



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO.358 OF 2010**

LWN.....PLAINTIFF

**VERSUS**

PLM.....1<sup>ST</sup> DEFENDANT

CONSOLIDATED BANK OF KENYA LTD.....2<sup>ND</sup> DEFENDANT

CGT.....3<sup>RD</sup> DEFENDANT

EQUITY BANK LIMITED.....4<sup>TH</sup> DEFENDANT

**JUDGEMENT**

1. By a plaint dated 26<sup>th</sup> July 2010 the plaintiff seeks:

*(a) A permanent injunction restraining the Defendants, their agents, servants and/or employees from alienating, selling, trespassing, charging and dealing with the suit premises known as Land Reference No. xxxx in any way and in any manner whatsoever.*

*(b) Spent.*

*(c) A declaration that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants' registration and their respective subsequent charging to the 2<sup>nd</sup> and 4<sup>th</sup> Defendants respectively was illegal, null and void and of no effect in law and the same be cancelled accordingly.*

*(d) An order directing the suit premises to be reinstated and to be registered in favour of the Plaintiff.*

*(e) Costs of the suit.*

*(f) Such other and / or further relief as this Honourable Court may deem fit and just in the unique circumstances of this matter.*

2. It is the Plaintiff's case that she has bought this suit property as a femme sole during the subsistence of the marriage between her and the 1<sup>st</sup> defendant. she stated that she transferred the suit property to the 1<sup>st</sup> defendant for purposes of using it as security to obtain a loan of Kshs.2,200,000 from his employer, which was, Cooperative Bank Kenya Limited at the time. She stated that the 1<sup>st</sup> Defendant obtained a further charge from the same bank without her knowledge and consent. She averred that he transferred the

said charge to the 2<sup>nd</sup> Defendant and got another loan from the 2<sup>nd</sup> Defendant.

3. It is here case that the suit property was fraudulently sold to the 3<sup>rd</sup> Defendant when the 1<sup>st</sup> Defendant failed to repay the loan. The 3<sup>rd</sup> Defendant then charged the suit property to the 4<sup>th</sup> Defendant.

4. She further stated that the defendant disregarded the principle of *lis pendens* since they transacted over the suit property while a court order issued in **HCCC 3 of 2009 (OS)** restraining the 1<sup>st</sup> Defendant from further dealing with the suit property was subsisting.

5. Upon being served with copies of Plaintiff and summons to enter appearance the 1<sup>st</sup> Defendant, entered appearance through the firm of M/S N. M & Co. Advocates on the 19<sup>th</sup> October 2010. He also filed a statement of defence dated 26<sup>th</sup> August 2010. He denied all the allegations contained in the plaintiff. He stated that he acquired the suit property procedurally vide a sale agreement dated 6<sup>th</sup> June 2001 for a consideration of Kshs.2,200,000/-. He further denied that he conspired with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to defraud the Plaintiff of her property.

6. The 2<sup>nd</sup> Defendant entered appearance through the firm of Kahari & Kiai Advocates on the 16<sup>th</sup> August 2010. It also filed a statement of defence dated 20<sup>th</sup> August 2010. It denied all the allegations contained in the plaintiff. It is its case that the 1<sup>st</sup> defendant offered the suit property as security for a loan. When he could not pay, the 2<sup>nd</sup> Defendant exercised its statutory power of sale which was regular, above board and in accordance with the terms of the charge instrument. It sold the suit property to the 3<sup>rd</sup> Defendant.

7. The 3<sup>rd</sup> Defendant entered appearance through the firm of M/S Nyiha Mukoma & Co. Advocates. He filed a statement of defence dated 2<sup>nd</sup> November 2010 and amended on 13<sup>th</sup> December 2011. He denied all the allegations contained in the plaintiff and averred that he bought the suit property from the 2<sup>nd</sup> defendant who was exercising its statutory power of sale, for Kshs.4,600,000/-. It was above the recommended forced sale value of Kshs.4,000,000/-. He then charged the suit property to the 4<sup>th</sup> Defendant for Kshs.2,760,000/-.

8. It is his contention that he was not a party to the proceedings in HCCC 3 of 2009 (OS). That the cancellation of the entry showing the court order was done by the Principal Registrar of Titles. He was therefore not bound by the doctrine of *lis pendens*. He further averred that the Plaintiff is not entitled to an equitable remedy having founded her cause of action on an alleged undertaking of obtaining a cheap loan unprocedurally from the bank.

9. The 4<sup>th</sup> Defendant entered appearance through the firm of M/S Mbugwa, Atudo & Macharia Advocates on the 5<sup>th</sup> August 2010. It filed a statement of defence dated 13<sup>th</sup> July 2011. It denied all the allegations against it, in the plaintiff. It is its case that it advanced to the 3<sup>rd</sup> defendant a sum of Kshs.2,760,000/- who offered the suit property as security. Consequently, a charge was created and was duly registered by the Registrar of Titles at Nairobi without any dispute, objection and or hindrance.

10. The Plaintiff's case is that, to protect her interest on the suit property she caused the court order obtained in HCCC 3 of 2009 (OS) to be registered against the suit property. However, on a date unknown to her the entry of the said court order was canceled by the Principal Registrar of Titles and the suit property was transferred by the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant. The registration was effected on 2<sup>nd</sup> March 2010.

