



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, W. KARANJA, G.B.M. KARIUKI, AZANGALALA & MOHAMMED JJA)

CIVIL APPEAL NO. 262 OF 2004

BETWEEN

MUGO MUIRU INVESTMENTS LIMITED.....APPELLANT

AND

E W B1ST RESPONDENT

S B.....2ND RESPONDENT

HOUSING FINANCE COMPANY OF KENYA LTD.....3RD RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nairobi (Kuloba, J.) dated 14th October, 2003

in

H.C.C.C NO. 4709 of 1987)

JUDGMENT OF THE COURT

PREAMBLE

1. This is an appeal by **Mugo Muiru Investment Limited (the appellant)** against the judgment of the High Court (**R. Kuloba, J.**) delivered on 14th October 2003 in H.C.C Suit No. 4709 of 2007 in which the 1st respondent, **E W B**, the wife of the 2nd respondent (**S B**), had sued the latter as the 1st defendant and the appellant as the 2nd defendant and **The Housing Finance Company of Kenya Limited**, the 3rd respondent, as the 3rd defendant. The said suit was commenced by way of a plaint and not by way of Originating Summons prescribed by Order 36 Rule 3A of the Civil Procedure Rules. In the suit, the 1st respondent qua plaintiff claimed that she had beneficial interest in the matrimonial home known as **L.R. [particulars withheld], Loresho**, Nairobi, which was mortgaged to the 3rd respondent as chargee. The 3rd respondent qua chargee sold the said property to the appellant to recover the mortgage debt owed to it by the 2nd respondent.

IMPUGNED JUDGMENT

2. The High Court determined Suit No.4709 of 2007 in the impugned judgment, in which the learned

Judge (R. Kuloba, J.) decreed as follows:-

- (1) That the prayer for a declaration that the plaintiff had a beneficial interest in the matrimonial home as wife and part owner is struck out.*
- (2) That the purported sale of L.R. No. [particulars withheld] be and is hereby declared null and void.*
- (3) That an injunction restraining the defendants, their servants or agents or howsoever otherwise from selling or proceeding with the sale of the matrimonial home be and is hereby refused.*
- (4) That the prayer for damages be and is hereby refused.*
- (5) That the plaintiff shall be paid by the defendants and the third party the costs of this suit.*
- (6) That the claim for counter-claim against the plaintiff be and is hereby dismissed with costs to be paid to the plaintiff.*
- (7) That the third party do reimburse the purchase price of the suit premises to the second defendant.*
- (8) That the claim for interest and costs against the third party to the second defendant fails.”*

BACKGROUND

3. The record of appeal shows that E W B, then a spinster aged 24 years, was married to S B, then a Bachelor and a student at Nairobi University on 13th April 1968 in St Andrew's Church (PCEA) Nairobi. As man and wife, they both later purchased in 1981 a matrimonial home in Nairobi on land title No. [particulars withheld]. E W B (referred to hereinafter as “**Elizabeth**”) averred that the purchase price was paid by both her husband, **S B** and herself and further that the balance of the purchase price was financed through a mortgage advanced by the Housing Finance Company of Kenya Limited, the 3rd respondent (hereinafter referred to as “**HFCK**”), to which they charged the title to the matrimonial home on **LR [particulars withheld]** to secure the loan.

4. Elizabeth and S B, as a couple, took possession of the matrimonial home following its purchase and lived in it until S B moved out and went to live elsewhere, ostensibly on account of ensuing domestic problems.

5. The mortgage over the matrimonial home was fully repaid in 1984. The record of appeal shows that the matrimonial home, though purchased by both spouses, was transferred to and registered in the name of S B alone.

6. The record of appeal also shows that after moving out of the matrimonial home and after repayment of the mortgage debt secured on the matrimonial home, Shem Bageine took a loan of Shs. 600,000/= from Housing Finance Company of Kenya Limited and offered as security a further charge over the title to the matrimonial home. He did not service the loan and so, in 1987, HFCK, in exercise of its powers of sale qua chargee sold the property to **Mugo Muiru Investment Limited**, the appellants herein, at a price of Kshs 1,000,000/- and a transfer was executed on 10th June 1988 in favour of the latter which started demanding rent from Elizabeth who was in occupation of the property.

7. The suit (No. 4709 of 1987) filed by Elizabeth in 1987 in the High Court was amended in November 1988 by joining Mugo Muiru Investment Limited as a second defendant. Elizabeth's claim against both her husband, S B, and Mugo Muiru Investment Limited, was for a declaration that she had beneficial interest in the matrimonial property as a wife and part owner; a declaration that the sale of the matrimonial property by HFCK to Mugo Muiru Investment Company Limited was null and void; and for

an injunction restraining HFCK and S B from selling or proceeding with the sale of the matrimonial property or otherwise preventing Elizabeth from living in it or in any way interfering with her occupation of the matrimonial home.

8. In his defence, S B denied that Elizabeth made any contribution towards the purchase of the matrimonial property. He averred that he purchased it alone using his own resources. He also alleged that the mortgage repayments were made by him alone from his resources.

9. Mugo Muiru Investment Company Limited on its part averred that it bought the matrimonial property, not from S B, but from HFCK which had a charge over the property which it sold pursuant to the chargee's power of sale under the charge instrument registered in its favour. It averred that it was a bona fide purchaser for value without notice of adverse claims.

10. By a Third Party Notice, Mugo Muiru Investment Company Limited claimed from HFCK indemnity in respect of all claims made by Elizabeth against it. It also claimed indemnity or reimbursement of the purchase price with interest should the prayers by Elizabeth against HFCK be granted.

HEARING AND DETERMINATION OF SUIT NO. 4709 OF 2007 IN THE HIGH COURT.

11. The suit came up for hearing in the High Court (before **Kuloba J.**). Elizabeth called four witnesses who testified how the matrimonial property was acquired by her and B and how it was sold. B did not give evidence. Mugo Muiru Investment Company Limited called one witness whose evidence focused on the value of the property. HFCK, the 3rd respondent, adduced evidence on how it sold the property to Mugo Muiru Investment Company Limited pursuant to its power of sale under the charge instrument.

12. The learned Judge crystallized the issue for determination thus:-

“... issue to be decided then arose from the pleadings and these facts, is this: Was this plaintiff, as a spouse of a chargor, living in a matrimonial home comprised in property charged to a finance institution lending money to the chargor who defaults in repaying it and who is the sole registered proprietor of the property, entitled to any form of protection and relief of the court in our law?”

13. In his determination, the learned Judge answered the issue and stated as follows:

“Under our law, a spouse has a right to remain in a matrimonial home. This is whether the home is mortgaged property. A legal mortgagee or a chargee, does not have an undisputed right of sale or to possession. A deserted spouse left without an alternative suitable home or accommodation must hold on and remain in the home. So must the children and dependants. Matrimony, and, indeed, parental care and guardianship, constitute a clog on a spouse's, parents or guardians property so as to run with it.

When advancing money as a loan to a spouse or a parent against the matrimonial home, therefore, a lending institution or bank, as the case may be, must carefully enquire whether the other spouse or

dependant under his or her roof has been suitably provided for by way of home and shelter. If this is not done, it is risky to accept a home as security for a loan given. There is no good reason why such a lender should not have regard for and “respect the rights and freedoms of others” as required by Section 70 of the Constitution of Kenya. It would be reckless negligence not to enquire and act accordingly.

The same principle applies when it comes to the exercise of a contractual or statutory right of sale or otherwise. You only exercise it subject to “respect [for] the rights of others.”

Remember, the rights of others are not required by the Constitution to be rights “registered”

anywhere. There is no constitutional requirement for registration of rights before they are protected. For example, a right to life does not have to be registered under statute for it to be protected. No one is free to kill an “unregistered” human being. Likewise, a spousal right, or that of an child, does not have to be registered to be protected by the Constitution – a spouse or child has a right to a home, and you have no right to subject a spouse or child to inhuman treatment or to put the spouse or child in degrading conditions, merely because his or her right to the home is not registered.”

14. The learned Judge found that HFCK had not done due diligence in charging the matrimonial property any more than Mugo Muiru Investment Company Limited had in making the decision to buy. Consequently, the court held that the charge was therefore void and the exercise of the chargee’s power of sale improper. In short, no valid title was passed to Mugo Muiru Investment Company Limited by HFCK. The learned Judge expressed himself as follows as regards both parties thereof:-

“You do not have money the way the second defendant had, and just buy a property because it is up for sale and you have the requisite money to pay for it: you must inspect it to ensure that the property is not encumbered. If you do not care to check the property, do not cry when you get burdens on it afterwards. Courts are not there for the indolent, incautious or reckless. If you are unmindful of other people's welfare and you are caught in a warp, it is up to you alone to extricate yourself, and the court will not assist you, unless to do so the court will not be bending constitutional provisions or engaging in a violation of basic fundamental human rights of others or acting contrary to the public interest.

The second defendant cannot be heard to claim that it was a bona fide purchaser. He (sic) made no inquiries when there was nothing to hinder it from doing so. There were all the circumstances putting it on notice. The very fact that it was purchasing property charged to secure a loan, was enough in itself to be put on inquiry into the state of the property. The register contained a caution and a temporary injunction; and yet the second defendant did not heed these; nor did the chargee selling.”

15. The learned Judge went on to state with regard to HFCK:-

“The third party (chargee), on the other hand, lent money on security of a matrimonial home without inspecting it and asking relevant questions to be answered by the borrower, regarding the wife's rights or interest in the home – including spousal rights and interest and her basic human right to a home irrespective of registration. It was upon the chargee to make sure that the wife agreed to the charging of the matrimonial home. For the lender (chargee) to have turned a blind eye to the wife's interest or its possibility, and afterwards, through sale of the property to a third party, seek to set in motion the train of eviction of the other spouse (wife in this case) and probably the entire family (if any), is not an action a court can legitimately sustain. Just as the second defendant (purchaser) cannot be heard on a plea that it did not know the wife was in occupation of the matrimonial home, the third party, too, cannot be heard in that regard.”

16. Finally, because the prayer for a declaration that Elizabeth had a beneficial interest in the matrimonial home was made in a plaint instead of an Originating Summons, the learned Judge declined to grant it. However, he found the sale by HFCK to Mugo Muiru Investment Company Limited null and void. He granted costs of the suit to Elizabeth to be borne by S B, HFCK and Mugo Muiru Investment Company Limited. This is the decision that prompted this appeal.

17. Aggrieved by the learned Judge’s decision, Mugo Muiru Investment Company Limited, gave Notice of Appeal on 7th January 2004 pursuant to rule 75 of the Court of Appeal Rules manifesting its intention to challenge the said decision in this Court.

APPEAL AND MEMORANDUM OF APPEAL TO THIS COURT

18. On 26th November 2004, Mugo Muiru Investment Company Limited lodged the Record of Appeal. In

the Memorandum of Appeal dated 26th November 2004, it proffered nine (9) grounds of appeal. In summary, it contended that the learned Judge was wrong in his judgment (delivered on 14th October 2003) because he failed to appreciate that Mugo Muiru Investment Company Limited was not under any statutory obligation to enquire as to who the occupants of the charged matrimonial home were before participating in the public auction where it purchased the property; that the learned Judge introduced extrinsic matters not canvassed before him thereby arriving at an erroneous decision; that the learned Judge erred and misdirected himself when he failed to consider that Mugo Muiru Investment Company Limited was a bona fide purchaser for value without notice of adverse claim superior to the charge which ranked in priority to any encumbrance; that the learned Judge erred in not appreciating that there was a valid sale and that HFCK properly exercised its power of sale and that Mugo Muiru Investment Company Limited was entitled to possession of the property and payment of mesne profits from Elizabeth who was in occupation and had possession and control of the property. **SUBMISSIONS MADE BY COUNSEL FOR THE PARTIES IN THIS APPEAL.**

19. The parties to this appeal filed written submissions and authorities. The appellant filed written submissions on 3rd November 2015 and two lists of authorities, one on 14th March 2012 and the other on 17th November 2015. The 1st respondent (Elizabeth) filed written submissions on 17th November 2015 and the 3rd respondent (HFCK) filed written submissions on 29th December 2004. The 2nd respondent (S B) filed only a list of authorities on 27th November 2007.

20. We were urged by the appellant in its submissions to reverse or set aside the impugned judgment and allow the appeal. We were also urged to vary the High Court judgment or substitute it with our own judgment and that costs of this appeal and of the High Court be awarded to the appellant, Mugo Muiru Investment Company Limited.

21. When the appeal came up for hearing, learned counsel **Mr. Samora Owino** appeared for the appellant, Mugo Muiru Investment Limited and learned Senior Counsel **Dr. G. K. Kamau** appeared for Elizabeth, the 1st respondent, while learned counsel **Mr. Alex Thangei** appeared for HFCK, the 3rd respondent. The 2nd respondent failed to participate and the record shows that on many occasions during the proceedings in the lower court he did not appear nor was he represented by counsel. He had, however, been served to attend the hearing of this appeal but did not appear and consequently it proceeded in his absence; it cannot therefore be said to be ex parte in relation to S B.

22. On behalf of Mugo Muiru Investment Company Limited, learned counsel Mr. Owino focused in his submissions on the exercise by chargee of the power of sale; indefeasibility of title; matrimonial dispute and failure of the court to consider reimbursement of the purchase price and interest thereon. Mr. Owino contended that the chargee's power of sale under the charge dated 16th November 1994 was properly exercised by HFCK and a transfer was effected. In his view, the **ITPA Section 69 B (1) (now repealed)** and **Section 24** of the Registration of Titles Act (RTA), (*now repealed*), showed that once a property was sold by public auction, the remedy of an aggrieved party, unless fraud is proved, was in damages. He referred us to the decision of this Court in the case of **Kenya Commercial Bank versus James Osebe [1982-88] I KLR 48** in which the borrower whose property was sold by public auction following the Bank's exercise of its power of sale under the charge took out an Originating Summons in 1978 seeking a declaration to determine whether the sale was fair and just and to set it aside if it was not. The outstanding balance of the debt prompting the sale in that case was Kshs 8,027.20/= out of a secured debt of Kshs 160,000/=. The Court found that although the auction was not irregular or improper, nevertheless the interest of the borrower as chargor was not taken into consideration and that the bank was careless, negligent and reckless. The High Court did not set aside the sale but awarded Kshs 180,000/= as damages. On appeal, this Court held that the Judge had no power to determine an issue, namely, damages, which was not before him, and moreover, had no power to award damages on an Originating Summons under Order 36; further, that while the bank had no duty to wait for a rising market, it was unrealistic for the bank to see as its only duty as covering its own outstanding debt especially as the debt had been reduced.

23. Mr. Owino criticized the procedure adopted in the proceedings giving rise to the impugned judgment and submitted that the suit should have been commenced by way of Originating Summons instead of a

plaint as was the case.

24. It was Mr. Owino's submission that as there was no fraud in the sale of the matrimonial property to Mugo Muiro Investment Company Limited, the court should have found in favour of his client instead of cancelling the title when fraud was not proved. Moreover, contended Mr. Owino, there was a counter-claim by the appellant seeking mesne profits which, in his view, should have been allowed.

25. It was urged on the appellant's behalf that HFCK as chargee had full powers to sell and transfer the property to the appellant. It was urged that Section 69 of the Transfer of Property Act (repealed) conferred on HFCK power to sell by public auction or by private contract without being answerable for any loss occasioned thereby. Counsel for the appellant relied on Section 69 B (1) of the said Act to buttress the contention that HFCK as mortgagee exercising the mortgagee's statutory power of sale had power "to transfer the property for such estate and interest as may be the subject of the mortgage freed from all estates, interest, rights and encumbrances to which the mortgage has priority but subject to all estates, interests, rights and encumbrances which have priority to the mortgage." It was emphasized by appellant's counsel that any person damnified by an unauthorized, or improper or irregular exercise of the power of sale shall have his remedy in damages against the party exercising the power. But in matters of land, damages are not always an adequate remedy especially where there is sentimental value or sentimental attachment to land; for instance, one's home which may be the only place the family has known or is entrenched. Heavy reliance was placed by counsel for the appellant on Section 24 of the Registration of Titles Act (repealed) to buttress the proposition that even in cases of fraudulent transfer of land registered under the Act such as the property in this case was, the remedy was damages. Section 24 of the Act (now repealed) provided:

"Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person or proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the and was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription."

26. Counsel for the appellant urged that once the hammer went down in a sale in an auction, the equity of redemption is lost and any claim proved is remedied by damages. The decisions in **Simon Njoroge Mburu v. Consolidated Bank of Kenya** [2014] e KLR and **Bomet Beer Distributors Limited & Another versus KCB & 4 Others** were cited in support of that proposition. It was the submission of the appellant's learned counsel that this court has repeatedly held that once a property is offered as security, it becomes an item susceptible to sale. Counsel quoted the decisions in **Vinette Daphine Oluola versus Akich & 3 Others** [2006] eKLR; **Ngaru v. Family Bank Ltd** [2014] e KLR and **Nyanza Fish Processors Ltd v Barclays Bank of Kenya** (Civil Appeal No.114 of 2009).

27. It was also contended that the appellant was a bona fide purchaser for value without notice and that a charge ranked higher than any other interest and that Elizabeth's interest required to be determined under the Married Women's Property Act as was done in the cases of **Francis Njoroge versus Virginia Wanjiku Njoroge** [2000] e KLR; **Paul Thuo Nganga v. Irene Wambui Thuo** [2006] e KLR; and **Peter Mbura Echaria v Priscilla Njeri Echaria** [2007] e KLR; **Ze Yu Yang versus Nova Industrial Products Ltd** [2003] 1 EA 362; At the time when the appellant purchased the property in question, spousal consent was not required, said learned counsel. Heavy reliance was also placed on Section 23(1) of the Registration of Titles Act (repealed) (set in paragraph 36 hereof) because it enacted that a registered proprietor's title is absolute proof of ownership.

28. As can be seen from these submissions, the appellant's case is that Shem Bageine as the chargor had his remedy in damages against HFCK and Elizabeth had no claim against the appellant.

29. On his part, learned senior counsel **Dr. Kuria** opposed the appeal and drew our attention to the three

lists of authorities filed by him and relied on his written submissions. It was Dr. Kuria's submission that as the matrimonial property was acquired during the coverture of the marriage between Elizabeth and S B, the latter held it in trust for Elizabeth. He relied for this proposition on **S. P. Baker and P. St. Langaman, Snell's Principles of Equity, 28th Edn, 1982**. He criticized the sale of the matrimonial property by HFCK and the appellant's failure to do due diligence by physically inspecting the property. In his view, the registration of the charge to HFCK by S B was to defeat Elizabeth's unregistered interest. Relying on **Section 23** of the RTA (now repealed) Dr. Kuria contended that the appellant was not a bona fide purchaser for value and could not therefore obtain a valid conveyance of the title.

30. On procedure, Dr. Kuria contended that the institution of the suit by Elizabeth by way of a plaint was proper because the suit involved parties other than Elizabeth's spouse, S B. He contended that the case of **Francis Njoroge vs. Virginia Wanjiku Njoroge [EA (Nbi) Civil Appeal No. 44 of 1999]** was wrongly decided. This Court held in 2000 in that case that as the dispute was under The Married Women's Property Act, 1882 (now repealed) the only way provided for such claims was through Originating Summons. A retrial of the dispute was ordered, *ex debito juititiae*, and the court directed the filing of Originating Summons in the High Court on which the re-hearing would take place.

31. It was further Dr. Kuria's submission that the appellant cannot legitimately claim to be a bona fide purchaser for value without notice when it had failed to do due diligence and when Elizabeth was in possession and control of the property. He pointed out that on 15th January 1988, the High Court (Akiwumi, J.) issued an interim injunction to stop the transfer of the matrimonial property and in spite of this injunction, the property was nevertheless transferred on 21st July 1988. This, said counsel, was in breach of the court injunction order. Counsel further submitted that when S B fell into arrears, Elizabeth offered to assume the responsibility of paying the balance of the mortgage debt but HFCK declined to accept and prevented this from happening and then proceeded to sell in spite of Elizabeth's unregistered beneficial interest in the property. Counsel urged us to dismiss the appeal and affirm the decision of the High Court and allow the prayers granted to Elizabeth by the High Court.

32. Learned counsel **Mr. Thengei** on behalf of HFCK relied on his written submissions filed on 29th December 2015 and on his list of authorities filed on 7th November 2007. It was his submission that although there was an injunction on 15th January 1988 prohibiting sale of the matrimonial property, transfer was effected on 21st July 1988 because the injunction was not registered against the title to the property. Moreover, he said, HFCK was not a party to the suit in which the injunction was issued. In his view, there was no requirement for his client (HFCK) to do due diligence. It was his view that the constitutional and international covenants referred to in the impugned judgment were not canvassed before the trial judge. Counsel contended that fraud was not pleaded or proved and that the power of sale by the HFCK as chargee was not shown to have been wrongly exercised. He urged that the appeal be dismissed.

33. In retort, Dr. Kuria stated that Elizabeth was in possession and claimed beneficial interest and that under Section 2 of the Registration of Titles Act (*now repealed*), there is "*fraud on the part of a person obtaining registration with proved knowledge of existence of an unregistered interest on the part of some other person whose interest he knowingly defeats by registration.*" It was Senior Counsel's submission that HFCK assisted S B to perpetrate fraud by disposing of the matrimonial property to undermine and defeat Elizabeth's unregistered interest.

