



**Rotich v Toroitich & another (Environment & Land Case 65 of 2015)
[2023] KEELC 22466 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22466 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 65 OF 2015
JM ONYANGO, J
DECEMBER 19, 2023**

BETWEEN

ANN JEBWAMBOK ROTICH PLAINTIFF

AND

JOHN K TOROITICH 1ST DEFENDANT

KIBIWOTT ARAP ROTICH 2ND DEFENDANT

JUDGMENT

1. The Plaintiff is the 1st wife of Kibiwott Arap Rotich, the 2nd Defendant herein who is the registered owner of land parcel number Moi's Bridge/Ziwa Block 10 /(Lemoru)/134. By virtue of her marriage to the 2nd Defendant, the plaintiff avers that she has a beneficial interest in the suit property. The Plaintiff further avers that the 1st defendant unlawfully trespassed onto the suit property measuring 4 acres purporting to have bought it from the 2nd Defendant without the plaintiff's consent. She avers that as a result of the defendants' actions, she has been deprived of the use of the suit property which is her family's only source of income and she has suffered loss and damage.
2. The plaintiff therefore instituted this suit against the defendants seeking the following reliefs:
 - a. A declaration that the purported sale is null and void and that the 1st Defendant is unlawfully occupying the suit land.
 - b. An order of permanent injunction restraining the Defendant and/or his servants from entering, planting, ploughing or doing any other act upon the suit land.
 - c. Mesne profits and general damages for trespass.
 - d. An eviction order evicting the 1st defendant from Moi's Bridge /Ziwa Block 10 / (Lemoru)/134.



- e. Costs of this suit
 - f. Any other or further reliefs that this Honourable Court may deem fit to grant.
3. Upon being served with the Plaint and Summons to enter appearance, the 1st Defendant filed a statement of Defence dated 18th March 2015 in which he denied that he has trespassed on the suit property and averred that he has been on the suit property since 2008. He stated that land parcel No. Moi's Bridge /Ziwa Block 10 /(Lemoru)/134 was a sub-division of a bigger parcel of land out of which the Plaintiff was given her share measuring 14.5 acres. From her share, the plaintiff gave her son 11.5 acres and sold the 1st defendant 1.1 acres. He maintained that he is entitled to 5.3 acres of the suit property.
 4. On his part, the 2nd defendant filed his statement of Defence dated 18.3.2015 in which he admitted that the plaintiff is his first wife and stated that he has a second wife. He denied that the 1st Defendant had trespassed onto the suit property as he had bought the land from them and he had been living thereon since 2008.
 5. He contended that the 1st Defendant is entitled to 5.25 acres out of the suit property which he bought either directly from him, the plaintiff or persons to whom either the plaintiff or he had earlier sold portions of the suit property.
 6. He further stated he initially owned 35 acres which he divided equally between his two wives. He then took 3 acres from each of his wives for himself, leaving them with 14.5 acres each. It is his contention that out of her share of 14.5 acres, the plaintiff gave her son Philip 11.5 acres leaving her with 3 acres. She subsequently sold 2.1 acres and remained with 0.9 acres and that the bulk of the remaining portion of the suit property belongs to his 2nd wife and her children. He therefore denied that the plaintiff is entitled to the entire 13.5 acres as alleged.
 7. After a failed attempt at mediation, the suit was set down for hearing and the Plaintiff testified and called one witness while the defendants each testified and the 2nd Defendant called one witnesses.
 8. The plaintiff relied on her Witness Statement dated 22nd August, 2019 and filed in court on 1st October, 2019. She testified that she was the first wife to the 2nd defendant who is the registered owner of land parcel number Moi's Bridge /Ziwa Block 10 /(Lemoru)/134. It was her testimony that her husband initially owned a parcel of land measuring 35 acres which he divided equally between her and her co-wife and each of them got 17.5 acres. She then transferred to 11.5 acres to her son. Her remaining 6 acres was further sub-divided into two with 3 acres comprising her homestead while 3 acres was left for farming purposes. They later sold 0.6 acres to the 1st defendant and he subsequently colluded with the 2nd defendant to buy another portion measuring one acre without her consent. When she realized what had happened, she placed a caution on the suit property. She informed the court that the 1st defendant has been cultivating a portion of the 3 acres which she used to cultivate.
 9. The plaintiff produced a copy of the Certificate of Official Search and title deed in respect of the suit property, minutes of a meeting held at the area Assistant Chief and an agreement for rescission of lease dated 19.3.2014 as Plaintiff's exhibits 1-4 respectively.
 10. In cross-examination she explained that after the suit property was sub-divided between her and her co-wife she got 17.5 acres out of which she transferred 11.5 acres to her son. Out of the remaining 6 acres, her husband took 3 acres and her co-wife also gave him 3 acres. She then remained with 3 acres where her matrimonial home is. Out of her 3 acres, she sold one acre to Arap Ngetich and 0.6 of an acre to the John Toroitich (1st Defendant). She claims that the 3 acres she ceded to her husband was supposed