11. She avers that the sale, alienation and transfer by the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant was fraudulent, malicious, illegal, unlawful and contrary to the provisions of law, in utter contempt of the said court order and through conspiracy by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

12. The particulars of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants fraud, malice, illegality, contempt and conspiracy were given in paragraph 21 of the Plaintiff as:-

(i) *The 1<sup>st</sup> Defendant acquired the suit premises from his innocent wife, the Plaintiff, fraudulently and without any consideration whatsoever.*

(ii) *The 1<sup>st</sup> Defendant acquired the suit premises fraudulently under the pretext that his previous employer, Co-operative Bank of Kenya had insisted on the property being transferred to him, but which was not the case.*

- (iii) *All the three Defendants knew and/or ought to have known that the suit premises was the subject matter of the said HCCC No 3 of 2009 and that the same was not available for alienation.*
- (iv) *All the three Defendants knew and/or ought to have known that this honourable court had issued an injunction order on 26<sup>th</sup> May 2009 in the said HCCC No 3 of 2009, barring sale, alienation and/or any dealing with the suit premises until the hearing and determination of the said suit.*
- (v) *Besides, the three Defendants had conspired and participated in the cancellation of the said court order by the Principal Registrar of Titles.*
- (vi) *All the three Defendants knew and/or ought to have known that the Principal Registrar of Titles had neither power nor jurisdiction to interfere with the said court order.*
- (vii) *The three Defendants conspired to sell and transfer the suit premises on the 3<sup>rd</sup> Defendant at a throw away price of Kshs.4.6 million, whereas the suit premises has an estimated value of about Khss.16 million.*
- (viii) *The three Defendants conspired and fraudulently transferred the suit premises to the 3<sup>rd</sup> Defendant who is inter alia related to the 1<sup>st</sup> Defendant.*
- (ix) *The 3<sup>rd</sup> Defendant is a brother in law of the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant was also fully aware of that relationship.*
- (x) *The 3<sup>rd</sup> Defendant alienated the suit premises in utter contempt of the said court order issued on 26<sup>th</sup> March, 2009.*
- (xi) *All the three Defendants were represented by their respective counsel and they all knew and/or ought to know that it was illegal, unlawful and contrary to the provisions of law to alienate the suit premises whereas there was the said HCCC No 3 of 2009 pending for hearing and determination and whereas this honourable court had issued an injunction order in respect of the same on 26<sup>th</sup> March 2009.*
- (xii) *All the three Defendants knew and/or ought to have known that the Principal Registrar of Titles had neither power nor jurisdiction to cancel a court order which had been registered against the Title in respect of the suit premises.*
- (xiii) *The said three Defendants, and particularly the 2<sup>nd</sup> Defendant, knew and/or ought to have known that it could not purport to alienate the suit premises to the 3<sup>rd</sup> Defendant as the suit premises was subject matter of a civil suit pending before this honourable court.*
- (xiv) *The 2<sup>nd</sup> Defendant knew and/or ought to have known that it was inter alia illegal and in conflict of interest to purport to transfer the suit premises to the 3<sup>rd</sup> Defendant who was a close relative of the 1<sup>st</sup> Defendant, the latter being an employee of the 2<sup>nd</sup> Defendant.*
- (xv) *All the three Defendants acted hastily to alienate the suit premises so as to put the same beyond the reach and scope of the honourable court in the said HCCC No 3 of 2009.*
- (xvi) *The 2<sup>nd</sup> Defendant knew and/or ought to have known it was wrong both in law and fact to transfer the suit premises to the 3<sup>rd</sup> Defendant by private treaty.*
- (xvii) *The sale agreement dated 11<sup>th</sup> June 2009 and entered between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, in respect of the suit premises, was not only a farce but the same was façade, fraudulent, illegal, unlawful and purely meant to defeat the cause of justice and particularly so on the face of the said HCCC No 3 of 2009, of which all the three defendants had full knowledge.*
- (xviii) *Although the said Agreement, dated 11<sup>th</sup> June 2009 provided that the said sale transaction would be completed within a period of 60 days and further that time was of essence, the said sale transaction was never completed until sometimes on 2<sup>nd</sup>*

*March 2010, when the transfer in favour of the 3<sup>rd</sup> Defendant was illegally registered, i.e more than 6 months later.*

*(xix) The 2<sup>nd</sup> Defendant acted illegally, unlawfully, in bad faith, in conspiracy with the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, and in total contempt of the said court order in purporting to enter into the said sale agreement of 11<sup>th</sup> June, 2009 and in its purported exercise of statutory power of sale, whereas it was fully aware of the existence of the said HCCC No 3 of 2009 in respect of the suit premises.*

*(xx) It is immaterial that the 2<sup>nd</sup> Defendant was not a party to the said HCCC No 3 of 2009 (the subject matter of the said court order issued on 26<sup>th</sup> March 2009) inter alia in that the 2<sup>nd</sup> Defendant knew of the existence of the said court order in respect of the suit premises.*

*(xxi) It is also immaterial that the 2<sup>nd</sup> Defendant was not a party in the said HCCC No 3 of 2009 inter alia in that the 2<sup>nd</sup> Defendant conspired with the 1<sup>st</sup> and 3<sup>rd</sup> Defendant to alienate the suit premises in contravention of the said court order, and to the 3<sup>rd</sup> defendant who was brother in law of the 1<sup>st</sup> Defendant.*

*(xxii) The 2<sup>nd</sup> defendant, like the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, was bound by the doctrine of lis pendens.*

*(xxiii) All the three Defendants acted in cohort to alienate the suit premises hurriedly and fraudulently.*

#### **Evidence of the Plaintiff**

**13.** PW1, LWN testified on 23<sup>rd</sup> July 2013. She adopted her witness statement dated 17<sup>th</sup> January 2012 as part of her evidence in this case. She told the court that she bought the suit property from M/S Nyari House Limited. That at all the time she was married to the 1<sup>st</sup> Defendant who worked as a bank manager with the Cooperative Bank of Kenya Limited. She stated that she approached the 1<sup>st</sup> Defendant to obtain a loan of Kshs.1,500,000 on her behalf from his employer since he would enjoy lower rates of interest as a member of staff.

**14.** She stated that they agreed he would borrow Kshs.2,200,000 whereby the 1<sup>st</sup> Defendant would take Kshs.700,000/- for his own use. She gave him her title and signed a transfer in favour of the 1<sup>st</sup> Defendant so that he could offer it as security for the loan. A sum of Kshs.2,200,000 was charged over the suit property. The money was released to her from the Cooperative Bank, Embu branch where the 1<sup>st</sup> Defendant worked as a manager. She then gave the Defendant Kshs.700,000/-. She stated that she later gave the defendant Kshs.1,500,000/- as the loan was being deducted from his salary.

**15.** It is her testimony that the 1<sup>st</sup> Defendant, after he was involved in a misconduct was charged with theft. She also stated that the 1<sup>st</sup> Defendant secured employment with the 2<sup>nd</sup> Defendant as a manager at its Thika Branch. He transferred the charge to his new employer. He defaulted in repaying the loan leading to the sale of the suit property to the 3<sup>rd</sup> Defendant. The 3<sup>rd</sup> Defendant happens to be the 1<sup>st</sup> Defendant's brother in law. The 3<sup>rd</sup> Defendant also charged the suit property to the 4<sup>th</sup> Defendant.

**16.** She further stated that in 2009, she filed HCCC 3 of 2009 (OS) to secure her rights on the suit property and on 26<sup>th</sup> March 2009, the court issued an injunction restraining the defendant from further dealing with the property. The court order was registered against the title on 26<sup>th</sup> May 2009 but the entry of the said court order was cancelled by Principal Registrar of Titles and the suit property was sold to the 3<sup>rd</sup> defendant.

**17.** She stated that the Defendants acted fraudulently, maliciously, illegally, unlawfully, in contempt of the court order and through conspiracy in the sale of the suit property. She further stated that when she realized she would lose the suit property; she wrote to the 2<sup>nd</sup> Defendant asking to be allowed to repay the loan to redeem the suit property but she was not accorded the opportunity. She attributed fraud on the part of the 2<sup>nd</sup> Defendant as it transferred the suit property to the 3<sup>rd</sup> Defendant despite the court order in place. The Defendants were aware of the court order. The 2<sup>nd</sup> Defendant also handpicked the 3<sup>rd</sup> Defendant as a buyer instead of selling the suit property at a public auction at its market value.

**18.** The 4<sup>th</sup> Defendant also accepted to take the suit property as security advanced to the 3<sup>rd</sup> Defendant despite the existence of the court order. She maintains that the 3<sup>rd</sup> Defendant was handpicked to buy the suit property and the only reason was to put the suit property beyond her reach.

19. When cross examined by Mr. Waweru for the 1<sup>st</sup> Defendant, PW1 told the court that she signed a transfer in favour of the 1<sup>st</sup> defendant before M/S Kamau Minjire Advocates. She denied that she signed the sale agreement dated 6<sup>th</sup> June 2001. She also admitted that she received Kshs.2,200,000/- of which she deposited Kshs.400,000 in the 1<sup>st</sup> Defendant's account and gave him Kshs.300,000/- in instalments. She also admitted that the Principal Registrar of Titles is not a party to this suit.

20. When cross examined by Mr. Kinyua for the 2<sup>nd</sup> Defendant, she told the court that she did not know how much was deducted from the 1<sup>st</sup> Defendant's salary. She told the court that there was a conspiracy between the Principal Registrar of Titles and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. She admitted that her interest on the suit property was not communicated to the 2<sup>nd</sup> Defendant before she went to the Bank.

21. When cross examined by Mr. Koceyo for the 3<sup>rd</sup> Defendant she admitted she transferred all her rights and interests on the suit property to the 1<sup>st</sup> Defendant. Further, that she trusted the 1<sup>st</sup> Defendant as her husband and she did not take any precautions as she did not believe he could take her suit property. She said she was denied chance to redeem the suit property. She also admitted that she had no documents to show that the 1<sup>st</sup> defendant was allowed to sell the suit property by private treaty.

22. When cross examined by Mr. Omuganda for the 4<sup>th</sup> Defendant, PW1 stated that the court order was fraudulently cancelled by the Principal Registrar of Titles.

#### **Evidence of the 1<sup>st</sup> Defendant**

23. DW1 PLM testified on 13<sup>th</sup> December 2018. He adopted his witness statement dated 13<sup>th</sup> May 2013 as part of his evidence in this case. He told the court he was married to the Plaintiff for over twenty (20) years. That during the subsistence of the marriage the plaintiff bought several properties including the suit property which she sold to him for Kshs.2,200,000/-. He told the court the sale agreement was drawn by the Plaintiff's advocates M/S Kamonde & Co. Advocates and the same is dated 6<sup>th</sup> June 2001. He further stated that the Plaintiff needed money to complete her project in Donholm. That she effected a transfer in his favour. He then used the title to obtain a loan from his employer, Cooperative Bank. That Kshs.2,200,000/- was then forwarded to the Plaintiff vide a Bankers Cheque dated 6<sup>th</sup> May 2002 by M/S Kamau Minjire Advocates, the bank's lawyers. The said loan was to be deducted from the 1<sup>st</sup> Defendant's salary. He denied that the Plaintiff assisted towards repaying the loan.

24. He further stated that he left Cooperative Bank and joined the 2<sup>nd</sup> Defendant in 2006. The 2<sup>nd</sup> Defendant took over the loan he had with his previous employer. He told the court that he defaulted on the loan repayments sometimes in 2009 and he was served with the statutory notices. Later the suit property was sold to the 3<sup>rd</sup> Defendant. He stated that he was not aware the suit property had been sold as it was sold by private treaty. He stated that he was not involved in the events leading to the sale to the 3<sup>rd</sup> Defendants and subsequent charge to the 4<sup>th</sup> Defendant. He stated that this suit has been filed by the Plaintiff to vex him. He prays that the same be dismissed.

25. When cross examined by Mr. Machira for the Plaintiff he told the court that at the time the suit property was sold by the 2<sup>nd</sup> Defendant, he did not know that the Plaintiff had an interest. He admitted that the Plaintiff gave him some money at some point as they were married. He maintained that he bought the suit property from the Plaintiff at her request. He admitted that Kshs.400,000 was deposited in his account but it was for purchase of timber for the Plaintiff not a refund of the loan. He admitted that he did not state in his statement the purpose of the Kshs.400,000/-. DW1 also denied that he caused the suit property to be sold to the 3<sup>rd</sup> Defendant in order to defeat the Plaintiff's interest.

26. When cross examined by Mr. Kinyua for the 2<sup>nd</sup> Defendant, he told the court that the Plaintiff did not retain any interest on the suit property after the transfer in his favour. Further that there was no agreement to transfer the suit property back to the Plaintiff. He also stated that he was not aware of any law that prevented the 3<sup>rd</sup> Defendant, who is his brother in law from purchasing the suit property.

27. When cross examined by Ms Maina for the 3<sup>rd</sup> Defendant, he told the court that he did not enter into any oral agreement to sell the suit property to the 3<sup>rd</sup> Defendant.

#### **Evidence of the 2<sup>nd</sup> Defendant**

28. The 2<sup>nd</sup> Defendant called one witness. D.W.2, Billy Ubendi, a remedial official with Consolidated Bank of Kenya Limited testified on 5<sup>th</sup> February 2020. He adopted his witness statement dated 2<sup>nd</sup> October 2019 as part of his evidence in this case. He also relied on the 2<sup>nd</sup> Defendant's list of documents dated 12<sup>th</sup> July 2011. The documents were produced as exhibits in this case. When cross examined by Mr. Machira for the Plaintiff, he confirmed that the 1<sup>st</sup> defendant defaulted on his loan repayments when he left employment with the 2<sup>nd</sup> Defendant in 2008. He further admitted that the bank got into a private treaty with the 3<sup>rd</sup> Defendant, which the 1<sup>st</sup> Defendant consented to.

#### Evidence of the 3<sup>rd</sup> Defendant

29. DW3, CGK, the 3<sup>rd</sup> Defendant testified on 6<sup>th</sup> February 2020. He adopted his witness statement dated 15<sup>th</sup> May 2013. He stated that he learnt of the suit land from a land broker and or agent. He then went to the bank and expressed his interest. He executed a sale agreement dated 11<sup>th</sup> June 2009 with the 2<sup>nd</sup> Defendant. the purchase price was Kshs.4.6 million. He stated that he had Kshs.1.9 million in his account. He got a facility from the 4<sup>th</sup> Defendant for the balance. The suit property was then charged to the 4<sup>th</sup> Defendant for Kshs.2,760,000/-. He further stated that he was not aware of any suit between the Plaintiff and the 1<sup>st</sup> Defendant. When cross examined by Mr. Machira for the Plaintiff he denied that he made arrangements with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to buy the suit property.

#### Evidence of the 4<sup>th</sup> Defendant

30. The 4<sup>th</sup> Defendant called one witness DW4, Paul Nduati, a credit manager with the 4<sup>th</sup> Defendant, adopted his witness statement dated 20<sup>th</sup> August 2013 as part of his evidence in his case. He also relied on the 4<sup>th</sup> Defendants list of documents dated 13<sup>th</sup> July 2011. The documents were produced as exhibits on this case. He further stated that the 3<sup>rd</sup> defendant was a long standing customer of the bank. He approached the bank for a loan and he was advanced Kshs.2,760,000 upon offering the suit property as security. He further stated that the 4<sup>th</sup> Defendant did due diligence and was satisfied that the title was not encumbered in anyway.

31. After the close of the oral testimonies parties tendered final written submissions.

#### The Plaintiff's Submissions

32. They are dated 02/07/2020. She submitted that the 1<sup>st</sup> Defendant had conceded under oath in **HCC no 3 of 2009(O.S)** that he intended to dispose of the suit property. Thus he acted in cahoots with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to form a web to maliciously defraud her of the suit property. She pointed to the relationship between the 1<sup>st</sup> and 3<sup>rd</sup> Defendant who are brothers in law and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who had an employer-employee relationship and asked the court to infer that they fraudulently conspired to deprive her of the suit property.

33. She also submitted that the sale agreement dated 11/06/2009 between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant is void because it did not meet the requirements of section 3(3) of the law of contract Act. She submitted that it was not attested to because the 3<sup>rd</sup> Defendant signed it on 09/10/2009, almost four (4) months after it was dated. She relied on **Eldoret ELC No. 411B of 2012; Sammy Some Kosgei vs Grace Jelet Boit**. She beseeched the court to grant her the prayer for a declaratory judgement which was founded on Order 3 rule 9 of the civil procedure Rules.

34. She further submitted that the sale agreement is a fundamental and mandatory document and it is the forerunner for any sale transaction in real property. The other subsequent transactions should be declared null and void. She further submitted that the transfer between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is dated 9<sup>th</sup> October 2009, the same day that the 3<sup>rd</sup> Defendant purports to have signed the Agreement. The transfer was registered on 2<sup>nd</sup> March 2010 together with the charge while the court order by Honourable J Gacheche was still in force.

35. It is also her submission that the Defendants colluded to deny her legal and equitable rights through extreme fraud, conspiracy and illegalities in dealing with the suit property. She has put forward the cases of **Johana Nyokwoyo Buti vs Walter Rasugu Omariba & 3 Others Civ. Appeal No 182 of 2006; Olympic Sports House Ltd vs School Equipment Centre Ltd [2012]eKLR**.

36. She further submitted that under the omnibus prayer, the court can award monetary compensation and that it is not in dispute that she is in possession of the suit premises.

### **The 1<sup>st</sup> Defendant's Submissions**

37. They are dated 3<sup>rd</sup> December 2020. The 1<sup>st</sup> Defendant submitted that Section 107 of evidence Act placed the burden of proof on the Plaintiff but she failed to prove the particulars of fraud alleged against the 1<sup>st</sup> Defendant. He relied on **Place Investment Limited v Geoffrey Kariuki Mwenda & Another [2015]Eklr**

### **The 2<sup>nd</sup> Defendant's Submissions**

38. They are dated 15<sup>th</sup> October 2020 and they identified the following issues for determination.

- a) *Whether the Plaintiff had legal capacity and/or locus standi to institute the suit.*
- b) *Whether the charge registered in favour of the 2<sup>nd</sup> Defendant by 1<sup>st</sup> Defendant was legal, lawful and regular.*
- c) *Whether the suit discloses any cause of action against the 2<sup>nd</sup> Defendant.*
- d) *Whether or not the alleged fraud, malice, illegality, contempt and conspiracy attributed to the 2<sup>nd</sup> Defendant as pleaded have been proved*
- e) *Whether or not the Plaintiff is entitled to the orders sought.*

39. Counsel for the 2<sup>nd</sup> Defendant submitted that the Plaintiff had no legal capacity to institute the suit since she had relinquished her interest in the property having sold it to the 1<sup>st</sup> Defendant vide the sale agreement dated 06/06/2001 free from any encumbrances and signed the transfer dated 26/04/2002. He also submitted that the sale agreement dated 06/06/2001 had met the requirements of Section 3(3) of the Law of Contract Act and the same could not be contradicted through oral evidence as provided for under Section 97(1) of the Evidence Act cap 80 laws of Kenya. It was his submission that at the time of sale of the suit property, there was no express/implied provision requiring spousal consent prior to sale or transfer or charging of the property. He also submitted that although the Plaintiff had attempted to infer that the 1<sup>st</sup> Defendant held the suit property in trust for her, she failed to prove the existence of a trust. He also submitted that the suit did not disclose any cause of action against the 2<sup>nd</sup> Defendant since all its transactions in respect of the suit property were above board and that the Plaintiff failed to call evidence from the Land Registrar to establish the fraud alleged on the entries against the title.

### **The 3<sup>rd</sup> Defendant's Submissions**

40. They are dated 20<sup>th</sup> March 2020 and raise the following issues for determination.

- a) *Whether the Plaintiff is deserving of a permanent injunction.*
- b) *Whether the 3<sup>rd</sup> Defendant acquired good title and whether the sale by private treaty was illegal, null and void and the same be cancelled.*
- c) *Whether the Plaintiff is entitled to a declaration order that the respective transaction on the suit property were illegal, null and void and the same be cancelled.*
- d) *Whether the Plaintiff is entitled to an order directing the suit property be reinstated and to be registered in favour of the Plaintiff.*

41. The 3<sup>rd</sup> Defendant submitted that the Plaintiff was not deserving of a permanent injunction because she admitted that she transferred the property to the 1<sup>st</sup> defendant who in turn charged it to the 2<sup>nd</sup> Defendant. He also submitted that he was a bona fide

purchaser for value and the sale by private treaty was legal and the only remedy for an invalid statutory of sale is in damages. He relied on the case of **Jose Estates V Muthimu Farmers Limited & Others [2019] eKLR** and **Nancy Kahoya Amadiva Vs Expert Credit Limited & Another [2015] eKLR**.

42. He also submitted that, the sale to the 3<sup>rd</sup> Defendant was regular because prior to selling, the 2<sup>nd</sup> Defendant exercised its due diligence and confirmed that the 1<sup>st</sup> Defendant was the registered owner of the suit property. He denied any fraud, misrepresentation or other dishonest conduct on his part.

#### **The 4<sup>th</sup> Defendant's Submissions**

43. They are dated 20<sup>th</sup> July 2020 and raised the following issues:-

- a) *Whether the 4<sup>th</sup> Defendant was aware of any court order and /or pendency of any suit as regards the suit land.*
- b) *Whether at the point of charging the suit property, there was an encumbrance.*
- c) *Whether charging of the suit premises by the 4<sup>th</sup> Defendant was illegal, unlawful/fraudulent.*
- d) *Whether the 4<sup>th</sup> Defendant knew/ought to have known that the suit premises was bound by the doctrine of lis pendens.*

44. The 4<sup>th</sup> Defendant submitted that there was no fraud/conspiracy on its part as alleged by the Plaintiff as it had a customer client relationship with the 3<sup>rd</sup> Defendant and that charging of the suit property was done in the ordinary course of business. It also submitted that it carried out due diligence by carrying out a valuation exercise and inspection of title which did not show any encumbrance save for the order in **HCCC No.3 of 2009(O.S)** that had been cancelled on the title document, therefore the doctrine of *lis pendens* did not bind it. It relied on the case of **Denis Noel Mukhulo Ochwada V Elizabeth Murungari Njoroge & Another [2018] eKLR**.

45. It also submitted that the contention by the Plaintiff that the doctrine of *lis pendens* founded on the provision of Section 52 of the Transfer of Property Act automatically prohibited sale of the suit property is incorrect since power of sale is statutory and it is granted by section 69(1) of the Transfer of Property Act and it is not fettered by section 52 of the Act.

#### **Plaintiffs' Reply to Defendants' Submissions**

46. They are dated 26<sup>th</sup> May 2021. The Plaintiff reiterated that she has always been in possession of the property and none of the parties had filed a counterclaim over the suit property.

#### **Analysis and Determination**

47. I have considered the pleadings and the evidence on record. I have considered the written submissions filed on behalf of the respective parties and the authorities cited. The issues for determination are:-

- (i) *Whether the charge registered in favour of the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant was legal, lawful and regular.*
- (ii) *Whether the suit discloses any cause of action against the 2<sup>nd</sup> Defendant.*
- (iii) *Whether the alleged fraud, malice, illegality, contempt and conspiracy attributed to the Defendants has been proved.*
- (iv) *Is the Plaintiff entitled to the reliefs sought''*
- (v) *Who should bear costs of this suit''*

48. By way of background, it is not in dispute that the Plaintiff and the 1<sup>st</sup> Defendant were married for over twenty (20) years before they separated. It is also not in dispute that they were blessed with two issues. The Plaintiff's case is that she purchased LR NO xxxx from Nyari Housing Limited. This land (hereinafter referred to as "**the suit property**") was registered in her name. The 1<sup>st</sup> Defendant was then working with Cooperative Bank Limited as a Manager. He was based in Embu at the time. As a bank manager and staff he enjoyed lower interest rates for any loans from the bank. It is the Plaintiff's case that she approached the 1<sup>st</sup> Defendant to apply for a loan on her behalf. She stated that the 1<sup>st</sup> Defendant informed her that this could only be possible if she transferred the title to the suit property in his name so that he could use it as security to secure the loan. It is the Plaintiff's case that she executed a transfer in favour of the 1<sup>st</sup> Defendant. She later got a cheque of Kshs.2.2 million from Cooperative Bank. She only needed Kshs.1.5 million so Kshs.700,000 was for the 1<sup>st</sup> Defendant's own use. That she deposited Kshs.400,000/- in his account and gave him kshs.300,000/- in cash. It is her case that she gave him the remaining amount in cash.

49. In summary, she told the court that it was not her intention to dispose of the suit property since they had agreed that she would get her title back once the loan was repaid. She denied that she signed the sale agreement dated 6<sup>th</sup> June 2001 and all that, all she did was in trust, as the 1<sup>st</sup> Defendant was her husband. She did not believe that he had any intention of depriving her of the suit property.

50. The 1<sup>st</sup> Defendant on the other hand stated that the Plaintiff offered, the suit property for sale, which he agreed to buy at Kshs. 2,200,000. He was to get this amount by applying for a loan from his employer. Before the loan was approved the suit property had to be in his name. They executed the sale agreement and later the Plaintiff transferred the suit property to his name. A cheque of Kshs.2.200,000 was released to the plaintiff who acknowledged receipt. He said thereafter he repaid the loan through deductions from his salary. It is his case that the Plaintiff transferred all her interest in the suit property to him. It is also his contention that the Kshs.400,000 deposited in his account by the Plaintiff was for him to purchase timber to complete her construction in Donholm. He denied that he received any other amounts from the Plaintiff towards the repayment of the loan.

51. The sale agreement dated 6<sup>th</sup> June 2011 is drawn by G. Kamonde Advocate. The same is executed by both parties in the presence of the said Advocate. It is clear from the said agreement what the intention of the parties was. It does not include any condition that the suit property was to revert back to the Plaintiff upon full repayment of the loan. The Plaintiff has denied that she signed the said agreement. She appeared to be suggesting that her signature was forged. She however adduced no evidence to the contrary. The document examiner was not called to confirm that the signature did not belong to the Plaintiff. She did not deny that she knew G. Kamonde Advocate.

52. After signing the agreement, she went ahead and executed a transfer in favour of the 1<sup>st</sup> Defendant. The transfer is dated 18<sup>th</sup> April 2002. It confirms that the transfer was effected in favour of the 1<sup>st</sup> Defendant for a consideration of Kshs.2,200,000/-The same is drawn by Kamau Minjire Advocate. I am of the view that the sale agreement dated 6<sup>th</sup> Jun3 2001 meets the requirements set out under Section 3(3) of the Law of Contract Act (Cap 23) Laws of Kenya.

53. **Section 97(1)** of the Evidence Act provides that :-

*"97(1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."*

54. I agree with the 2<sup>nd</sup> Defendant's submissions that no oral evidence is admissible to contradict or alter the terms of a clear written contract and/or instrument. The Plaintiff sold and transferred her interest in the suit property to the 1<sup>st</sup> Defendant vide the sale agreement dated 6<sup>th</sup> June 2001 and the transfer dated 18<sup>th</sup> April 2002. The 1<sup>st</sup> Defendant explained the lapse of time in that, the process of obtaining a loan was a lengthy one. I find that the sale agreement, and the transfer are valid, legal and enforceable.

55. The Plaintiff told the court that the suit property was registered in the 1<sup>st</sup> Defendant's name who held the same in trust for her and that the 1<sup>st</sup> Defendant was to transfer the suit property back to her after the loan repayment. The terms of the Agreement are clear. The suit property was sold free from any encumbrances and with vacant possession. The Plaintiff failed to adduce evidence to the contrary. I also agree with the 2<sup>nd</sup> Defendant's submissions that no spousal consent was required under the Registration of Titles Act (Repealed).

**56.** Section 23(1) of the Registration Titles Act (Repealed) is replicated in Section 26(1) of Land Registration Act 2012 provides that:-

*“1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

*a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

**57.** In the case of **Agricultural Finance Corporation vs Lengetia Ltd & Another [1985] eKLR**. The Court of Appeal cited with authority **Halsburys Laws of England, 3<sup>rd</sup> Edition vol. 8 at paragraph 110** which states as follows:-

*“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract”.*

**58.** In the case of **ENW vs PWM & 3 Others [2013] eKLR** Justice J. M. Mutungi held that:-

*“Charges taken before the enactment of the land registration act 2012 cannot be invalidated on the basis that spousal consent had not been obtained. It was not a requirement prior to the enactment of the new land registration Act and therefore the plaintiff in the present case cannot have refuge under the new land act”.*

**59.** I am also guided by the cited case of **Charles K. Kandie vs Mary Kimoi Sang [2017] eKLR** where it was held that:-

*“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because the law never implies, the court never presumes, a trust, but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before trust will be implied”.*

**60.** I find that the Plaintiff has failed to prove that the 1<sup>st</sup> Defendant held the title to the suit property in trust for her. She has also failed to prove that she had any interest on the suit property at the time a charge was created in favour of the 2<sup>nd</sup> Defendant. she therefore has no *locus standi* to seek any remedies against the 2<sup>nd</sup> Defendant.

**61.** The 2<sup>nd</sup> Defendant exercised due diligence and confirmed that the 1<sup>st</sup> Defendant was registered owner of the suit property. He therefore had the right to sell, transfer, charge and/or deal with the suit property in any manner he wished. He decided to charge the suit property to his then employer Cooperative bank and later to the 2<sup>nd</sup> Defendant. After the 1<sup>st</sup> Defendant, left employment with the Cooperative Bank, the charge was taken over by his new employer, the 2<sup>nd</sup> Defendant. I find that the charge registered in favour of the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant was legal, lawful and regular.

**62.** It is the Plaintiff's case that in order to safeguard her interest on the suit property she filed HCCC No 3 of 2009 (OS) against the 1<sup>st</sup> Defendant. That a court order was issued and the same registered against the title. It should be noted that the 2<sup>nd</sup> Defendant was not party to the above suit. The Plaintiff told the court that the said order was cancelled by the Principal Registrar of Titles. She admitted that she got a notice in writing about the intended cancellation of the said order but she got the letter late after the order had been cancelled. The Plaintiff was cross examined repeatedly on why she did not enjoin the Principal Registrar of Titles to this suit to explain the cancellation but she had no justifiable reason. I find that her failure to enjoin the Principal Registrar of Titles to explain the cancellation of the court order is fatal to her case.

**63.** The Plaintiff moved the court on HCCC NO 3 of 2009 (OS) claiming the suit property was matrimonial property. In this suit

she states that she bought the suit property as a femme sole during the subsistence of the marriage between her and the 1<sup>st</sup> Defendant.

64. The Plaintiff in paragraph 21 of the Plaintiff has given the particulars of fraud, malice, illegality, contempt and conspiracy on the part of the Defendants. She was of the view that the 3<sup>rd</sup> Defendant bought the suit property from the 2<sup>nd</sup> Defendant as a proxy of the 1<sup>st</sup> Defendant. Further the whole scheme was calculated to deprive her of the suit property given the fact that the 3<sup>rd</sup> defendant is a brother in law to the 1<sup>st</sup> defendant.

65. As stated earlier, the Plaintiff failed to enjoin the Principal Registrar of Titles, who would have explained the entries made on the title. The Principal Registrar of Titles is the holder of the records to the suit property.

66. Whoever alleges fraud must prove. Section 107, 108, 109 of the Evidence Act provides that:-

*“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

*108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*

*109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

67. In the case of **Githinga Kibutha vs Caroline Nduku ELCA No 16 of 2007** the court stated thus:-

*“The Land Registration Act does not define fraud. Recourse must therefore be had to other sources of law. The Black’s Law Dictionary defines fraud thus:-*

*“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another’.*

*Fraud would, therefore consist of deceitful actions which may be made through either positive assertions or concealment of facts. It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.”*

68. Similarly, in the case of **Denis Noel Mukhulo Ochwada & Another vs Elizabeth Murungari Njoroge & Another [2018] eKLR**. The court stated that:-

*“As regards standard of proof of fraud, the law is quite clear. In *R. G. Patel vs Lalji Makanji (Supra)*, the former Court of Appeal for Eastern Africa stated thus:-*

*“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”*

Also in the case of **Urmilla w/o Mahendra Shah vs Barclays Bank International Limited & Another [1979] KLR 76; [1976-80] 1KLR 116B** it was held that: *“allegations of fraud must be strictly proven and that although the standard of proof may*

*not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned”.*

69. It is the Plaintiff’s case that the charge and/or transfer of the suit property to the 3<sup>rd</sup> defendant was fraudulent, illegal and unlawful. That it was due to a conspiracy by the defendants because this occurred during the pendency of a court order and because the 3<sup>rd</sup> defendant is the 1<sup>st</sup> defendant’s brother in law. I have gone through the evidence tendered by the Plaintiff and I find that she has failed to prove the particulars as enumerated in paragraph 21 of the plaint. The plaintiff was not privy to the contract between the 1<sup>st</sup> and 2<sup>nd</sup> defendant and likewise between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. It is not in dispute that the 3<sup>rd</sup> Defendant was not aware of the HCCC NO 3 of 2009 (OS) or the orders that were issued therein.

70. In the absence of the testimony of the Principal Registrar of Titles, I find that the plaintiff has failed to prove that any conspiracy existed between the Defendants. The allegations by the Plaintiff that the 1<sup>st</sup> defendant planned for the 3<sup>rd</sup> defendant (his brother in law) to purchase the suit property cannot stand in the absence of cogent evidence. The Plaintiff failed to demonstrate that there was any law prohibiting the 3<sup>rd</sup> Defendant from purchasing the suit property. The plaintiff failed to call any evidence from the Principal Registrar of Titles or the Chief Land Registrar regarding the entries against the title which she claims were done fraudulently.

71. Section 69(1) of the Transfer of Property Act of 1882; provided that:-

*“69(1) a mortgagee, or any person acting on its behalf where the mortgage is in 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 mortgage 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 resell, without being answerable for any loss occasioned thereby; the 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”.*

72. The Plaintiff willingly transferred the suit property to the 1<sup>st</sup> Defendant who took up a loan facility with the 2<sup>nd</sup> Defendant. He failed to service the said loan. The 1<sup>st</sup> Defendant was aware of the 2<sup>nd</sup> Defendant’s right to recover upon the said default. It is not in dispute that the 2<sup>nd</sup> Defendant in exercise of its right to a statutory sale, sold the suit property to the 3<sup>rd</sup> defendant. I agree with the 3<sup>rd</sup> Defendant’s submissions that, the law is that, the equity of redemption is lost on completion of a valid agreement. In the case of **Ze Yun Yung vs Nova Industrial Products Limited [2003] 1EA 362** where it was held that *“the appellant’s acceptance of the sale by private treaty and subsequent completion of a valid agreement for the sale of the suit property effectively locked out the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ right of redemption over the suit property”.*

73. The 3<sup>rd</sup> Defendant is therefore an innocent purchaser for value as the Plaintiff failed to prove any conspiracy on the part of the Defendants. I am guided by the decision of Uganda Court of Appeal in **Katende vs Harndar & Co. Ltd [2008] EA 173**.

74. I find that the 2<sup>nd</sup> Defendant’s right to realise its security could not be faulted. In the case of **John Karanja Njenga & Another vs Bank of Africa [2015] eKLR** where the court held:-

*“However, for this court, the defendant’s right to exercise its power to sell the charged property arises the moment there is a debt which remains outstanding despite demand. It is therefore upon the plaintiffs to prove that there is in fact no debt due to the defendant”.*

75. Also in the case of **Jose Estates Limited vs Muthumu Farm Ltd & 2 Others [2019] eKLR** the Court of Appeal observed thus:-

*“.....Similarly in cases where fraud is alleged it is not enough to simply infer fraud from the facts. In Vijay Morjoria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi JA (as he then was):-*

*“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also well settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.*

76. As stated earlier the Plaintiff failed to lay a basis by way of evidence to prove fraud and conspiracy on the part of the Defendants herein. I find that the sale by private treaty cannot be faulted. There is no evidence tendered by the plaintiff to show that the 2<sup>nd</sup> defendant did not act in good faith.

77. I agree with the 4<sup>th</sup> defendant’s submissions that the 3<sup>rd</sup> defendant’s statutory power of sale is not fettered by Section 52 of Transfer of Property Act (Repealed). The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were not bound by the doctrine of *lis pendens*. It was held by the Court of Appeal in **Uhuru Highway Development Ltd vs Central Bank of Kenya & 2 Others Nairobi Civil Appeal No 36 of 1996 (unreported)** thus:-

*“Here we must make it clear that courts do not order exercise of statutory power of sale. It is statutory. Courts can only stop such exercise if the circumstances so warrant. If a court declines to grant an injunction, the stopping of such a statutory power of sale, the sale proceeds under the statute that gives such a power”.*

I find that at the time the suit property was transferred to the 3<sup>rd</sup> defendant there was no order prohibiting such transfer and registration.

78. From the foregoing, I find that the plaintiff who was not a party to the transactions after she transferred the suit property is not entitled to the reliefs sought.

79. The plaintiff has no legal proprietary interest on the suit property having relinquished her interest when she transferred the suit property to the 1<sup>st</sup> Defendant. Her case must fail.

80. In conclusion, I find that the Plaintiff has failed to prove her case as against the Defendants on a balance of probabilities. Consequently, the suit is dismissed with costs to the Defendants.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 14TH DAY OF OCTOBER 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

J. P. Machira for the Plaintiff

Mr. Waweru for the 1<sup>st</sup> Defendant

Ms Muriithi for the 2<sup>nd</sup> Defendant

No appearance for the 3<sup>rd</sup> Defendant

Ms Muturi for the 4<sup>th</sup> Defendant

Steve - Court Assistant



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