REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 227 OF 2017

GRACE NJERI KABIRU..PLAINTIFF/RESPONDENT

VERSUS

STEPHEN WAGIITA KIBOI..1st DEFENDANT/APPLICANT

ISAAC MWANGI KANYORO....................................2nd DEFENDANT/APPLICANT

LAND DISTRICT REGISTRAR

NYANDARUA...3rd DEFENDANT/APPLICANT

RULING

1. The Plaintiff/ Respondent herein filed her Plaint dated the 12th November 2015, on the 16th November 2015. In the said plaint she had confirmed that she was the wife of the 1st Defendant/Applicant herein.

2. The plaintiff's grievance was to the effect parcel No. Nyandarua/Ol'kalou Central/1502 being matrimonial property was divided into three creating parcels No. 5115, 5116, and 5117, with the sole aim of disposing the resultant sub-divisions.

3. That on the 6th December 2011, the Plaintiff had placed a caution on parcels of land No. 5115 and 5116 but to her utter dismay the same was unlawfully and illegally removed from the register wherein the land was transferred to the 2nd Defendant/Applicant.

4. That not only had she placed the caution on the said parcels of land, but she had also not given spousal consent for the disposal of the said matrimonial properties.

5. In her plaint, the Plaintiff prayed for orders that;

> i. A declaration that the removal of the Plaintiff's caution registered against parcel No. Nyandarua/Ol'kalou Central/1515 and 1516 (the suit land) was and is fraudulent and illegal.
>
> ii. A declaration that the transfer of the suit land to the 2nd Defendant/Applicant was and is un-procedural, unlawful and illegal.
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> iii. An order that the transfer of the suit land to the 2nd Defendant/Applicant be cancelled and set aside.
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> iv. An order that the 2nd Defendant/Applicant's registration and title as proprietor of the suit land be cancelled and set aside
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> v. An order that entries number 4, 5, and 6 in the registers (green Card) of land parcels No. Nyandarua/Ol'kalou Central/1515 and 1516 (the suit land) be cancelled and set aside.
>
> vi. Cost of the suit and interest thereon
>
> vii. Any other order or further relief that this honorable court may deem fit and just to grant to the Plaintiff.

6. On the 14th June 2017, while parties were in the process of complying with the provisions of Order 11 of the Civil Procedure Rules, the 1st Defendant/Applicant herein filed an application dated the 13th June 2017 under 51(1) and Order 2 Rule 15 (1) (a) and (d) of the Civil Procedure Rules wherein he sought for the suit to be struck out giving reasons that it raised no reasonable cause of action against the 2nd

Defendant/Applicant and secondly that the same was an abuse of the court process.

7. By consent parties, save for the 3rd Defendant/Applicant who had not filed any papers, agreed to dispose of the said application, in the first instance, and through written submissions. Both outlined the facts as contained in their pleadings and also cited various authorities.

8. The 2nd Defendant/Applicant's contention was that although the plaintiff herein sought the above captioned reliefs sating that the subject suit herein was matrimonial properties, yet she had not stated how or when the said properties were acquired for them to qualify as matrimonial properties, nor had she stated what contributions she had made towards the purchase of the said property to entitle her to a share of the same, matters which were essential for the court to make a determination of entitlement to matrimonial property.

9. It was the 2nd Defendant/Applicants' further submission that the Plaintiff pleaded in her plaint that the cautions she had placed on the suit lands had been removed from the register through fraud, yet she had not attributed the said fraudulent actions to any of the Defendant/Applicants and more so the 2nd Defendant/Applicant.

10. That the Plaintiff's case was based on the fact the spousal consent was not obtained before the suit lands could be transferred yet at the time the transactions were carried out, spousal consent was not a requirement. That the issue of spousal consent was introduced by the Matrimonial Property Act No. 49 of 2013 which Act came into effect in 2014. The transaction in this case had transpired in the year 2012. The law applicable then was the Registered Land Act which did not require spousal consent for the transaction in sale of any land.

11. The 2nd Defendant/Applicant also submitted that the Plaintiff's suit was an abuse of the due process of the court. That vide an order in Nakuru High Court No. 238 of 2012 there had been interim orders issued on the 9th November 2012 restraining the Plaintiff, 1st Defendant/Applicant and their family form interfering with the 2nd Defendant/Applicant's suit lands. This order had not been set aside and was still valid. That at paragraph 11 of the plaint the Plaintiff had admitted to being in possession and use of the suit lands in contravention of the Court's orders.

12. Finally the 2nd Defendant/Applicant submitted that the present case was Res judicator by virtue of Nakuru High Court Civil case No. 283 of 2012(ELC 314/13 a matter which was subsequently transferred to this court and registered under Nyahururu ELC No. 82 of 2017 between Isaac Mawngi Kanyoro and Stephen Wagita Kiboi. That the matter was heard and the court made a determination that the Suit lands herein belonged to the Isaac Mwangi Kanyoro the 2nd Defendant/Applicant herein.

13. The Application was opposed by the Plaintiff and 1st Defendant/Applicant through their separate but somehow identical written submissions. The said parties submitted that the remedy of striking out a suit ought to be exercised sparingly and only in cases where the plaint is incontestably bad and subject to the remedy of allowing or ordering and amendment of the plaint if an amendment would cure the defect.

14. They framed the issues for determination as to;

i. Whether the plaintiff's plaint is incontestably bad

ii. Whether the plaintiff's suit is so hopeless that it plainly and obviously discloses no reasonable cause of action and

iii. Whether the plaintiff's suit is so weak as to be beyond redemption and incurable by amendment.

15. The Plaintiff as well as the 1st Defendant/Applicant reiterated what the Plaintiff had averred in her plaint to the effect that they were husband and wife and the Land parcel No. Nyandarua/Ol'kalou Central/1502 being matrimonial property was fraudulently sub-divided into three creating parcels No. 5115, 5116, and 5117 without the consent of the Plaintiff.

16. That following this development, the Plaintiff had placed cautions on the on parcels of land No. 5115 and 5116 which caution was unlawfully and illegally removed from the register and both parcels of land transferred and registered to the 2nd Defendant/Applicant.

17. The parties also submitted that the present suit was not res judicata by virtue of the Nakuru High Court Civil case No. 283 of 2012 because the issues raised in the Plaintiff's plaint were not heard and finally determined in the said suit. Secondly that since the 2nd Defendant/Applicant did not plead Res judicata in his application dated the 13th June 2017, he could not now raise it as parties were bound by their pleadings.

18. I have considered all the issues raised in the Application, the Affidavits in support and against, the rival Submissions and the case law cited by the parties. As already indicated the Application is brought under Order 2 Rule 15(1) (a) & (d) of the Civil Procedure Rules.

19. Order 2 Rule 15(1) of the Civil Procedure Rules, 2010 provides as follows:-

(*1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:-*

a) It discloses no reasonable cause of action or defence in law.

b) Its scandalous, frivolous or vexatious; or

c) It may prejudice, embarrass or delay the fair trial of the action; or

d) It's otherwise an abuse of the Court process and may order the suit be stayed or dismissed or judgment to be entered accordingly as the case may be.

20. In the exercise of its powers under the said provision there are certain well established principles that a Court of Law must adhere to. Whereas the essence of the said provision is the striking out of a pleading, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit or defence tried by a proper trial.

21. At this stage no evidence is admissible and the court will therefore only make a decision based on the Plaint and the Defence as filed. Under the aforementioned provision, the Court has the discretion to either dismiss, stay or enter judgment as it may deem fit for the ends of justice, once it has been established that the grounds as set out in the said application warrant such relief.

22. In the case of **DT Dobie & Company Kenya Limited –vs- Muchina (1980)KLR** the Court of Appeal held as follows:

"…A cause of action is an act on the part of the Defendant/Applicant, which gives the Plaintiff his cause of complaint….A pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The Court must see that the Plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments and must not dismiss an action merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved….it is not the practice in civil administration of the Courts to have preliminary hearing as in crime. If it involves parties in the trial of the action by affidavits it is not a plain and obvious case on its face…the summary jurisdiction is not intended to be exercised by minute and a protracted examination of the documents and the facts of the case in order to see whether the Plaintiff really has a cause of action. To do that is not usurp the position of the trial Judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to be an abuse of the inherent power of the Court and not a proper exercise of power… Whereas no evidence is permitted in the case of Order 6 Rule 13(1) (a), it is permitted in the case where there is an allegation that it is an abuse of the Court process…A Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal….If a suit shows a semblance of a cause of action, provided that it can be injected with real life by amendment, it ought to go forward to hearing for a Court of justice ought not act in darkness without the full facts before it.."

23. In the instant case, I find that the matter here is plain and obvious in the sense that the Plaintiff's case was based on the fact the spousal consent was not obtained before the suit lands could be transferred.

24. Regarding the first argument as to whether consent was required or not, it is clear that the Matrimonial Property Act was enacted in 2013 and assented to on the 24th December 2013 wherein it commenced on 16th January, 2014.

25. In the case of **Peninah Wambui Mugo -vs- NMK and MMN & Another [2017] eKLR,** Mulwa**.** J observed that;

*"Other than her testimony that the property was bought during the marriage she did not expressly prove any trust by way of monetary contribution or otherwise.- Echaria -vs- Echaria **(2007) eKLR.***

*Under the now repealed Registered Land Act Cap 300, spousal consent was not a requirement. Such consent became a requirement with the enactment of the Land Registration Act, 2012 as stated in the case C.A No. 278 of 2006 by Nambuye, Okwengu & Kiage, JJA sitting at Nakuru in **Fredrick Chege Ndogo -vs- Bernard Njoroge Mbugua & 2 Others*** **[2016] eKLR** *in their judgment on the 16th June 2016.*

Spousal consent is a recent development in Kenya under Land Act 2012, and that it had no application whatsoever to the sale of land which predated the statute. That in my considered view, and having analyzed both Defendant/Applicants evidence concludes the issues of whether there was fraud in the sale of the suit land by the 1st Defendant/Applicant to the plaintiff without consent of the 2nd Defendant/Applicant separated wife to the registered owner of the suit land".

26. The same court also stated as follows:

*"In **Echaria -vs- Echaria, (Supra)** the court interpreted what constitutes a matrimonial property and the rights of each spouse. Status of a marriage in itself does not create or result in common ownership of property in the old order, under the 1882 Act. Jurisprudence in **Pettit -vs- Pettit (Supra)** is that Section 17 did not grant the court substantive powers to vary property rights but to declare what rights accrue to each spouse, upon proof of financial contribution…."*

27. Having regard to the above holdings, I find that since the transaction in this case took place in the year 2012, the law applicable then was the Registered Land Act which did not require spousal consent for the transaction in sale of any land.

28. In her plaint, the Plaintiff had also sought for orders that the 2nd Defendant/Applicant's registration and title as proprietor of the suit land be cancelled and set aside and that entries number 4, 5, and 6 in the registers (Greencards) of land parcels No. Nyandarua/Ol'kalou Central/1515 and 1516 (the suit land) be cancelled and set aside.

29. I find that the present case which had initially been registered as Nakuru High Court Civil Case No. 283 of 2012 (ELC 314/13) was

subsequently transferred to this court and registered under Nyahururu ELC No. 82 of 2017 between Isaac Mawngi Kanyoro and Stephen Wagita Kiboi. That the matter was heard and the court made a determination that the suit land herein belonged to the Isaac Mwangi Kanyoro the 2nd Defendant/Applicant/Applicant herein.

30. In the said case being **Isaac Mwangi Kanyoro vs. Stephen Wagita Kiboi [2017] eKLR** this court held as follows;

> *'In light of the above, this court finds that the Plaintiff has established that he is indeed the duly registered proprietor of the suit property and is entitled to all the rights appurtenant thereto. It had been demonstrated that despite service, the Respondent failed to file his papers and/or defend the suit, and further that the continued illegal stay of the Defendant/Applicant on the Plaintiff's land has* led to loss to the Plaintiff.
>
> *On whether the Defendant/Applicant should deliver vacant possession of the suit land, the court finds that there is no justification for the Defendant/Applicant to continue occupying the Plaintiff's property without his consent. The Defendant/Applicant is a trespasser and has to vacate the subject suit properties being No. Nyandarua/Ol'kalou Central /5115 and No. Nyandarua/Ol'kalou Central /5116 respectively or he be forcefully evicted.'*

31. The issue of res judicata, was sufficiently addressed in the case of **E.T vs. Attorney General & Another (2012) eKLR** where it was held that:

> ***"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata….."***

32. I find that the Plaintiff herein is trying **to bring before the court, in another way and in the form of a new cause of action in a matter that was resolved by a court of competent jurisdiction. I find that t**he matter in issue is identical in both suits; that the parties **though merely added** in the suit are the same; that there is sameness of the title and/or claim and concurrence of jurisdiction. Finally I find that there was finality in the previous decision.

33. The upshot of the foregoing is that matters in this case were conclusively decided vide Nyahururu Environment and Land Court Case No.82 of 2017 and therefore the present case is res judicata and an abuse of the court process.

34. In the end and for the above captioned reasons I find the 2nd Defendant/Applicant's application meritorious, I strike out the Plaintiff's suit dated the 12th November 2015 and filed on the 16th November 2015, with costs to the 2nd Defendant/Applicant.

Dated and delivered at Nyahururu this 16th day of October 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE