purportedly in his capacity as a buyer of the same having entered into an agreement with the 1st respondent through the 2nd respondent, courtesy of the power of attorney.

4. It was the appellant's case that the transfer of the suit property from the 1st respondent to the 2nd respondent was illegal and fraudulent and was tainted with misrepresentation, particulars whereof were disclosed. She averred that the 2nd respondent's title was unlawfully obtained, and that the 2nd respondent never acquired a legitimate title capable of being registered. As regards the 3rd respondent's claim to the suit property, the appellant averred that, since the 2nd respondent never had a good title to the suit property, the alleged agreement was null and void notwithstanding the fact that the 3rd respondent had been in possession of the suit property since December 2013 or thereabouts.

5. The 1st and 2nd respondents filed their defences in which they denied the appellants' claim. However, they did not appear at the hearing and, even though the 4th respondent was represented, he did not call any witness in support of his case.

6. The 3rd respondent filed his statement of defence on 11th June 2015. His case was that he purchased the suit property for valuable consideration and without any notice of fraud from the 1st respondent. That he duly paid the purchase price, was given vacant possession, and was still in occupation thereof. According to him, before purchasing the suit property, he conducted a search thereon and confirmed that it was in the name of the 2nd respondent, but entered into a sale agreement with the 1st respondent on the basis of the power of attorney donated by the 1st respondent to the 2nd respondent. About 10 days after he moved into the suit property, the appellant served him with a court order of injunction against the 1st respondent issued in December 2010. It was his case that he neither knew the 1st and 2nd respondents, nor the appellant, in 2010. In his view, the appellants' remedy, if any, was in damages against the 1st respondent.

7. In his judgement, the learned trial Judge found that the issues he was called upon to determine were: whether the court had jurisdiction to deal with the dispute; whether spousal consent was required before the suit property could be transferred; whether the 3rd respondent was an innocent purchaser for valuable consideration without notice; and whether the appellant was entitled to the remedies sought.

8. On jurisdiction, the learned Judge found that the jurisdiction of the Environment and Land Court is found in Article 162(2) of the *Constitution* as read with section 13 of the *Environment and Land Act*. The learned Judge further held that by the time the suit property was transferred to the 2nd respondent and later sold and transferred to the 3rd respondent, the appellant had vacated the suit property and was no longer living therein; that the 2nd respondent was registered as the proprietors thereof on 18th May 2010 under the repealed *Registration of Titles Act* (RTA); that the property was then sold and transferred and registered in the name of the 3rd respondent; that a spousal right over matrimonial property came into force in 2012 under the *Land Registration Act* (LRA); that spousal rights over the suit property could not operate retrospectively to defeat the transfer which was registered in favour of the 2nd respondent on 18th May, 2010; that it was not in dispute that the caveat had been removed and the land transferred to the 2nd respondent on 18th July 2010; and that the agreement for sale and the executed transfer in favour of the 3rd respondent were both dated 19th November 2013, 3 years after the caveat had been removed.

9. The learned Judge found that the 3rd respondent was not a party to the suit and was never served with the court orders issued on 8th December 2020 and 12th July 2013, which orders were never registered against the title to the suit property at the lands registry; that the appellant confirmed at the hearing that the existence of the said orders were brought to the attention of the 3rd respondent about 10 days after the 3rd respondent had taken possession and occupation of the suit property as purchaser; that although the appellant was, by May 2010, aware that the suit property had been transferred by the 1st respondent to the 2nd respondent, she took no steps to ensure that the orders obtained were registered against the title to the suit property in order to give notice to innocent third parties; that in the premises, the 3rd respondent was not guilty of any illegality having purchased the suit property from a registered owner without any restriction on record; that at the time of the purchase of the suit property, the certificate of title reflected the 2nd respondent as the registered proprietor having been so registered in May 2010; that the 3rd respondent was entitled to rely on the said title as conclusive evidence of proprietorship under and by virtue of section 26(1) of the *LRA*, and hence the 3rd respondent was an innocent purchaser for valuable consideration; that the allegations of fraud and illegalities were vague and generalised and were not proved; and that the appellant failed to prove her case.

10. The learned Judge proceeded to dismiss the suit with costs to the 3rd and 4th respondents.

11. It was this decision that aggrieved the appellant and provoked the present appeal in which the appellant contends that the learned Judge erred in law and in fact: in holding that spousal consent was not required when transferring the suit property from the 1st respondent to the 2nd respondent, and the subsequent transfer to the 3rd respondent; in failing to find that there was fraud and illegality in the entire transaction; in failing to find that the transactions were fraudulent and illegal since they were carried out during the existence of two court injunctions; by failing to find that the removal of the caveat was without notification to the appellant by the 4th respondent thus rendering the entire transaction illegal; by failing to address the doctrine of lis pendens; in failing to hold that the appellant had interest in the suit property despite finding that there was a restrictive pre-nuptial agreement between the 1st respondent and the appellant and a pending Divorce Cause No Kilifi 37 of 2020 – Klaus Willis Lutkeimeir v Lucy Wangari Murigi; in holding that the 3rd respondent was an innocent purchaser

for value without notice, and yet there was glaring evidence to the contrary; in holding that the suit property had already been transferred and registered in the 3rd respondent's name despite evidence produced by the 3rd respondent showing that he only held a transfer which was yet to be registered; by failing to hold that failure by the 1st, 2nd and 4th respondents to call any witnesses or produce any evidence left the appellant's case uncontroverted and, therefore, the court had no alternative but to rule in the appellant's favour; and by failing to appreciate that the matrimonial court had already issued an order that the suit premises be rented and the proceeds therefrom deposited in a joint account, but the 1st and 3rd respondents exploited this order to enable the 3rd respondent gain entry into the suit property. It was further contended that the judgement was against the weight of evidence and the law.

12. We were therefore urged to set aside the judgement and decree of the ELC with costs to the appellant.

13. We heard the appeal on the Court's GoTo virtual platform on 30th October 2023 when learned counsel, Mr. Mutugi, Mr. Omwenga, Ms. Kemei holding brief for Ms Langat appeared for the appellant, 3rd and 4th respondents respectively. The three learned counsel relied entirely on their written submissions.

14. In her submissions, which ran into some 40 odd pages contrary to the Practice Directions of this Court, the appellant contended that the trial court only considered the appellant's case as against the 3rd respondent and failed to consider her against the 1st and 2nd respondents; that, in so doing, the court did not deal with the root of the title, which the 1st respondent was trying to sell to the 3rd respondent; that the court did not consider the fact that, pursuant to section 93 of the *LRA*, section 12 of the *Matrimonial Property Act* and Article 45(3) of the *Constitution*, the appellant being a spouse of the 1st respondent had acquired interest in the suit property, which was matrimonial property, an issue that was for determination before the court in Mombasa High Court Divorce Cause No. 37 of 2010; and that, since the suit property was matrimonial property as at May 2010, spousal consent was mandatory.

15. On proof of fraud, it was submitted that the court failed to consider that the removal of the caveat was effected without notification to the appellant; that, by 25th August, 2010, the suit property was still in the name of the 1st respondent, and yet the property was alleged to have been transferred from the 1st to the 2nd respondent on 18th May 2010; and that these were sufficient proof of fraud, collusion and illegalities committed by the 1st, 2nd & 4th respondents in relation to the suit property.

16. According to the appellant, on the basis of sections 107 and 108 of the *Evidence Act*, the cases of *Maurice Odawo Onduro v Kisumu Municipal Council* [2019] eKLR and Mbuthia Macharia v Annah Mutua Ndwiga and another [2017] eKLR, the moment the appellant proved the registration of the caveat in September 2009, and the fact that it was removed without notification to her, the burden shifted to the 1st, 2nd and 4th respondents to reply and prove the absence of fraud. According to the appellant, this is due to the fact that, while both the legal and evidential burdens initially rested upon, the evidential burden may shift in the course of trial and as the weight of evidence given by either side during the trial varies, and so will the evidential burden shift to the party who would fail in the absence of further evidence.

17. In addition, it was submitted that the trial court failed to make a finding on the lawfulness of the sale from the 2nd respondent to the 3rd respondent during the pendency of two court orders issued on 8th December 2010 and 12th July 2013, and that the purported sale in November 2013 was done in contempt of the court order; that the trial court erred in finding that the suit property was sold, transferred and registered in the name of the 3rd respondent, and yet the evidence was that the 3rd respondent could not register the transfer because there was a court order; and that, on account of the existence of the caveat, the court order and the status of the suit property as at August 2010, the suit property was not available for sale, and that any sale which took place was null and void. Reference was

made to the cases of Maina Waniigi & another v Bank of Africa Kenya Ltd & 2 others [2015]1 eKLR; and Elias M. Musyoka v Halal Developers Limited & 3 others [2019] eKLR for the proposition that there is no way a transfer would have been effected without the caveat being removed lawfully.

18. According to the appellant, the learned trial Judge ignored the doctrine of les pendens in light of the foresaid court orders and relied on the cases of Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others [20171 eKLR; and Municipal Council of Eldoret v Titus Gatitu Niau [2020] eKLR as authority for the need to obey court orders

19. According to the appellant, in the absence of the evidence from the 1st, 2nd and 4th respondents, she conclusively proved the existence of a statutory marriage between the appellant and the 1st respondent; the existence of divorce proceedings between the appellant and the 1st respondent; the existence of the suit property which was purchased by the 1st respondent during the subsistence of a valid statutory marriage; the fact that, after the purchase of the suit property and the construction of a residential house thereon, the appellant, the 1st respondent and their son named Stephan Lutkeimier, moved in and lived until after the year 2009; the construction on the suit property was supervised by the appellant; the existence of the pre-nuptial agreement which restricted the appellant from working and instead to remain at home and undertake domestic chores and, in return, this would amount to her contribution to the welfare of the marriage; the existence of a caveat by a spouse on the file of the suit property at the lands registry registered on 24th April 2009 long before the transfer made on 17th May 2010; the existence of a search made on 25th August 2010, which revealed that the 1st respondent was still the owner; and the fact that the caveat registered on 24th April 2009 was removed on 18th May 2010 without the pre-requisite notice to the appellant.

20. In support of her submissions, the appellant relied on Grace Nzula Mutunga v Joyce Wanza Musila [2017] eKLR citing the decision in Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007; and Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR on the effect of failure to call evidence.

21. The appellant also took issue with the locus of the 3rd respondent in light of the evidence that he transferred money from the account of his aunt, one Matihlde Gassenshmidt, and was therefore an agent of a disclosed principal; and that the general power of attorney dated 23rd November 2013 was not registered and had no number. It was submitted that the said power of attorney was a nullity on the authority of Francis Mwangi Mugo v David Kamau Gachago [2017] eKLR; and Kenneth Omollo Simbiri & another v Daniel Ongor [2020] eKLR.

22. According to the appellant, there was no evidence or proof of payment of the purchase price to either the 1st or 2nd respondent.

23. On the grounds aforesaid, we were urged to allow the appeal.

24. The 1st and 2nd respondents, who were not represented at the hearing of the appeal, did not file any submissions.

25. The 3rd respondent relied on the submissions dated 11th February 2020 filed by M/s. Mogaka Omwenga & Mabeya, in which it was submitted that the spousal consent was not explicitly required until the coming into force of the *Land Act*, 2012 and, in this regard, reference was made to this Court's decision in Stella Mokeira Matara v Thadus Mose Mangenya & Anor [2016] eKLR. It was submitted that, in this case, transfer of the suit property from the 1st to the 2nd respondent on 18th May 2010 was way before the enactment of the *Land Act*; that the 2nd respondent could therefore not be victimised for failing to obtain the said consent; that, in any case, the appellant did not tender any evidence

that the suit property was matrimonial property, and that the trial court was not legally equipped to undertake such interrogation; that, since the 3rd respondent did not purchase the property from the 1st respondent, it was not demonstrated that such a consent was required for the transaction between the 2nd and the 3rd respondent; that, consequently, on the authority of Savings & Loan (K) Ltd v Kanyenje Karangaita Gakombe & Anor [2015] eKLR, the appellant did not have the locus standi to question the subsequent transaction between the 2nd and the 3rd respondent since she was not a party thereto.

26. Regarding proof of fraud, it was submitted that the appellant did not plead or allege any fraud or illegalities as against the 3rd respondent in the absence of which the trial court was not expected to make such findings. This submission was based on the decision of this Court in Kibos Distillers Lts & 4 Others v Benson Ambuti Adega & 3 Ors [2020] eKLR where it was held that there is a presumption of regularity that official duties have been properly discharged and all procedures duly followed until the challenger presents clear evidence to the contrary. This contention was also based on this Court's decision in Caltex Oil (Kenya) Limited v Rono Limited [2016] eKLR where it was held that a party who wishes the court to determine or grant a prayer must specifically plead and prove the same. Accordingly, it was submitted that the law presumes that all the acts done by the Land Registrar in effecting the transfer were regular, unless proved otherwise.

27. According to the 3rd respondent, the caveat registered by the appellant was based on a licensee's interest as opposed to an interest in matrimonial property, and the same was not produced so that the trial court could verify the period for which it was to last; that the 3rd respondent was not privy to the transaction between the 1st and 2nd respondent; that the appellant, apart from bare allegations of fraud, did not lead any evidence to support the same; and that the appellant's averment did not meet the prescriptive standard of proof in such matter as held in Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another [1979] eKLR that a higher standard of proof is required to establish such allegations.

28. It was submitted further that from the evidence adduced, the appellant was, since May 2010, aware that the suit property had been transferred to the 2nd respondent, but took no action, and that the 3rd respondent purchased the suit property in November 2013, more than three years from 18th May 2010 after a caveat had been removed from the record and the suit property transferred in favour of the 2nd respondent; and that, in the absence of any evidence linking the 3rd respondent's certificate of title to the alleged fraud, collusion and illegalities, the 3rd respondent's title cannot be successfully impeached. This submission was based on this Court's decision in Bruce Joseph Bockle v Coquero Limited [2014] eKLR.

29. According to the 3rd respondent, as the appellant had failed to prove her allegations based on this Court's decisions in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Anor [2014] eKLR; and Margaret Wanjiru Ndirangu & 4 Others v Attorney General [2020] eKLR, failure by the 1st, 2nd and 4th respondents' to tender evidence did not mean that the appellant's case was uncontroverted.

30. It was therefore submitted that the evidence tendered by the appellant was below the required standard, and we were accordingly urged to dismiss the appeal with costs.

31. On behalf of the 4th respondent, reliance was placed on the submissions dated 20th May 2020. According to the 4th respondent, apart from mere allegation that the suit property was acquired during the marriage, the appellant failed to adduced evidence showing that it was matrimonial property; that the transfer of the property from the 1st to 2nd respondent was effected before the law requiring spousal consent came into effect (see Florence Asami Agoro & 5 Ors v Samuel Oyindo Agoro & 2 Ors [2019] eKLR; that the appellant only made generalised allegations of fraud without proof, and yet there is presumption of regularity as held in Chief Land Registrar and 4 Ors v Nathan Tirop Koech [2018]

eKLR; that the appellant failed to make full disclosure before the trial court by not presenting the registration form for the caveat before the trial court, which would have revealed the period when the caveat was to lapse; that the caveat claimed a licensee's interest as opposed to beneficial interest on the basis of matrimonial property; and that failure by the respondents to adduce evidence did not automatically mean that the appellant's case was proved. Counsel submitted that, as held in Margaret Wanjiru Ndirangu and 4 Ors v Attorney General [2020] eKLR; and Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau [2016] eKLR, the appellant was bound to prove her case as long as the respondents did not admit her claims.

32. We were likewise urged by the 4th respondent to dismiss the appeal with costs.

33. We have considered the material placed before us. This is a first appeal in respect of which we are enjoined to consider the submissions made before us as well as the record of the proceedings before the trial court. In so doing, we are under a duty to analyse and re-assess the evidence on record and reach our own conclusions on the issues for determination in the appeal. However, caution must be exercised that, in so doing, and since, unlike the trial court, we had no benefit of seeing or hearing the witnesses testify, and we must therefore give allowance for that handicap. This position was restated in Selle v Associated Motor Boat Co. [1968] EA 123 where this Court held that:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 EACA 270)."

34. As held in Alfarus Muli v Lucy M Lavuta & Another [1997] eKLR, the Court, sitting as the first appellate court, must appreciate that it will interfere with the findings of the trial court:

> " only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence."

35. The appellant's claim against the respondents was based on three grounds: firstly, that the transfer of the suit property from the 1st to the 2nd respondent was fraudulent and illegal; and that the fraud and illegality was based on the fact that the said transaction was effected without her consent as a spouse; secondly, that the transfer was effected contrary to existing court orders; and, thirdly, that it was done after the caveat she had registered on the suit property had been unlawfully removed without her knowledge.

36. On the first issue as to whether her spousal consent was necessary, it is not in doubt that the 2nd respondent became registered as the proprietor of the suit property on 18th May 2010 under the RTA. However, it was not until 2012 that a spousal right over matrimonial property came into force by the enactment of the LRA. Clearly, therefore, spousal rights over the suit property could not operate retrospectively so as to defeat the transfer which was registered in favour of the 2nd respondent as the law in existence at that time did not expressly require the consent of a spouse to be obtained before any matrimonial property could be disposed of. While dealing with an appeal against a decision declining

to find that the failure to obtain spousal consent in a transaction pre- dating the *Land Registration Act*, this Court expressed itself in Stella Mokeira Matara v Thadus Mose Mangenya & Anor [2016] eKLR thus:

> "While the question as to whether section 78(1) of the *Land Act*, 2012 operates retrospectively or not must await determination by the trial court, all we can say at this juncture is that the appellant did not establish that the learned judge exercised his discretion erroneously in rejecting her contention that her consent was required before the suit properties could be charged to the 2nd respondent."

37. This Court was even more clear in its mind in Florence Asami Agoro & 5 Ors v Samuel Oyindo Agoro & 2 Ors (supra) where it held that:

> "15. The upshot of Section 107 (2) as applied to the appeal herein is that if the sale agreement was executed before the Act entered into force, then the entire transaction which it relates to will be governed by the provisions of the law in force before the LRA entered into force. Accordingly, even if the sale agreement was executed on August 2011 and the entry in the register was made on 2nd October 2012 as submitted by learned counsel Mr. Wanyama, by dint of section 107 (2) of the LRA, the provisions of the LRA would not be applicable to the transaction in question.
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> 16. Under the now repealed Registered *Land Act* Cap 300, spousal consent was not a requirement. Such consent became a requirement with the enactment of the LRA that came into force after the signing of the sale agreement."

38. In Fredrick Chege Ndogo v Benard Njoroge Mbugua and 2 others Civil Appeal No 278 of 2006, this Court appreciated that:

> "...the requirement for spousal consent is a recent development in Kenya attributable to the enactment of the *Land Registration Act* of 2012 and the *Land Act*, 2012 by parliament. It had no application whatsoever to the sale of the suit land which predated the statute..."

39. Accordingly, the provisions of LRA on spousal consent were not applicable as it has not been shown that the Act has a retrospective effect. With regard to retrospective effect of legislation, the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR held that:

> "As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."

40. In the same vein, this Court concluded in Florence Asami Agoro & 5 Ors v Samuel Oyindo Agoro & 2 Ors (supra) that:

> "From the foregoing, we find that spousal consent from the 1st appellant was not required to the sale transaction between the 1st respondent and the 2nd and 3rd respondents as the LRA had not come into effect on 24th August, 2011 when the sale agreement was signed. This ground of appeal therefore fails."

41. We agree with the learned Judge that the provisions of the LRA did not apply to the said transaction so as to make it mandatory that the spousal consent of the appellant be obtained before the transfer from the 1st respondent to the 2nd respondent was effected.

42. Apart from that, it would seem that the determination of the status of the suit property was pending before the Divorce Court and, although the appellant contends that certain conservatory orders had been made therein, it was not contended that a determination as to whether the said property was matrimonial property or not had been made. The mere fact that a property is acquired during the marriage does not ipso facto give it the status of a matrimonial property. It was incumbent upon the appellant to prove that the suit property was in fact matrimonial property. In the absence of that evidence, the learned Judge cannot be faulted for his decision in that regard.

43. On the issue as to the existence of the caveat, it was not in dispute that the caveat had been removed and the land transferred to the 2nd respondent on 18th July 2010. The agreement for sale and the duly executed transfer in favour of the 3rd respondent were both dated 19th November 2013, which was some 3 years after the caveat had been removed. Even though the appellant was, by May 2010, aware that the suit property had been transferred by the 1st respondent to the 2nd respondent, she took no step to protect her interests and, even after she obtained the court orders, she did not ensure that the orders were registered against the title to the suit property. In her submissions, the appellant admitted (?) before the trial court, that she did not place the application for the caveat on record on the strength of which the trial court could have made a finding as to whether or not the caveat was still in existence at the time the suit property was sold by the 1st respondent to the 2nd respondent. In our view, the learned Judge could not have been expected to find in favour of the appellant regarding the caveat placed on the title to the suit property in the absence of evidence as to the period for which the caveat was to remain in force, and in light of the inactivity on the part of the appellant in protecting her interest in the suit property.

44. Regarding the court orders issued on 8th December 2020 and 12th July 2013, the 3rd respondent was not a party to the suit at the time they were issued and, in any event, those orders, were never registered against the title to the suit property. Instead, they were only brought to the attention of the 3rd respondent about 10 days after he had taken possession of the suit property as a purchaser. Consequently, the appellant took no steps to ensure that the orders were registered against the title to the suit property in order to notify innocent third parties of their existence. There was no evidence that the same was registered against the suit property by the time of registration of the transfer from the 1st respondent to the 2nd respondent. Although the appellant contends that that transaction was undertaken in contempt of court, she did not disclose the steps, if any, taken by her in order to protect her interests before the 3rd respondent came into the picture.

45. Regarding the doctrine of lis pendens, Black's Law Dictionary defines it as the jurisdiction, power or control acquired by a court over property while a legal action is pending. In K N Aswathnarayana Setty (D) Tr. LRs. & Others v State of Karnataka & Others [2013] INSC 1069, the Supreme Court of India stated that the doctrine is based on the legal maxim 'ut lite pendente nihil innovetur' (During a litigation nothing new should be introduced). The doctrine is based on equity, good conscience or justice because it rests upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail.

46. In the repealed (Indian) Transfer of Property Act (ITPA) 1882, this doctrine was espoused in section 52 in which it was stipulated that:

> During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

47. The ITPA was repealed by the *Land Registration Act* Number 3 of 2013 in which section 107(1) provides for the saving and transitional provisions of the Act in the following terms:-

> Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

48. A reading of the LRA does not reveal any prohibition of the application of the doctrine of lis pendens. It is for this reason, and in view of section 107 aforesaid, that this Court has held that the doctrine of lis pendens is still applicable to this day, albeit under common law (see Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR)

49. That doctrine was dealt with extensively by this Court in Co- operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR in which the Court expressed itself as hereunder:

> " 54. On whether the doctrine can be interpreted to mean that the filing of proceedings serves as an automatic stay of the sale; we are of the view that it cannot. As stated under the repealed Section 52 of the ITPA, an automatic prohibition of dealings or transfers of the property is only during the 'active prosecution' of the proceedings. Consequently, while the parties are automatically duty bound to preserve the property during the pendency of active proceedings, the same cannot be said of fresh proceedings that have just been filed and whose prosecution is yet to begin.
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> 55. This conclusion is informed by the fact that lis pendens as applied in Kenya is heavily borrowed from the Indian system. However, unlike our system, the Indian one was amended to rid itself of the phrase 'active prosecution.' Consequently, in India, lis pendens kicks in from the moment proceedings are instituted, all the way through to the appellate stage. This has been the position adopted by the Supreme Court of India (see Jagan Singh v. Dhanwanti [2012] 2 SCC 628). Clearly, the plaintiffs under that system enjoy a wide berth in so far as the doctrine is concerned. To ensure that this new found freedom is not abused by unscrupulous plaintiffs-who may file frivolous suits in a bid to frustrate a legitimate owner's right to deal in his land, several safeguards were put in place; from levies of compensatory costs in frivolous proceedings, to expedited proceedings and compensatory damages against vexatious plaintiffs (see Vinod Seth v. Devinder Bajaj & Another SCC No. Civil Appeal No. 4891 of 2010). In Kenya, however, no such measures have been legislated regarding

> lis pendens. As such, the practical approach remains that mere institution of suit does not trigger the doctrine. Rather, it is upon the active prosecution of that suit that the doctrine automatically sets in. Consequently, the contention that mere filing of suit operates as an automatic stay of dealings, fails."

50. In this case, the 3rd respondent was not a party to the proceedings as at the time the said orders were obtained, and by the time of his going into occupation of the suit property, the appellant had vacated the property. It is noteworthy that we were not addressed on the point at which, in the course of the proceedings, the doctrine was operational and whether at that time the parties were actively prosecuting the suit. In the premises, there is no basis upon which the 3rd respondent can be found guilty of any illegality having purchased the suit property from a registered owner without any restriction on record. At the time of the purchase of the suit property by the 3rd respondent, the certificate of title reflected the 2nd respondent as the registered proprietor having been so registered in May 2010. We agree that the 3rd respondent was entitled to rely on the said title, which was, by virtue of section 26(1) of the *Land Registration Act*, conclusive evidence of proprietorship. Accordingly, the 3rd respondent was an innocent purchaser for valuable consideration without notice.

51. In light of the foregoing, the vague and generalised allegations of fraud and illegalities were not proved. We reiterate this Court's holding in Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another (supra) that:

> " A higher standard of proof is required to proof to establish such findings, proportionate to the gravity of the offence concerned, and the judge did not direct himself to this effect. As was said by this Court's predecessor in Ratilal Gordhanbhai Patel v Lalji Makanji [1957] EA 314, 317:
>
> 'There is one preliminary observation which we must take on the learned judge's treatment of this evidence: he does not anywhere... expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not.'"

52. We agree that the issue of spousal consent was an issue between the appellant and the 2nd respondent but that, once the property passed to the 2nd respondent, that issue became moot in view of the fact that such consent was not required to validate the transfer since, as between the 2nd and 3rd respondents, the issue as to spousal consent in respect of matrimonial property did not arise.

53. To our mind, the learned Judge would not have been properly seized of matters regarding the status of the suit property or of any matrimonial property on account of the marital relationship between the 1st and 2nd respondent. That issue could only be determined by the court handling the divorce proceedings or the High Court when determining the distribution of matrimonial properties.

54. We have considered the submissions made in respect of failure by the 1st, 2nd and 4th respondents to adduce evidence. In light of our foregoing findings, we hold that the fact that the said respondents did not adduce evidence did not place the appellant's case on a higher pedestal than it was at the close of her case. The burden of proof rested squarely on the appellant on a balance of probability, and it was not lessened by failure by the said respondents to give evidence. The law is clear that a case is proved nor disproved and the appellant could not rely on failure by the said respondents as a basis for propping

up her otherwise weak case. That was the position adopted by this Court in the case of Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau [2016] eKLR where this Court had occasion to consider whether the plaintiff satisfactorily proved his claim in a case where the defendant failed to adduce evidence. The Court stated in that case:

> "We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."

55. We see no reason to deal with the twin issues of the alleged agency relationship between the 3rd respondent and the said Matihlde Gassenshmidt, on the one hand, and the legality of the power of attorney on the other since those issues were not expressly taken up as grounds of appeal.

56. We have said enough to conclude that this appeal has no merit and is hereby dismissed with costs to the 3rd and 4th respondents.

57. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL, 2024

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR