



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C CASE NO. 56 OF 2013

R C C.....PLAINTIFF

VERSUS

R K C.....DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 22nd August, 2013 the plaintiff filed suit against the defendant who is her husband, seeking *inter alia* an order for cancellation of the title deeds issued fraudulently and illegally in respect of the pieces of land registration numbers KERICHO/KIPCHIMCHIM/ [particulars withheld] and KERICHO/KIPCHIMCHIM/ [particulars withheld] restricting the defendant from allocating and that the same be registered in her name. She also seeks an order restricting the defendant from allocating L.R No KERICHO/KIPCHIMCHIM. [particulars withheld] to L C or any other party without the consent of the plaintiff.
2. The defendant filed a defence denying that the registration of the suit land in the name of one L C was fraudulent or illegal. He stated that the suit land is matrimonial property and being a polygamous man he divided his land among his wives equitably in accordance with Kipsigis customary law.
3. At the hearing of the suit, both the plaintiff and the defendant testified and none of them called any witness. It was the plaintiff's case that she is the first wife of the defendant having been married in the early 60s. The said marriage was blessed with 13 children. The defendant subsequently married three other wives namely; C C (deceased), J C (who left after a short while) and L C.
4. The suit land was purchased in 1976 after the defendant had married all his four wives. The plaintiff testified that the defendant established their matrimonial home on the suit land which was initially known as L.R No. KERICHO/KIPCHIMCHIM/ [particulars withheld] measuring 3.83 Hectares or approximately 9 acres. When he married his 4th wife L, they stayed in the same house with the plaintiff for a while before the defendant built for her a separate house on the same parcel of land. The defendant subsequently divided land parcel number KERICHO/KIPCHIMCHIM/[particulars withheld] into two parcels, namely KERICHO/KIPCHIMCHIM/[particulars withheld] measuring 1.88 Ha and KERICHO/KIPCHIMCHIM/ [particulars withheld] measuring 1.92 Ha. The former parcel was registered in the name of L C while the latter title is registered in the defendant's name.
5. It is the plaintiff's case that the registration of suit land in the name of L was fraudulent and illegal as the Plaintiff is entitled to the said parcel of land since it is her matrimonial home.
6. The defendant testified that he is married to four wives the plaintiff being his first wife. He denied that the sub-division and subsequent registration of the suit land was fraudulent or illegal as his intention was to divide the suit land into two equal shares between his two wives, that is, the that plaintiff and his 4th wife, L. He explained that according to Kipsigis customary law a polygamous man is supposed to divide his land among his wives equally. He stated that he had given 9 acres of his land in Narok to the children of his deceased second wife while the 3rd wife had deserted him and had never come to claim any land. He stated that he had registered land parcel no. KERICHO/KIPCHIMCHIM/4420 measuring 1.88 Ha in the name of L and he wanted to process a title deed in respect of KERICHO/KIPCHIMCHIM/ [particulars withheld] in the plaintiff's name but she declined and instead decided to file this suit claiming the two parcels of land. He admitted that the plaintiff has her home on the parcel registered in the name of L and she has been utilizing the lion's share of it leaving L with just about half an acre.

Issues for Determination

7. The following issues emerge for determination:
 - i. Whether the suit parcels of land are matrimonial property

ii. Whether the suit parcels of land constitute the plaintiff's matrimonial home

iii. Whether the defendant's registration of land parcel number KERICHO/KIPCHIMCHIM/ [particulars withheld] in the name of L C was fraudulent and unlawful

iv. Whether the plaintiff is entitled to the orders sought

Analysis and Determination

8. From the evidence on record it is clear that the two parcels of land namely; land parcel no. KERICHO/KIPCHIMCHIM/ [particulars withheld] and KERICHO/KIPCHIMCHIM/ [particulars withheld] were carved out land parcel number KERICHO/KIPCHIMCHIM/[particulars withheld]. The said parcel of land was purchased by the defendant during the subsistence of his marriage to the plaintiff. Section 6 of the Matrimonial Property Act defines matrimonial property as follows:

“For the purposes of this Act matrimonial property means:

a) The matrimonial home or homes

b) Household goods and effects in the matrimonial home or homes

c) Any other movable or immovable property jointly owned and acquired during the subsistence of the marriage”

9. It is therefore my finding that the suit properties are matrimonial property.

10. Land parcel no. KERICHO/KIPCHIMCHIM/ [particulars withheld] is currently registered in the name of L C who is the plaintiff's co-wife and the defendant's 4th wife while land parcel no. KERICHO/KIPCHIMCHIM/ [particulars withheld] is registered in the defendant's name.

11. Under section 2 of the Matrimonial Property Act 2

“a matrimonial home means any property that is owned or leased by one or both spouses and occupied by the spouses as their family home”.

12. It is common ground that the plaintiff's matrimonial home is on land parcel number KERICHO/KIPCHIMCHIM/ [particulars withheld] which is registered in the name of her co-wife L C although the plaintiff is in possession of the both land parcel number KERICHO/KIPCHIMCHIM/ [particulars withheld] and a big chunk of land parcel no. KERICHO/KIPCHIMCHIM/ [particulars withheld]. The plaintiff testified that she has lived on this parcel of land since she got married in the early 60s.

13. The defendant who is a polygamous man married to 4 wives testified that he divided his land among his wives in accordance with Kipsigis customary law. According to the Restatement of Customary Law by Eugene Cetram P. 119

a) “A (Kipsigis) wife must live where her husband directs. Once the husband has established a separate matrimonial home, the wife must live there. A husband is under a duty to provide his wife with a home. Until such time as he establishes a separate home, he may live elsewhere with his wife.

b) A husband who is a polygamist is under a duty to provide a separate hut for each of his wives. The location of the dwelling of each wife is determined by the husband”.

14. Section 11 of the Matrimonial Property Act provides as follows:

“During the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution be taken into account, including

a) The customary law relating to divorce or dissolution of marriage

b) The principle of protection of the rights of future generations to community and ancestral land as provided for under article 63 of the Constitution and

c) The principles relating to access and utilization of ancestral land and the cultural home by a wife or wives or former wife or wives.”

15. In the instant case, even though the defendant divided his land and constructed houses for his wives, he allocated the plaintiff land on a parcel away from her house without constructing another house for her. This is contrary to Kipsigis customs as it the sole duty of the husband to establish a home for his wife.

16. When the court sought clarification as to whether he would construct a house for the plaintiff on the parcel of land he had assigned to her,

he claimed that her sons would build her a house as he no longer has the resources. It therefore beats logic why he wants to dispossess the plaintiff of a matrimonial home she has occupied for more than 50 years without providing a suitable alternative.

17. The plaintiff's suit is hinged on the allegation that the sub-division and transfer of land parcel number KERICHO/KIPCHIMCHIM/ [particulars withheld] is fraudulent and unlawful and that the title ought to be cancelled so that the original title measuring 3.38 Ha can be transferred to her.

18. Considering that the suit property is matrimonial property as between the plaintiff and the defendant as well as the defendant's 4th wife, L, I do not see how the issue of fraud arises. In any event fraud must not only be pleaded and particulars thereof set out in the Plaint, it must also be proved to a standard higher than on a balance of probabilities. See the case of **Nancy Khaoya Amadiva vs. Expert Credit Ltd & Another 2015 eKLR** where the Court of Appeal held as follows:

“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 settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

19. I agree with counsel for the defendant that L being a wife to the plaintiff is equally entitled to a share of the defendant's property that was acquired during the subsistence of her marriage to the defendant. No evidence was led by the plaintiff to controvert the fact that L is a lawful wife to the defendant, nor was there any evidence that the property was acquired before she got married to the defendant. Infact, it was the defendant's evidence that L contributed Kshs. 12,000 towards the purchase price of the suit property. The Plaintiff also testified that she contributed to the purchase price though she did not elaborate. It is therefore my finding that fraud has neither been pleaded nor proved.

20. I have carefully considered the pleadings, the evidence as well as the rival submissions and even though I sympathize with the Plaintiff I am not persuaded that she has proved her case on a balance of probabilities and I dismiss it.

21. Perhaps what the defendant might want to consider is to re- survey and subdivide his land in such a way that the plaintiff remains with her house on it while his 4th wife retains her house with each wife having a separate title for their share of the suit land.

22. As this is a case between a wife and husband, each party shall bear their own costs.

Dated, signed and delivered at Kericho this 30th day of May 2018.

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J. M. ONYANGO

JUDGE

In the presence of:

1. Miss Sitati for Mr. Orina for the Plaintiff
2. Mr. Koske for Mr. Motanya for the Defendant
3. Court assistant - Rotich