Njaramba & 3 others v Kamau (Civil Appeal 37 of 2018)
[2024] KECA 1847 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1847 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 37 OF 2018

MA WARSAME, FA OCHIENG & SG KAIRU, JJA

DECEMBER 20, 2024

BETWEEN

MARY MUTHONI NJARAMBA ..... 1ST APPELLANT

EPHULAS WANJIRU KARAITA ..... 2ND APPELLANT

MARGARET NJERI KIARII ..... 3RD APPELLANT

REGINA WAIRIMU KARAITA ..... 4TH APPELLANT

AND

MOSES NJARAMBA KAMAU ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (J. N. Mulwa, J.) dated 21st September 2017 in HCCC No. 409 of 2001)

JUDGMENT

1. The 1st appellant herein is the estranged wife of the respondent, while the 2nd and 3rd appellants were her sisters, and the 4th appellant was her mother. By an amended plaint dated 25th February 2005, the respondent sued the 1st appellant after she sold and transferred land parcels Nyandarua/Silibwet/579, 580, and 1408 (hereinafter, "the suit properties") to the 2nd, 3rd and 4th appellants. His claim was that the sale and transfer were fraudulent. He sought the following orders:

    "a) A declaration that a trust exists between the plaintiff and the 1st defendant whereby the 1st defendant held Land Reference No. Nyandarua/Silibwet/579, 580, and 1408 in trust for the plaintiff.

    a. An order terminating the said trust.

b. An order declaring the transfer of Nyandarua/Silibwet/579, 580, and 1408 by the 1st defendant to the 2nd, 3rd and 4th defendants are null an d void.

c. An order for rectification of the register by cancellation of the said titles issued to the 2nd, 3rd and 4th defendants.

d. General damages.

e. Costs and interest."

2. The respondent's case was that he purchased the suit properties from one Danson Wachira. He paid the full purchase price as exhibited through the three sale agreements and the acknowledgment notes adduced in evidence. He obtained the necessary consents from the Land Control Board and registered the suit properties in the name of the 1st appellant, in trust for himself and their five children. The 1st appellant did not contribute financially to the purchase price. However, the trust was not registered against the titles.

3. The respondent stated that he and the 1st appellant sold plot 580 to the 3rd appellant for Kshs.210,000 and plot 579 to the 4th appellant for Kshs.280,000 but the two failed to pay the purchase price. He therefore, asked the 1st appellant to destroy the sale agreements. However, in 2001 he discovered that the 1st appellant had secretly transferred and registered the suit properties in the names of the appellants.

4. The respondent stated that when he conducted an official search at Nyandarua Lands Registry on 30th May 2001, he confirmed that the suit properties were transferred without his consent to the 2nd, 3rd and 4th appellants on 23rd March 1995. However, the Land Registrar refused to show him the green cards for the suit properties and he believes that the registrations were backdated and they were not issued on 23rd March 1995 as shown in the official searches.

5. The respondent further stated that he was in occupation of the suit properties from 1989 and had built a house on plot 579 and cultivated the other two parcels. He denied knowledge of the sale agreements dated 22nd June 1993, which were witnessed by one Michael Kihia, and that were the basis upon which the 1st appellant transferred the suit properties to the 2nd, 3rd and 4th appellants.

6. In cross-examination, the respondent reiterated his testimony and stated that when he suspected that the titles were backdated, he reported the matter to the Criminal Investigations Department. He denied receiving money from the 2nd, 3rd and 4th appellants for the purchase of the suit properties.

7. PW2 was Danson Wachira Thuita. He confirmed that he sold the suit properties to the respondent in 1988. He also confirmed that he received the full purchase price from the respondent in the absence of the 1st appellant and that the respondent caused the suit properties to be registered in the name of the 1st appellant in trust for himself and his children.

8. PW3 was Michael Kihia Kamau. He denied witnessing the sale agreements dated 22nd June 1993 between the 1st appellant and the 2nd, 3rd and 4th appellants or any other subsequent agreements. He denied that the signatures on the said agreements were his.

9. The appellants' case was that the 1st appellant and the respondent bought several properties together until 2001 when they separated. The 1st appellant stated that she bought the suit properties separately from the respondent together with other properties, including a vehicle. She had also bought three other parcels of land in Nyahururu in the name of the respondent. She stated that they agreed to sell the suit properties in 1993 to the 2nd, 3rd and 4th appellants to assist in them complete the construction of a

commercial plot in Nyahururu. She further stated that the purchase price was paid to the respondent, who drafted the sale agreements and his close friend, PW3, witnessed the said agreements.

10. The 1st appellant stated that it was only after their separation in 2001 that the respondent raised a claim on the suit properties. She stated that there was no record of payment of the purchase price to the suit properties by the 2nd, 3rd and 4th appellants because the respondent ran away with the records. She confirmed that the 2nd, 3rd and 4th appellants never occupied the suit properties, and that the respondent has been in occupation thereof since 2001.

11. The 2nd appellant testified as DW2. She stated that the 1st appellant and the respondent sold the suit properties to them, and they paid the purchase price in full. The respondent drafted the sale agreement which they signed at his home in the presence of PW3. Her title was issued to her on 23rd March 1995 after making payments at the Lands Office, Nyahururu. However, she did not produce any evidence of payment of the purchase price, or the payments made at the Lands office. The 2nd appellant denied the allegation that she hatched a plot to defraud the respondent and the 1st appellant of the suit properties

12. The 3rd appellant was DW3. She reiterated DW2's testimony on the signing of the sale agreement. She stated that she paid the purchase price in instalments to both the 1st appellant and the respondent. She further stated that she went to the Land Control Board in the company of the respondent and the 1st appellant, and was later issued with the title to the plot 580. She denied that the consent and title were forged. She also did not have any records of payments of the purchase price and registration fees.

13. DW4 was the 4th appellant. She stated that she bought 4 acres of land from the 1st appellant and the respondent. She paid the purchase price in two instalments to both the 1st appellant and the respondent. However, she did not sign a sale agreement even though she knew how to write. She stated that she was later issued with the title. She stated that she was taken to the Land Control Board where she paid an unknown amount to an unknown person but she was later on issued with a title. She stated that she did not have any records of payment of the purchase price. She also did not know the alleged witness, PW3.

14. Upon evaluation of the evidence before the court, the learned Judge observed that the following facts were not in dispute; the suit properties were purchased by the respondent from PW1 on 16th July 1989 and the respondent caused the suit properties to be registered in the 1st appellant's name. The 1st appellant and the respondent agreed to sell the suit properties to the 2nd, 3rd and 4th appellants in 1993. The 1st appellant and the respondent purchased several assets together as a couple until 2001 when they separated.

15. On whether there existed a trust between the 1st appellant and the respondent, the learned Judge held that the couple bought and developed plots for their joint benefit and that of their children. Therefore, the suit properties were held in trust for the respondent, by the 1st appellant. The learned Judge held that this was a special trust and there was no need to register the same against the register of the titles as the couple owned other properties like their motor vehicle jointly.

16. The learned Judge proceeded to hold that the transactions herein having taken place between 1993, 1995 and 2001, the applicable law was the legislation governing matrimonial properties, and the Registration of *Land Act*, (repealed). The learned Judge referred to Section 28(a) of the *Land Registration Act*, Section 93(1) of the *Matrimonial Property Act*, and Section 126(1) of the Registration of *Land Act*, (repealed), in holding that; "a trust being an overriding interest and beneficial interest over a property jointly acquired by joint effort of both spouses during their marriage need not be registered against the title."

17. The learned Judge held that the 1st appellant did not have absolute rights over the suit properties as any dealings with the properties, and specifically sale, was subject to the respondent's consent.

18. On whether the 2nd, 3rd and 4th appellants paid the purchase price on the suit properties, the learned Judge held that a contract of sale must be in writing, signed by all the parties, and attested to by a witness who ought to be present when the contract is signed. However, the evidence adduced by the appellants did not support that fact as the alleged attesting witness denied knowledge of the sale or ever being a signatory.

19. Furthermore, the learned Judge held that 4th appellant denied knowing the said witness and the signing of the sale agreement despite knowing how to write. The court noted that Section 3 of the *Law of Contract Act* is explicit on the requirement that an agreement must be signed by all parties and attested to by a witness. However, the evidence by the appellants did not point to the compliance with the said requirements.

20. The learned Judge observed that although the 1st appellant acknowledged receiving Kshs.520,000 from the 2nd, 3rd and 4th appellants as part payment and the balance was to be paid in instalments, no dates for completion were shown. The court pointed out that it was upon the 2nd, 3rd and 4th appellants to call evidence to prove that they paid the purchase price to either the 1st appellant or the respondent. However, the 2nd, 3rd and 4th appellants failed to produce evidence to show their source of monies, whilst the 1st appellant failed to convince the court of how the purchase price was paid. The learned Judge held that it was highly doubtful that any purchase price was paid in the circumstances.

21. The learned Judge further held that there was no valid sale agreement capable of enforcement, as the contract of sale became unenforceable because of uncertainty. This was so because the sale agreement did not specifically state the completion date or when the balance would be paid.

22. On whether the suit properties were fraudulently transferred to the 2nd, 3rd and 4th appellants by the 1st appellant, the learned Judge held that nothing valid would come out of an invalid contract, and the court had found the sale agreements were void ab initio.

23. In so holding, the learned Judge observed that despite the 2nd, 3rd and 4th appellants stating that they went to the Land Control Board on various dates to obtain consent, they did not produce the applications for consent and the 1st appellant as the vendor, never went to the board but they produced duly signed consents from the board. The court further observed that the 2nd, 3rd and 4th appellants did not produce any receipts to confirm that they paid stamp duty or registration fees at the Lands office, or produce the duly signed transfers.

24. The learned Judge held that Section 6 of the *Land Control Act* was not complied with as consent was not obtained and therefore, the sale transactions were rendered unenforceable. The court held that the burden shifted to the 2nd, 3rd and 4th appellants to prove the validity of their titles, and they failed to discharge that burden by failing to produce the relevant documents.

25. The learned Judge held that the appellants failed to satisfactorily explain how the 2nd, 3rd and 4th appellants' titles were entered in the registers on 23rd March 1995 yet an official search conducted on 19th July 2001 showed that the suit properties were in the name of the 1st appellant. The court held that the only plausible explanation was that the titles were backdated to fit into a scheme of fraud and corruption between the appellants and the Ministry of Lands officials with the aim of depriving the respondent his beneficial interest in the suit properties.

26. Having so found, the learned Judge ordered the cancellation of the titles to the suit properties, and the rectification of the register.

27. Consequently, the learned Judge entered judgment in favour of the respondent and against the appellants jointly and severally as follows:

> " a) It is declared that the 1st defendant holds the following land parcel numbers Nyandarua/ Silibwet/579, 580 and 1408 in trust for the plaintiff.
>
> b. An order is issued, directed to the Land Registrar, Nyandarua County to forthwith cancel Title Deeds over properties known as Nyandarua/ Silibwet/579, Nyandarua/Silibwet/ 580 and Nyandarua/Silibwet/1408 issued on 23rd March 1995 in favour of the 2nd, 3rd, and 4th defendants respectively.
>
> c. The Land Registrar, Nyandarua County is ordered and directed that upon cancellation of the said titles stated in (2) above, to rectify the Register and restore the names of the 1st defendant, Mary Muthoni Njaramba as the proprietor, within 60 days of this judgment.
>
> d. That the said Mary Muthoni Njaramba shall therefrom hold the said three titles for herself and in trust for the plaintiff which properties shall be so held as matrimonial properties pending division of the said properties under the Kenyan *Matrimonial Property Act* 2013, upon application."

28. Being dissatisfied with the judgment of the court, the appellants lodged the present appeal in which they raised nine grounds of appeal, to wit:

> " a) The learned Judge erred in law and fact in holding that the land sale contracts entered into separately between the 1st appellant and the 2nd, 3rd and 4th appellants did not comply with the provisions of Section 3 of the *Law of Contract Act*.
>
> b. The learned Judge erred in law and fact in holding that the 1st appellant's evidence on payment of the purchase price under the land sale contracts was contradictory.
>
> c. The learned Judge erred in law and in fact in relying on the decision in the case of Purple Rose Trading Co. Ltd v Bhanoo Shashikant Jai [2014] eKLR whose facts were clearly distinguishable and inapplicable to the circumstances of the instant case.
>
> d. The learned Judge erred in law and fact in holding that there was no evidence of payment of consideration by the 2nd, 3rd, and 4th appellants in spite of the 1st appellant's evidence to the contrary effect.
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> e. The learned Judge erred in law and fact in holding that there were no valid sale agreements whereas the respondent who was suing on the contracts had no legal capacity to challenge the contracts.
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> f. The learned Judge erred in law and fact in holding that there was no payment of stamp duty and registration fees and there were no applications for nor Land Control Board consents obtained in respect of the suit contracts pursuant

to the *Land Control Act* and proceeded to invalidate the 2nd, 3rd, and 4th appellants' titles on a misapprehension of the law.

g. The learned Judge erred in law and fact in shifting the burden of proof on the validity of titles to the 2nd, 3rd, and 4th appellants and proceeded on a misapprehension of the law to declare the titles invalid, null and void.

h. The learned Judge erred in law and fact in holding without evidence that there was collusion between the appellants and the ministry of lands officials in a grand scheme of corruption and fraud on sale and transfer of the suit land.

i. The learned Judge erred in law and fact by invoking Section 80(1) of the *Land Act* and disregarding the legal protection afforded to the 2nd, 3rd, and 4th appellants under Section 39(2) of the Registered *Land Act* and thereby proceeded on a misapprehension of the law to order cancellation of their titles."

29. The appellants prayed for orders that; the appeal be allowed with costs, the impugned judgment be set aside and substituted with an order dismissing the respondent's case, and any other relief.

30. When the appeal came up for hearing on 11th June 2024, Mr. Gakuhi Chege, learned counsel appeared for the appellants while Ms. Elizabeth Mwangi, learned counsel appeared for the respondent. Counsel relied on their respective written submissions which they briefly highlighted.

31. Mr. Gakuhi relied on the written submissions dated 5th June 2024 in support of the appeal. Counsel pointed out that the respondent heavily relied on the provisions of the *Land Registration Act*, which came into effect in 2012; and the *Matrimonial Property Act* which became operational in 2014, whereas the transactions pertaining to the subject matter of the appeal took place in 1993. He pointed out that the law does not operate retrospectively and therefore, the two statutes were not applicable to the circumstances of this case.

32. Counsel submitted that the suit properties were sold with the consent of the respondent and a disagreement only arose in 2001 when the 1st appellant and the respondent separated. Counsel submitted that despite his admission that they agreed to sell the suit properties, the respondent claimed that the transfers were fraudulently done.

33. In their written submissions, the appellants faulted the learned Judge for shifting the burden of proof to the appellants to produce the documents to prove the validity of their titles, and relied on the provisions of Section 107(1) & (2) of the Evidence Act. They submitted that the burden of proof was on the respondent to prove the allegations of fraud he leveled against the appellants.

34. The appellants submitted that the 3rd appellant paid the purchase price but the learned Judge held that there was no payment of consideration by all the three purchasers. They submitted that the respondent was involved at all the stages of the transaction and he even drafted the sale agreements in that respect.

35. While citing the case of Agricultural Finance Corporation vs Lengetia Limited [1985] KLR 765 the appellants submitted that the respondent could only sue the 1st appellant for a share of the purchase price in the cause for division of matrimonial property, but he could not seek cancellation of the transactions between the appellants. They were of the view that even in the event that the 1st appellant was in breach of the trust bestowed on her in the suit properties by the respondent, the 2nd, 3rd and 4th appellants, being bona fide purchasers for value were protected under Section 39(2) of the Registered *Land Act*.

36. The appellants submitted that the allegations of fraud were not proved in line with the decision in Mutsonga vs Nyati [1984] KLR.

37. The appellants faulted the learned Judge for determining issues not pleaded, such as non-compliance with the provisions of the *Law of Contract Act*, *Land Control Act*, *Stamp Duty Act*, and the Registered *Land Act*. In support of this submission, they relied on the case of Nairobi City Council vs Thabiti Enterprises Limited [1995-1998] 2 E.A 231.

38. Opposing the appeal, Ms. Mwangi submitted that the impugned judgement had already been executed and the suit property is currently registered in the name of the 1st appellant. She relied on the written submissions dated 7th June 2024. Counsel submitted that although the 1st appellant and the respondent intended to sell the suit properties, the process was frustrated by the 2nd, 3rd and 4th appellants when they failed to pay the purchase price. This prompted the respondent to ask the 1st appellant to destroy the draft sale agreements.

39. Counsel submitted that sale agreements did not meet the requirements of Section 3 of the *Law of Contract Act* as PW3 denied witnessing the agreements between the 1st appellant and the 2nd, 3rd and 4th appellants.

40. On the issue of fraud, counsel submitted that although the appellants claimed that the suit properties were transferred to the 2nd, 3rd and 4th appellants in 1995, an official search conducted in 2001 indicated that the said properties were still registered in the 1st appellant's name.

41. In answer to the court's question on the issue of the Land Control Board, counsel submitted that despite producing consents from the board, the appellants did not produce the applications for the consents and they transferred the suit properties on the same day without proof of payment of stamp duty.

42. In his written submissions, the respondent relied on the provisions of Sections 6, 12(1) and 14 of the Matrimonial Property Act, in submitting that the suit properties were part of matrimonial property hence the 1st appellant could not legally transfer the same to the 2nd, 3rd and 4th appellants, without his consent.

43. The respondent submitted that the 1st appellant was limited under Section 80 of the *Land Registration Act* and Section 28 of the *Land Registration Act* from selling the suit properties. He submitted that he had a beneficial interest in the suit properties resulting from the trust created during the subsistence of his marriage to the 1st appellant. He submitted that by virtue of that trust, he had the capacity to file the suit in order to protect his interest and the interest of his children.

44. While citing the case of Okoth vs Nyaberi & Another [2024] KECA 427 KLR, the respondent submitted that the appellants did not comply with the provisions of Section 3 of the *Law of Contract Act*, specifically, the requirement that the agreement must be signed by both parties and that it had to be attested by a witness.

45. On whether consideration was paid, the respondent submitted that although the 1st appellant testified that she received of Kshs.520,000 as and part payment she did not produce any evidence in support of the same. The respondent also pointed out that, in a contradictory statement, the 1st appellant had testified that it was the respondent who received the money. Be that as it may, the balance of the purchase price which was to be paid in instalments had no completion date, and therefore, the contract was incapable of enforcement. To buttress this submission, the respondent cited the case of Michira vs Gesima Power Mills Limited [2004] eKLR.

46. The respondent submitted that despite claiming to have gone to the Land Control Board to obtain consents, the appellants did not produce the applications through which they had sought the said consents. He also pointed out that the appellants did not produce any receipts to show that they had paid registration fees or stamp duty. While citing the provisions of Sections 107 and 108 of the *Evidence Act*, the respondent submitted that it was upon the appellants to produce the requisite documents to prove that the suit properties were correctly transferred to them.

47. While citing the case of Sagoo & Another vs Mwicigi & 3 Others [2022] KECA 83 KLR, the respondent submitted that Section 46 of the *Stamp Duty Act* prohibits acceptance of documents for registration unless it is stamped in accordance with the Act. However, in this instance, there was no evidence that the documents allegedly presented by appellants were evaluated for purposes of assessment of stamp duty as the consents were obtained the very day the transfers were registered, and title deeds issued to the 2nd, 3rd and 4th appellants.

48. On whether there was collusion between the appellants and officials in the Ministry of Lands, the respondent submitted that the evidence adduced indicated that the titles issued to the 2nd, 3rd and 4th appellants were registered in 1995. However, the copy of records issued on 27th January 2016 showed that the Land Registrar's signature for LR Nyandarua/Silibwet/579 was appended on the title on 15th May 2005, and the title deed was issued on 23rd March 1995.

49. The respondent further submitted that an official search conducted on 19th January 2001 showed that Nyandarua/Silibwet/1408 was in the name of the 1st appellant whereas the title showed that it was issued on 23rd March 1995. The respondent submitted that the 2nd, 3rd and 4th appellants could not explain the discrepancy, leading to the conclusion that the transfers were backdated and they also did not rebut this allegation.

50. The respondent urged that the appeal be dismissed with costs.

51. This being a first appeal, Rule 31(1)(a) of the Court of Appeal Rules, 2022 provides that:

> "On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power —
>
> (a) to re-appraise the evidence and to draw inferences of fact; and ..."

52. It follows that the primary role of this court as a first appellate court is to re-analyze and re-evaluate the evidence that was placed before the learned trial Judge and draw our own conclusions therefrom. However, in doing so, we bear in mind the fact that the trial court had the advantage of seeing and hearing the witnesses and we give allowance for the same. In the case of Peters v Sunday Post Ltd [1958] EA 424, at P 429 O'Connor P. stated thus:

> "An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand."

53. We have carefully considered the record, submissions by counsel, the authorities cited, and the law. The main issues for determination are; whether the respondent had the capacity to sue, whether there was a valid contract of sale between the 1st appellant and the 2nd, 3rd and 4th appellants; whether or not the alleged fraud was proved; whether the necessary consents were properly obtained; and whether the respondent was entitled to the reliefs sought.

54. It is common ground that the suit properties were bought by the respondent and registered in the 1st appellant's name. It is also common ground that the 1st appellant and respondent were married. It is not in dispute that sometime in 1993 the two parties decided to sell the suit properties to the 2nd, 3rd and 4th appellants in order to obtain funds to develop a commercial property they had acquired.

55. In line with this decision, they commenced the process of sale and transfer. However, in 2001 the marriage between the 1st appellant and the respondent broke down and the issue of the suit properties arose. The circumstances surrounding the sale indicate that part payment of the purchase price was made to the 1st appellant with the intention to have the balance paid in instalments. It was the respondent's case that when the 2nd, 3rd and 4th appellants failed to pay the purchase price, he asked the 1st appellant to destroy the sale agreements. On the other hand, the appellants insist that the purchase price was paid.

56. When the respondent conducted a search in 2001, he found that the suit properties were registered in the name of the 1st appellant but he was informed that the suit properties were transferred to the 2nd, 3rd and 4th appellants. This prompted the respondent to file the suit before the trial court. The question to be answered then is, did he have the capacity to do so?

57. The trial court in determining this issue found that as husband and wife who had acquired several properties together during the subsistence of their marriage, the 1st appellant held the suit properties in trust for the respondent. In so holding, the court relied on the provisions of Section 93(1) of the *Matrimonial Property Act*.

58. In this instance, we find that the court erred in placing reliance on the provisions of the *Matrimonial Property Act*. The court ought to have relied on the provisions of the Married Women Property Act,1882 which was the applicable law at the time the suit was lodged as that is also when rights, duties and remedies accrued between the parties. In the case of Samuel Kamau Macharia & Another vs KCB & 2 Others [2012] eKLR, the Supreme Court found that all statutes are prospective and that therefore, retrospective application should not be made unless by express words or necessary implication, it appears that this was the intention of the Legislature.

59. In the case of Joseph Ombogi Ogentoto vs Martha Bosibori Ogentoto, SC Petition No. 11 of 2020, the court held thus:

> "We reiterate the above holdings and further note that for legislation to have retrospective effect, the intention must be clear and unambiguous from the words of such statute or legislation. Having perused the Act in contention and considered the submissions by parties as well as the law as expressed above, we have come to the conclusion that there is no retrospective application of the *Matrimonial Property Act* and hold that the applicable law to claims filed before the commencement of that Act is the Married Women Property Act,1882."

60. Section 1 of the Married Women Property Act provides that:

    1. A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

    2. A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need

not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

3. Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

4. Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

5. Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.

61. In this instance, it is clear that the suit properties were not solely acquired by the 1st appellant. The properties were bought by the respondent and registered in the 1st appellant's name. The 1st appellant testified that she had acquired some other properties and registered them in the respondent's name. We find that the relationship between the 1st appellant and the respondent was based on trust that either of them would deal with the properties in their respective name in the best interests of the other and for their children.

62. Section 24 of the Married Women Property Act provides that:

> " The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action."

63. On whether there existed valid contracts between the 1st appellant and her co-appellants', Section 3 of the *Law of Contract Act* provides that:

> " No suit shall be brought upon a contract for the disposition of an interest in land unless —
>
> a. the contract upon which the suit is founded —
>
> i. is in writing;
>
> ii. is signed by all the parties thereto; and
>
> b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
>
> Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust."

64. It is not in dispute that PW3 whom the appellants claimed attested the sale agreements denied the signatures on the said agreements or even witnessing the signing of the agreements. We find that as

it was the appellants' agreement in question, it was incumbent upon the appellants to prove that the sale agreements were valid, and that indeed, PW3 witnessed the signed agreements, and the signatures thereof belonged to him.

65. In any event, the 4th appellant testified that she did not sign any agreement, despite being able to write. She also denied knowing the alleged witness. In the circumstances we find that the sale agreements herein were invalid for failure to meet the mandatory provisions of Section 3(b) of the *Law of Contract Act*.

66. Furthermore, as the trial court correctly held, there was no proof of payment of consideration which is a key element in a contractual agreement. The 1st appellant contradicted her testimony by stating that she was paid Kshs.520,000 as part payment and also stated that the money was never paid to her but to the respondent, who denied the same. It is evident from this testimony that there was no proof of part payment of the purchase price.

67. Be that as it may, the sale agreements were open ended as they did not have a completion date or a set date when the balance of the purchase price was to be paid. This in itself rendered the agreements unenforceable. In the case of Michira vs Gesima Power Mills Ltd, (supra), this Court stated:

> "That is, indeed, an unusual clause for it is a condition precedent to specific performance of an agreement for sale of land that the purchaser must pay or tender the purchase price at the time and place of completing the sale – see Openda v Ahn [1984] KLR 208 at page 218 paragraphs 10 to 15. That clause would mean that the contract would be executed first before the balance of purchase price becomes due and payable. The agreement did not even provide for the time within which the balance of purchase price would be payable or secure the payment. The fact that the agreement is uncertain on the fundamental term on the payment of the purchase price makes the entire agreement void for uncertainty. Lastly, the fact that the agreement is capable of being construed as providing for two different dates for giving vacant possession by the respondent is itself evidence of uncertainty. In the final analysis, we are satisfied, like the learned Judge, that the entire agreement is void for uncertainty and that neither party can be held to be in breach of the agreement or be entitled to any damages from the abortive agreement."

68. On whether the Land Control Board Consents were properly obtained, the respondent called into question the procedure in which the consent was obtained. We note from the record that although the appellants produced an application form for consent for plot 233 which was not subject to the suit, they only produced the consents for the suit properties.

69. The said consents show that the applications were made between 20th and 22nd March 1995 and the board sat and approved the same on 23rd March 1995, the very date the 2nd, 3rd and 4th appellants were issued with title deeds to the suit properties. This gave rise to the question raised by the respondent concerning how possible it was to apply for consents, get the said consents, and obtain titles thereof, within three days.

70. Section 2 of the *Land Control Act* on the manner of application for consent, provides that:

> "(1) An application for consent to a controlled transaction shall be in Form 1 in the Schedule and be accompanied by a fee of one thousand shillings.
>
> 2. Every application for approval to a subdivision of land shall be accompanied by —

a. a suitable plan on durable material showing the manner of subdivision, the means of access to each subdivision and, very approximately, any existing permanent development; and

b. a statement in writing of the water supply which is available for the subdivisions and the use to which the subdivisions are proposed to be put.

3. Every applicant shall furnish the land control board with such additional information as the board may from time to time require."

71. The appellants did not produce any evidence to show that they paid the fee of Kshs. 1,000 as required by law. It is also evident from the record that there was no evidence of payment of stamp duty before the suit properties were registered in the 2nd, 3rd and 4th appellants' names. In the circumstances, we find that the issuance of titles in the names of the 2nd, 3rd and 4th appellants was shrouded with mystery of the nature that casts doubt on their integrity.

72. In the case of Kagina vs Kagina & 2 Others [2021] KECA 242 KLR, this Court held that:

> "Turning to the threshold for proof of fraud, the Judge took into consideration the Court of Appeal decision in the case of Central Kenya Ltd vs. Trust Bank Limited & 4 Others [1996] eKLR for the holding, inter alia, that: allegations of fraud must be strictly proved; great care needs to be taken in pleadings containing allegations of fraud or dishonesty; there must be sufficient evidence to justify the allegation; fraud and conspiracy to defraud are very serious allegations; and lastly, that the burden of proof for fraud is slightly much higher than that of balance of probability."

73. The respondent produced the official searches he conducted in respect of the suit properties in 2001 which indicated that the suit properties were in the name of the 1st appellant at the time, yet the 2nd, 3rd and 4th appellants claimed to have acquired titles to the suit properties in 1995. We find that the appellants were obligated to explain the discrepancy of how they held titles to parcels of land registered in the name of the 1st appellant. Having failed to do so, we find that any reasonable man would have arrived at the inevitable conclusion that the title deeds were backdated.

74. In the circumstances, we find that the claim for fraud was specifically pleaded and strictly proved by the respondent.

75. As regards the reliefs sought, it is common ground that the impugned judgment was executed and titles to the suit properties reverted to the 1st appellant's name. Therefore, we find no reason to interfere in the reliefs granted by the trial court.

76. For the above reasons, the appeal is without merit and is dismissed. As this dispute involves family members, each party to bear own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.