- to be sold so that he could build for her a permanent house. She denies having consented to the sale of any further portion of her land. She stated that the portion she currently occupies is 0.8 of an acre.
11. Leach Chemesunde who is a granddaughter to the plaintiff and 2nd Defendant testified as PW 2. She relied on her Witness Statement. It was her evidence that she did not know how her grandfather had divided his land. However, in 2014, she was requested to refund a sum of Kshs.74, 710 to the 1st Defendant who had leased a portion of her grandparents' land and after she refunded him the lease was terminated. She confirmed that the plaintiff occupies 0.8 of an acre and she is disputing the sale of 1.8 acres.
 12. The 1st Defendant testified as DW1. He stated the he bought a total of 5.25 acres of the suit land made up as follows:
 - a. 1.1 acres from the plaintiff
 - b. 1.85 acres from the 2nd defendant
 - c. 1.0 acre from Arap Ngetich (who had previously bought the same from the Plaintiff)
 - d. 1.0 acre from Charles Cheptarus (purchaser)
 - e. 0.3 of an acre from James Maiyo (2nd Defendant's son).
 13. He produced a copy of a sale agreement dated 24th April, 2014. He told the court that the said agreement consolidates all the parcels he bought from various vendors as the title for the suit property was still registered in the name of the 2nd Defendant. He denied that he was a trespasser. He stated that apart from the 1.1 acres she sold to him, the plaintiff also sold acre to Arap Ngetich and she remained with 0.9 of an acre. She was therefore not entitled to the 4 acres she is claiming.
 14. The 2nd Defendant testified as DW2. He told the court that he bought the suit property which originally measured 36 acres. He surrendered one acre for public utilities and remained with 35 acres which he divided equally between his two wives. He gave each of his wives 14.5 acres and remained with 6 acres. He transferred 11.5 acres of the plaintiff's share to her son and she remained with 3 acres. He sold 1.85 acres out of the plaintiff's share to educate her grandchildren. The plaintiff also sold a portion of her share and she therefore only has 0.9 of an acre left.
 15. Emily Cheptoo Rotich who is the Plaintiff's co-wife testified as DW3. She told the court that she 13 children while the plaintiff only has one son. She corroborated DW's evidence with regard to how he divided the suit property. It her testimony that of the 14.5 assigned to each of them, 3 acres for their use while 11.5 acres was for their children. The plaintiff gave 11.5 acres to son. Out of her remaining 3 acres, the plaintiff sold 2.1 acres and she was left with only 0.9 of an acre. According to her, the 1st defendant bought the 5.25 acres he is claiming from the plaintiff's son.
 16. With that evidence, the defendants closed their case after which the parties filed their written submissions.

Plaintiff's Submissions

17. The Plaintiff filed his submissions dated 15.3.2023 through the firm of Nyaundi Tuiyott & Company Advocates. After summarizing the pleading and evidence, learned counsel for the Plaintiff submitted on 3 main issues. The first one is that the suit property is matrimonial property, which the 2nd defendant could not sell without the plaintiff's consent. He relied on Section 93 of the [*Land Registration Act*](#) which provides that where property is obtained during the subsistence of a marriage, it should be dealt with in accordance with the Matrimonial Properties Act. He submitted that under the Matrimonial



Properties Act, a matrimonial home is part of matrimonial property and since the plaintiff and her co-wife have their homes on the suit property, it forms part of their matrimonial property.

18. It is his further contention that section 6 of the Matrimonial Properties Act forbids the alienation of any interest in matrimonial property within a monogamous marriage, without the consent of both spouses. He submitted that the 2nd defendant having divided the suit property between his 2 wives, is required to consult each of them before dealing with her respective portions. Counsel relied on Article 45 of the Constitution which provides that parties to a marriage are entitled to equal rights. It is therefore his submission that the 2nd Defendant cannot purport to own 6 acres of the suit property to the exclusion of his spouses and proceed to sell it without their consent.
19. The second issue on which counsel submitted is whether the plaintiff is entitled to the prayers sought. He submitted that since the 2nd defendant purported to sell the suit property without the plaintiff's consent, the sale is unlawful thus the plaintiff is entitled to the reliefs sought.
20. It was counsel's further contention that since consent of the Land Control Board was not obtained within 6 months, the sale is null and void. He relied on the cases of Elizabeth Cheboo v May Gimnyigei Civil Appeal number 40 of 1986 and Mbutia Kiarie Kaguru Civil Appeal No. 87 of 1986.

Defendant's Submission

21. On the other hand, learned counsel for the Defendants submitted on whether trespass had been established, whether the 2nd defendant had sold matrimonial property without consent and whether the plaintiff was entitled to the reliefs sought.
22. On the first issue counsel submitted that since the plaintiff did not have exclusive possession of the suit property, her claim of trespass could not succeed. He was of the view that the 1st defendant had lawfully bought the suit property from the 2nd defendant who is the registered owner thereof and he had been in occupation thereof since 2008. He could therefore not be termed a trespasser.
23. Regarding the second issue, counsel submitted that the 2nd Defendant sold what belonged to him and after giving each of his 2 wives their respective portions and the plaintiff's claim was therefore baseless.
24. It was counsel's submission that the plaintiff had failed to prove that she has any right over the portion of land that the 2nd defendant had sold to the 1st defendant and she was therefore not entitled to the reliefs sought.

Analysis and Determination

25. After a careful consideration of the pleadings, evidence on record and the submissions filed by the parties, the following issues arise for determination:
 - i. Whether the suit property is matrimonial property
 - ii. If the answer to no. (i) is in the affirmative, whether the 2nd defendant needed to obtain the plaintiff's consent before selling a portion of the suit property to the 1st defendant.
 - iii. Whether 1st defendant is a trespasser
26. Whether the plaintiff is entitled to the reliefs sought.
27. I will determine the first two issues jointly, starting with the question as to whether the suit property is matrimonial property.
28. S. 6 of the Matrimonial Property Act, defines matrimonial property as follows:-



Meaning of matrimonial property :-

- (1) 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;
or
 - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
- (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
- (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
- (4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

A “matrimonial home” is defined in Section 2 as follows :-

“matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;

29. There is no dispute that the suit property is matrimonial property as the 2nd defendant and his two wives, one of whom is the plaintiff reside on a portion of it. It is also common ground that the suit property originally measured 36 acres and after he surrendered one acre for utilities, the 2nd defendant remained with 35 acres. He divided the suit property equally between his two wives and each wife got 17.5 acres. Thereafter, he took 3 acres from each of the two portions leaving each wife with 14.5 acres while the 2nd Defendant remained in control of 6 acres. Of the 14.5 acres assigned to the plaintiff, 11.5 acres were transferred to her only son while 3 acres were left at her disposal. Problems started when the 2nd defendant sold a portion of the 6 acres under his control without the plaintiff’s consent.
30. While in her plaint the plaintiff claims that the entire portion sold to the 2nd defendant was done without her consent, in her evidence she admitted that she sold 0.6 of an acre to the 2nd defendant and one acre to one Arap Ngetich. On the other hand, the 2nd defendant testified that he only sold 1.85 acres to the 2nd Defendant while the plaintiff sold him 1.1 of an acre. He then sold various portions to different people who in turn sold their portions to the 2nd defendant to make a total of 5.25 acres.
31. The question is therefore whether parties in a polygamous marriage can sell property without the consent of their spouses.

Section 12 of the *Matrimonial Property Act* provides as follows :-

Special provisions relating to matrimonial property

1. An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both



spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.

32. The Matrimonial Property Act only provides for consent in monogamous marriages and there is no specific provision for consent of all the spouses in a polygamous marriage as this would no doubt be difficult to enforce especially if a man has several wives with some consenting and others refusing to grant their consent. This is apparent in this case where the second wife appears to side with her husband (the 2nd Defendant).
33. In the present case, even though the plaintiff accused the 2nd defendant of having sold a portion of the matrimonial property, she admitted having sold part of the suit property and in cross-examination, she is stated that she was complaining about the portion sold by the 2nd defendant because he did not share the sale proceeds with her. Be that as it may, the fundamental question is whether the 1st defendant has a valid claim to 5,25 acres out of lad parcel no. Moi's Bridge /Ziwa Block 10 /(Lemoru)/134.
34. One of the grounds upon which the plaintiff seeks to invalidate the sale agreement between the 1st defendant and 2nd defendants is that they entered into an oral sale agreement.
35. Section 3 of the Law of Contract Act, Chapter 23 of the Laws of Kenya provides that:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- (a) the contract on which the suit is founded –
 - (i) is in writing.
 - (ii) is signed by all parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

Provided that this Section shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526); nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

36. This section is replicated in Section 38 (1) of the land Act which provides that

S. 38 Validity in contracts of sale in land

- (1) “Other than as provided in this Act or any other written law, no suit shall be brought upon a contract for disposition of an interest in land unless
 - (i) the contract upon which the suit is founded
 - (a) is in writing,
 - (b) is signed by all parties thereto and
 - (c) the signature of each party has been attested by a witness who was present when the contract was signed.
2. Subsection (1) shall not apply to –
 - (a) a contract made in the course of a public auction.
 - (b) the creation or operation of a resulting, implied or a constructive trust; or



- (c) any agreement or contract made or entered into before the commencement of this Act, provided that-
 - (i) the verbal contracts shall be reduced to writing within two years from the date of the enactment of this Act; and
 - (ii) the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing in a newspaper of nationwide circulation.”

37. The 1st Defendant produced a sale agreement dated 4th April, 2014. A perusal of the said agreement however, reveals that it is for the sale of a portion of land parcel no. Moi’s Bridge /Ziwa Block 10 / (Lemoru)/138 measuring 5.35 acres. In cross-examination he stated the parcel number was erroneous. He also stated the purchase price was Kshs.100,000 out of which he paid Kshs.70.000. However, the sale agreement indicates that the purchase price was Kshs.500,000. Even though he stated that the sale agreement consolidates all the parcels he bought from various vendors out of the suit property, he did not produce any sale agreement with the alleged vendors, including the plaintiff. This makes it difficult to ascertain whom he bought the alleged portions from and the total acreage of the land he bought. Further, the alleged individual “oral” sale agreements with the various vendors is in breach of the provisions of section 3 of the Law of Contract Act and Section 38 of the Land Act 2012.
38. To make matters worse, the defendants did not produce any evidence to show that they obtained the consent of the Land Control Board. The 2nd defendant’s evidence that he attended the meeting of the Land Control board but he did not sign any document does not help his case. Since the suit property is agricultural land, it was incumbent upon the vendor to obtain consent of the Land Control Board. Section 6 of the Land Control Act provides as follows:
- “ Each of the following transactions that is to say-
- a. The sale, transfer, lease mortgage, exchange, partition or other disposal of a dealing with agricultural land which is situated within a control area is void for all purposes unless the Land Control board for the land control area or division in which the land is situated has given its consent in respect of that transaction.
39. I hasten to add that although section 6 of the Land Control Act remains a part of our laws, the Court of Appeal has in instances where it has found that a constructive trust exists, held that the said section does not apply. See the case of Willy Kitilit v Michael Kibet (2018) eKLR. However, in the instant case, no basis has been laid for the court to declare that there is a constructive trust.
40. The above analysis leads me to the conclusion that the sale agreement between the 1st and second defendant has no legal basis and it is therefore null and void. Consequently, the 1st defendant is a trespasser on the suit property.
41. As to whether the plaintiff is entitled to the reliefs sought, in her plaint the plaintiff seeks a declaration that the sale of land be considered null and void, a permanent injunction to restrain the 1st defendant from entering, ploughing or doing any other act on the suit land, mesne profits and general damages, an eviction order and costs. In view of the evidence on record, I decline to grant mesne profits as the same were not proved.
42. In conclusion, it is my finding that the plaintiff has proved her case on a balance of probabilities and the justice of this case leads me to grant the following final orders:



- a. A declaration is hereby issued that the sale agreement in respect of land parcel No. Moi's Bridge /Ziwa Block 10 /(Lemoru)/134 is null and void.
- b. A permanent injunction is hereby issued restraining the 1st Defendant from planting, ploughing or doing any other act upon the suit property.
- c. The 1st defendant shall vacate the suit property within 90 days failing which he may be forcefully evicted.
- d. In view of the special circumstances of this case, each party shall bear their own costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER, 2023.

J.M ONYANGO

JUDGE

In the presence of;

1. Chemwok for the Respondent
2. Miss Atema for Mr. Songok for the Plaintiff

Court Assistant: A. Oniala