ANALYSIS AND DETERMINATION

34. We have anxiously given due consideration to this appeal and have carefully perused the record and the rival submissions of the parties. In line with the principles in **Selle v. Motor Boat Co [1968] EA 123** and **Abdul Hameed Saif v. Ali Mohamed Sholam [1955] 22 EACA 270** we are under a duty to give the parties a retrial by re-evaluating the evidence and making our own deductions and conclusions bearing in mind that the trial court had the advantage of seeing the witnesses and their demeanour and thus was in a better position to evaluate the veracity of their evidence. The first issue for our determination in this appeal is the nature of Elizabeth's interest in the matrimonial property and secondly the legal effect of Elizabeth's interest in the matrimonial property and thirdly whether the sale of the property by HFCK to

the appellant, Mugo Muiro Investment Limited, was subject to such interest and fourthly, the effect thereof. We do so alive to the fact that the applicable law on which our decision must be predicated is the law as it stood when the suit was instituted and subsequently decided in 2003; we are aware that since the impugned decision on 14th October 2003, statute land law of this country has changed. We observe that the **Land Registration Act, Cap 300** was enacted and came into force on **2nd May 2012** and that it revised, consolidated and rationalized the registration of titles to land so as to give effect to the principles of devolved government in land registration and that **Act No. 3 of 2012** repealed the following statutes:

The Government Lands Act (Cap 280); and (ii) The Registration of Titles Act (Cap 281); and (iii) Land Titles Act (Cap 282); and (iv) Registered Land Act (Cap 300); as well as Transfer of Property Act (Group 8) while Acts No.19 of 2011 and 6 of 2012 repealed Land Disputes Act, Cap 303A and Way Leave Act Cap 292 together with Land Acquisition Act Cap 295 respectively.

35. The evidence adduced in the trial shows that the matrimonial property was purchased and belonged to both Elizabeth & S B both of whom paid for it and therefore owned it. It also shows that the debt secured on the matrimonial property was ultimately repaid, albeit with difficulty. Further, it also shows that HFCK Senior Managers were well aware of these facts and that Elizabeth claimed interest in it as a spouse. The facts also show that the matrimonial property was subsequently offered as a collateral to secure a loan of Kshs 600,000/= to S B. It is this second debt that gave rise to the sale of the matrimonial property and hence Suit No.4709 of 2007. The evidence on record further shows that HFCK's Managers were aware that Elizabeth, a spouse, was residing in and had the control of the matrimonial property when they took it as a collateral for the subsequent loan of Shs. 600,000/= to Shem Bageine. The possession, occupation and control of the matrimonial property by Elizabeth qua spouse should have raised a red flag not only to the HFCK in considering whether or not to grant the further loan to S B. As we shall show later, the appellant ought to have done due diligence while purchasing it. The fact that Elizabeth was in possession and control of the matrimonial property without paying rent gave rise to the possibility that she might have an interest in it. Whether or not such interest was reflected on the title to the matrimonial property was immaterial as we shall show later.

36. In the plaint filed in the High Court by Elizabeth, the latter pleaded that the matrimonial property was purchased by S B and herself (Elizabeth) and that it was conveyed to S B “for convenience and appearance”. There was no evidence by S B to rebut this averment. The matrimonial property was registered under The Registration of Titles Act, (Chapter 281 of the Laws of Kenya) (now repealed) to which the substantive law was the Indian Transfer of Property Act [1882] (now repealed). The charge that resulted in the sale of the matrimonial property was registered under the provisions of the Registration of Titles Act (repealed). Section 23 of the Act stated:

“S.23(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions, and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

37. Under Section 69(1) of the Indian Transfer of Property Act [1882], the mortgagee was given overwhelming statutory power to sell mortgaged property. The Section stipulated:-

“69 (1) A mortgagee, or any person acting on his behalf where the mortgagee or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to buy in at an auction, or to rescind any contract for sale,

and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage-money, or part thereof, immediately due and payable.

Section 69 B of the Transfer of Property Act [1882] stipulated:-

“69 B. A mortgagee exercising the mortgagee's statutory power of sale shall have the power to transfer the property sold, for such estate and interest therein as may be the subject of the mortgage freed from all estates, interests, rights and encumbrances to which the mortgage has priority but subject to all estates, interests, rights, and encumbrances which have priority to the mortgage.

(2) Where a transfer is made in exercise of the mortgagee's power of sale, the title of the purchaser shall not be impeachable on the ground;

(a) that no case has arisen to authorize the sale; or

(b) that due notice was not given; or

(c) the power was otherwise improperly or irregularly exercised.

38. As the law stood at the time of institution and determination of the suit No.4709 of 1987, the relevant provisions of the law were contained, *inter alia*, in the **Registration of Titles At Cap 281** (now repealed), and **Married Women's Property Act 1882** (now repealed) **The Indian Transfer of Property Act 1882** and precedents and **common law** by dint of Section 3 of the Judicature Act Chapter 8 which states

“3. (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with –

(a) the Constitution;

(b) subject thereto, all other written laws, including Acts of Parliament of the United Kingdom cited Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date; but the common law, doctrines of equity and statutes of general application shall apply so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

39. In this appeal, it is not for us to make a determination of the extent of the interest in the matrimonial property between Elizabeth and S B or their respective contributions in the matrimonial property. Clearly, they are both co-owners. Rather, our role is a narrow one; it appertains to determination of the nature of the Elizabeth's interest in the matrimonial home (standing on Plot No. L.R. [particulars withheld]) and

how it affected the matrimonial property and the sale and transfer of the matrimonial property to the appellant. There is no controversy or dispute as regards the fact that the Registration of Titles Act (now repealed) gave a chargee the power to sell by public auction or by private treaty charged property after the requisite statutory notice to sell was given to the chargor to pay the mortgage debt. In this appeal, no issue arises as regards the statutory notice to S B. What we are called upon to determine is whether the learned trial Judge (Kuloba J) was right in his decision as regards Elizabeth's interest in the matrimonial property. There is evidence that Elizabeth tried to assume responsibility to pay the second debt that gave rise to the sale and transfer of the matrimonial property to the appellant but HFCK declined to entertain her request to do so and instead proceeded to sell the matrimonial property when S B failed to pay. At the time of the sale, HFCK knew or ought to have known that Elizabeth claimed to be a co-owner and was in possession and control. In her evidence before the trial judge, Elizabeth testified on 8th May 1996 as follows:

"I am a Kenyan Citizen. My husband is a Ugandan citizen. He is now in his country of origin. I lived with him in Kenya from 1968 when we were married till 1981. He was a professional valuer working for [particulars withheld] Ltd, then [particulars withheld], and later his own firm of [particulars withheld]..."

"Between 1973 and 1974 my husband and I bought a property known as L. R. No.[particulars withheld] along Loresho Crescent Road, Loresho Ridge Estate, Nairobi, I provided the down-payment. I gave Shs. 29,000/=. The purchase price was Shs. 190,000/=.... The property was bought under a mortgage arrangement with Savings & Loan initially but later with HFCK. We serviced the loan repayments. The loan was for 14 years....."

In August 1988, I came to learn that HFCK had purported to sell the house in July 1988.... to Mugo Muiru

Investments Ltd. This was a shock to me. I had seen HFCK (Mr. Mukuria) and offered to continue loan repayment. He did not turn down my request. I was waiting for the mortgage to be transferred to me....."

On 28th May 1996

My then advocate Mrs. Majiwa talked with HFCK on the purported sale of the property. In September 1988 Mr. Paul Kimani of HFCK had not sold the property. I have a bundle of various documents to which I wish to make reference....."

(Court: the bundle of documents from page 1 to 49 is

admitted as evidence as an exhibit; Exhibit No.1). I refer to page 32 in the bundle. It is a draft of an affidavit which was not eventually sworn. It was drafted by my then advocate, Mrs. Majiwa.... it was a draft of a verbal

interview between my advocate and Mr. Paul Kimani of HFCK At paragraph 3 thereof it is said that the

property was not to be sold by HFCK. This is in fact what Paul Kimani said and I heard him say it very clearly....."

I obtained a temporary injunction dated 15th January 1988. It is at page 2. It stopped sale of the property. By the time the property was sold, the injunction was in force..... Before the sale and the injunction, I had

registered a caveat against the property. The caveat is at pages 39, 48 and 49. Before then, I had registered caveats which appear at pages 5, 6 and 7.

On 28.10.1997

“... I did not contribute anything towards redeeming the

second charge. It had been taken against my will. The second charge was to secure Shs.600,000/=. In 1987 I knew that HFCK could sell the property....

I am still legal wife of the 1st defendant (S B). As at 21st July 1988, there was a court order restraining the 3rd party (HFCK) from selling the property. This was the order of 15th January 1988....

28th January 1997

“...HFCK refused to allow me to repay the loan.

40. There is no dispute in this appeal that Elizabeth was the lawful wife of the chargor, S B, nor that she was in possession and control of the matrimonial property. There was no evidence to contradict her claim and averment that she was a part-owner having contributed to its acquisition. HFCK knew or ought to have known that the first mortgage over the matrimonial property which was repaid related to its acquisition while the second charge was to secure repayment of Shs.600,000/= advanced to S B alone. In the circumstances of this case and the evidence before the trial judge, it is plain to see that Elizabeth had an equitable interest in the matrimonial home and that her husband, S B, held the title to it in trust for both. Such equitable interest combined with actual possession and control of the matrimonial home gave rise in common law to an overriding interest superior to that of an adverse possessor in a claim for land under the doctrine of adverse possession. Because such interest was not noted against the title, only a physical search could reveal the actual state of the property. The Married Women Property Act 1882 of England (now repealed) which applied to Kenya at the time material to this appeal, gave a wife who contributed money or money's worth towards acquisition of matrimonial home a proprietary interest by imposing a trust on the husband who held the title by requiring him to hold such title in trust for both jointly. The inexorable inference in this appeal is that S B held the legal title to the matrimonial home in trust for both himself and Elizabeth.

41. The peculiar circumstances and evidence in this appeal show that HFCK knew or ought to have known that S B was not entitled to deal with it (HFCK) as he wished without the involvement and concurrence of Elizabeth who was in possession and control of the matrimonial home and who had interest in it as an unregistered co-owner and a beneficiary. Prior to coming into force of the **Land Registration Act Cap 300**, a married spouse's unregistered proprietary interest in the matrimonial home by dint of his or her contribution to its acquisition and, therefore, as a part-owner thereof, was held in trust on his or her behalf by the spouse registered as title holder and owner, and such unregistered proprietary interest was in common law an overriding interest which superseded any registered instrument conveying title in the matrimonial property including a transfer and a charge. In the instant case, the transfer to the appellant was subject to Elizabeth's overriding interest as an unregistered co-owner. S B could not pass good title to HFCK, and the transfer by HFCK to the appellant was subject to Elizabeth's overriding, albeit unregistered, interest in the matrimonial home.

42. There is ample evidence to show that when HFCK started the process of realizing the security, HFCK knew or ought to have known that Elizabeth was the wife of S B and that Elizabeth was in actual possession and control of the matrimonial home and had proprietary interest in it. In other words, HFCK knew or ought to have known that Elizabeth was not merely a wife sitting on the property; she had proprietary interest in it and S B held it in trust for her and himself. When, therefore, it sold the property, HFCK sold it subject to Elizabeth's interest. HFCK could not transfer to the appellant a better title than S B had in the property. As the interest of B was not for the whole property, the appellant could not get a good title for the said property because it was encumbered with the trust in favour of Elizabeth. It was urged that the appellant was an innocent buyer; that the appellant was a bona fide buyer for value without notice. But the appellant could not get a better title than S B had in the property. The appellant's title was subject to Elizabeth's interest. S B was to all intents and purposes a trustee for Elizabeth to the extent to which Elizabeth was entitled. As a purchaser, the appellant ought to have made physical checks of the property besides searching the title at the Lands Office. Whereas a buyer of a property who fails to

physically check the state in which the property is before the sale runs the risk of having a sitting tenant or an adverse possessor, in the event that overriding interest exists as in this case, the buyer takes subject to such overriding interest and cannot claim to be entitled to possession because, once overriding interest is established or it is shown that the sale was in breach of trust, the sale must be vitiated and transfer cancelled.

43. In this appeal, to the knowledge of HFCK, Shem Bageine held legal title to the property and Elizabeth held unregistered beneficial interest coupled with possession and control of the property. The fact that HFCK's managers knew that the matrimonial property was occupied by Elizabeth with whom they had dealt during the redemption of the mortgage to acquire it, placed a duty on HFCK to enquire if Elizabeth had given her consent to the proposed borrowing by S B to secure the loan of Shs.600,000/= on the title of the matrimonial home. As Lord Denning said in **Williams & Glyn's Bank v. Boland** [1979] 2 All E R 697 –

“Anyone who lends money on the security of a matrimonial home nowadays ought to realize that the wife may have a share in it. He ought to make sure that the wife agrees to it or to go to the house and make enquiries of her. It seems to me utterly wrong that a lender should turn a blind eye to the wife's interest or the possibility of it and afterwards seek to turn her and the family out on the pleas that he did not know she was in actual occupation. If a Bank is to do its duty, in the society in which we live, it should recognize the integrity of the matrimonial home. It should not destroy it by disregarding the wife's interest in it, simply to ensure that it is paid the husband's debt in full, with the high interest rate now prevailing. We shall not give monied might over social justice. We should protect the position of a wife who has a share, just as years ago we protected the deserted wife....”

44. In the circumstances of this case, both HFCK and S B violated Elizabeth's unregistered equitable overriding interest in the matrimonial property by registering the charge that subsequently gave rise to the impugned sale and transfer of the matrimonial property to the appellant. As was said in **Williams and Glyn's Bank v. Boland and Another**, a wife's beneficial interest in the matrimonial property coupled with her actual occupation as in this case, results in an overriding interest in the property which is not inferior to the mortgagee's right to claim possession of it. S B was bound by Elizabeth's resulting trust arising from her unregistered equitable interest in the matrimonial property which amounted to an overriding interest binding S B as the person registered. Elizabeth's unregistered overriding equitable interest bound the appellant as transferee of the matrimonial home from HFCK. Where as here, a spouse contributed to the acquisition of the matrimonial home which is registered in the name of the other spouse, the matrimonial home is held in trust and the unregistered spouse in possession and control of the same has an overriding interest in it and his or her unregistered interest is an overriding interest that amounts to an encumbrance against the title to which a transfer or charge would be subject and such overriding interest cannot be defeated by any instrument of transfer or charge regardless of whether such transferee or chargee is aware of the overriding interest or is a bona fide purchaser for value without notice.

45. Moreover, the transfer to the appellant of the matrimonial home could not give the appellant the right to possession not only in view of Elizabeth's overriding interest but also because the sale and transfer of the matrimonial home were in **disobedience of court orders**. The charge by S B to HFCK during the pendency of the litigation by Elizabeth and the transfer in defiance of the court injunction orders stopping alienation of the matrimonial property must call for sanction to protect the integrity of the court process. All the parties were represented by counsel who knew of the orders. The injunction order was issued on 15th January 1988 restraining S B from dealing with the suit property pending the hearing of the suit by Elizabeth. In **Clark and Others versus Chadburn & Others** [1985] 1 All E R (P.C.) 211, the Privy Council to which appeals from Kenya went in the pre-independence days observed –

“...those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted with illegality that produced them.... even if the

defendants thought that the injunction was improperly obtained or too wide in its terms, that

provides no excuse for disobeying it. The remedy is to vary or discharge it.”

46. The sale to the appellant was *pendete lite*. Literally put, the sale was one “awaiting the litigation” or “pending the litigation” which Elizabeth had instituted. The sale and transfer was made while the matter was pending. In **Mawji v. US International University & Another** [1976] KLR 185, Madan JA, as he then was, stated that the doctrine of *lis pendens* under Section 52 of (I) TPA is substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law.

“It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides Section 23 of the Registration of Titles Act (now repealed) and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

47. In the peculiar circumstances of this case, if the charge by S B to HFCK was defective, the purported transfer of Elizabeth’s interest in the matrimonial property by HFCK to the appellant when the court injunction order was in place and was within the knowledge of HFCK's lawyers and managers, and while the appellant was not an innocent transferee, could not give the appellant a valid title.

48. Turning to the institution of HCCC No. 4709 of 1987, the learned trial judge struck out Elizabeth’s prayer for a declaration that she had a beneficial interest in the matrimonial home as S B’s wife and co-owner. The Court also declared the purported sale of the matrimonial property No. L.R. [particulars withheld] null and void and declined to grant damages to Elizabeth or a restrictive injunction to restrain S B and HFCK from selling or proceeding with the sale of the matrimonial home. The learned judge also dismissed the counter-claim against Elizabeth with costs to Elizabeth; and HFCK was ordered to reimburse the appellant the purchase price of the premises. No interest on costs was awarded.

49. The learned judge reasoned that Elizabeth’s claim for beneficial interest in the matrimonial home could not be raised by way of a plaint as was done in this case; he stated that “*but on authority of the Court of Appeal it must be raised by way of an originating summons.*” We think the judge went into error. The plaint before him did not plead a case under Section 17 of the Married Women Property Act, 1882 which mandates institution of proceedings of a summary nature by way of originating summons. That Section does not relate to a claim for damages either which Elizabeth claimed in the plaint in consonance with the pronouncement in the case of **Kenya Commercial Bank versus James Osebe** [1982-88] 1 KAR. Clearly, the action in the High Court was an ordinary suit in which Elizabeth claimed, *inter alia*, damages and part ownership of the property No. L.R. [particulars withheld] on the basis that she contributed to its acquisition and in addition not only sought a declaration that she has beneficial interest in it as a wife and owner, but also impugned the transfer of the property to the appellant. The learned Judge erred in striking out the prayer for a declaration that Elizabeth had a beneficial interest on the ground that it was pleaded in a plaint and not in an originating summons. Yet it was patent that the suit was not only against Elizabeth’s husband S B but also against other parties not privy to the marriage between Elizabeth and S B and it challenged the sale of the matrimonial property by HFCK to the appellant. One does not have far to go to see that the nature of the claims made by Elizabeth could not be tried summarily in an originating summons. A full-fledged trial commenced by a plaint was called for.

50. The appellant did not regard the issue of trust imposed on the chargor, S B, and its effect on the sale and transfer by HFCK as significant. As stated above, even though the matrimonial property was registered in the name of S B alone, he held the title and legal estate in trust for both himself and Elizabeth jointly. This proposition is buttressed by the decision in **Gissing v. Gissing** [1970] 2 All E.R. 780, [1971] AC 886. See also **Falconer v. Falconer** [1970] 3 All E R 449, [1970] 1 WLR 1333; and **Hazell v. Hazell** [1972] 1 All ER 923; [1972] 1 WLR 301. Lord Diplock in **Gissing v. Gissing** (supra) at pg 906 in [1971] AC 886 held that –

“in nearly all these cases, the inexorable inference is that the husband is to hold the legal estate in the house in trust for them both, for both to live in for the foreseeable future. The couple does not have in mind a sale, nor division of proceeds of sale, except in the far distance.”

51. Elizabeth's interest in the matrimonial home was an overriding, equitable and unregistered interest. Such interest entitled her to remain in the property. It was an interest in the property. It follows that a purchaser of the matrimonial property even without notice that Elizabeth was in possession would take the property subject to Elizabeth's interest. The evidence in this appeal shows that the appellant either did not do due diligence, or was unconcerned with the occupation of the property by Elizabeth and her interest in it. The appellant took the property subject to Elizabeth's overriding interest in it and Elizabeth being a part-owner could not be removed from the property. Even before the **Land Registration Act** Cap 300 came into force on 2nd May 2012, the equitable beneficial interest of a spouse in a matrimonial home occupied by such spouse was an overriding interest and therefore transfer of the title to the matrimonial home was subject to such overriding interest. It is immaterial that there was not at the time statutory provision expressly declaring it to be an overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property. In this appeal, the appellant acquired the title registered in the name of S B subject to the interest of Elizabeth. In effect, the appellant neither obtained legal title of the property as notionally it was overridden by Elizabeth's overriding interest nor was the appellant entitled to possession. The transfer to the appellant was subject to Elizabeth's unregistered overriding encumbrance.

52. The learned judge was wrong in striking out Elizabeth's claim for a declaration that she had beneficial interest in the matrimonial home. He was however spot on in his decision, which we uphold, in making a declaration that the purported sale of the property was null and void. He however contradicted himself in holding that the sale of the property had taken place and that for that reason the restrictive injunction would be refused as it was valueless.

53. In light of what we have stated above, we dismiss the appeal as lacking in merit. We uphold the decision of the learned judge requiring HFCK as the 3rd respondent to reimburse to the appellant, Mugo Muiro Investments Limited, the purchase price of the suit property without interest. A declaration is hereby issued that the sale and transfer of the suit property No. L.R. [particulars withheld] by HFCK, to the appellant, Mugo Muiro Investments Company Limited had no legal effect on Elizabeth's overriding equitable interest and was bad in law. The registration of Mugo Muiro Company Limited as the owner of No. L.R. [particulars withheld] Nairobi is hereby cancelled.

54. Elizabeth's costs in the High Court and in this appeal shall be paid jointly and severally by the appellant, Mugo Muiro Investments Company Limited, and the 2nd and 3rd respondents, S B and Housing Finance Company of Kenya Ltd respectively. The appellant and 2nd and 3rd respondents shall meet their own costs in this appeal and in the High Court.

By the time of delivery of this judgment, the Hon. Mr. Justice Azangalala JA had left the judiciary on retirement.

Dated and delivered at Nairobi this 24th day of November, 2017.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

G. B. M. KARIUKI SC

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR