



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL SUIT NO.118 OF 1997

M M..... 1ST PLAINTIFF
H K 2ND PLAINTIFF
A G3RD PLAINTIFF

Versus

J G G..... DEFENDANT

JUDGMENT

Matrimonial property

[1] On 10th July 1998 J V O Juma J ordered that HCC 118 OF 1997, HCC 184 of 1996 and HCC 106 of 1997 be consolidated and be heard together on the premise that all the three cases encompass similar questions of law and fact. This judgment therefore relates to a consolidated suit comprising of the following suits:

1. HCC. NO. 184 OF 1996 (OS) J G G VS. A G
2. HCC. NO. 106 OF 1996 J G VS. A G, M M AND H K (By way of Plaintiff)

Accordingly, in this judgment, the parties shall be referred to as they appear in the title of the suit. In this case, the suit land is NTIMA/IGOKI/[particulars withheld] which was one of the parts arising from the partition of NTIMA/ IGOKI/ [particulars withheld] owned by 3rd Plaintiff and one J G (See Exhibit D EX I). The 3rd Plaintiff was thereafter registered on 19th March 1974 as the proprietor. On 12th August 1997 the inhibition placed on the suit land was lifted and on the same day the 1st and 2nd Plaintiff bought the suit Land and a title deed was issued to them showing they have equal shares therein. See green card – Exhibit DEX I and title deed -Exhibit DEX 10 respectively.

Plaintiffs’ Case

[2] From the pleadings filed, the Plaintiffs seek the following orders:

- a) Order for vacant possession and eviction of the Defendant from land parcel No. NTIMA/IGOKI/[particulars withheld].
- b) Declaration that the Defendant is unlawfully occupying all that parcel of land and premises

comprised on land parcel No. NTIMA/IGOKI/[particulars withheld].

c) General damages for trespass.

d) Mesne profit at the rate of Kshs. 32,000/= per month in respect of the market rental rated of the shop and 11 rear rooms with effect from August 1997 until possession is delivered up.

e) An order for permanent injunction to restrain the Defendant from interfering, wasting remaining in occupation and a trespassing in any manner on plot No. NTIMA/IGOKI/[particulars withheld].

[3] The 3rd Plaintiff stated that he bought the Suit Land jointly with one J G. Subsequently, they partitioned the suit land and his share became NTIMA/IGOKI/ [particulars withheld] for which he was registered as proprietor on 19th March 1974. At the time, he was not married to the Defendant. He further stated that he used the houses he had built on the said land for business/lodging until in 1991 when he moved with the family into the property. But he realized that by leaving in close proximity to lodgings, his children were being exposed to bad habits. He therefore asked the Defendant and the children to relocate to the matrimonial home at Uruku. But both the Defendant and children refused and he relocated alone.

[4] The 2nd Plaintiff is the son and the administrator of the estate of the late M M, 1st Plaintiff herein. He and his father jointly own the Suit Land. He denies that the Defendant had cautioned them over the sale of Suit Land. He stated that he has suffered loss of money invested, income and opportunity of investing their monies in another venture. He stated that there was no notice from the Defendant that she objected the sale.

Defendant's Case

[5] From the pleadings and the Defendant's written submissions dated 16th February 2015, the Defendant seeks for judgment against the Plaintiffs for:

a) Permanent injunction to restrain the 1st Plaintiff from selling, alienating, disposing parcels of land comprising matrimonial property and property acquired by the couple during the subsistence of the marriage.

b) An order of declaration that the transfer of NTIMA/IGOKI/ [particulars withheld] was fraudulent and subject to trust.

c) An order to nullify transfer of NTIMA/IGOKI/ [particulars withheld] and re- transfer of the same to Defendant's name.

d) An order of permanent injunction restraining the Plaintiffs from entering, taking possession in whatsoever is interfering with Defendant's occupation, user and management of business premises NTIMA/ IGOKI/[particulars withheld](hereinafter Suit Land).

[6] According to the Defendant, her ex-husband- the 3rd Plaintiff- sold their matrimonial property to the 1st and 2nd Plaintiff without her consent. Again, she claimed that the sale and transfer of the suit property was done during the pendency of Meru HCC No. 184 of 1996. In addition, she contended that her ex-husband removed the caution or inhibition secretly and transferred the suit land to 1st and 2nd Plaintiffs despite them being warned of a pending suit. She did not stop there; she claimed that the suit property was subject to the Defendant's beneficial interest and so her husband was holding it in trust for herself and the children. Thus, the sale transaction and transfer of the suit land was illegal, null and void and should be nullified. The Defendant reinforced her claim and argued that she has been living on the Suit Land with the children who have grown up there and it can be considered to be the matrimonial home for she has continued to live there even after the separation. She testified that she borrowed a loan and used part of it i.e. Kshs. 300,000 to develop the suit land- developed 20 rooms and stocked the shop on the suit

land. She used the income from the shop and rooms to pay fees for the children after the 3rd Plaintiff abandoned her and repaid the loan she had taken in 1995. She made the property produce more rent unlike the lodgings which were giving her only Kshs. 500 per day. She claims that the property is her matrimonial home.

THE DETERMINATION

Issues

[7] From the pleadings, the evidence adduced and the submissions filed by the parties, the issue in controversy is whether the suit land was matrimonial home of the 3rd Plaintiff and the Defendant. Once this issue is resolved, ownership of the Suit land will be clear and appropriate orders shall be made on whether the sale and transfer of the suit land to the 1st and 2nd Plaintiff was fraudulent or not.

The question of matrimonial property

[8] The evidence on record show that the Defendant and 3rd Plaintiff got married in 1978 and divorced in 1998. At the time, the applicable law on matrimonial property was Married Women's Property Act (1882). Under the said Act, a woman could own separate property either within or outside marriage. Similarly, if she contributes to acquisition of property within the marriage she acquires proprietary interest in the said property. Again, where property is acquired by the husband prior to the marriage, the wife acquired proprietary interest thereto if she has contributed to its improvement and such property will be classified as matrimonial property. However, such contribution ought to be established through cogent evidence. The contribution may be monetary and or non-monetary. The Matrimonial Property Act embodied this in Section 2 of the Matrimonial Property Act which defines contribution as follows:

“contribution” means monetary and non-monetary contribution and includes—

- (a) domestic work and management of the matrimonial home;**
- (b) child care;**
- (c) companionship;**
- (d) management of family business or property; and**
- (e) farm work;**

“family business” means any business which—

- (a) is run for the benefit of the family by both spouses or either spouse;**
- and**
- (b) generates income or other resources wholly or part of which are for the benefit of the family.”**

[9] The evidence before court is that the Suit Land was bought by the 3rd Plaintiff in 1974 which was before his marriage to the Defendant in 1978. Among the exhibits he produced were agreements he entered into with builders and a manager of the property. The testimony given by one J M on 23rd March 2017 was that he built 6 rooms and extended a shop. He completed the building in 1977 before the 3rd Plaintiff and the Defendant got married in 1978- a wedding that he attended. His evidence was supported by Exhibit 'EX 2'- the agreement between J M and the 3rd Plaintiff entered into on 17th May 1977. According to the 3rd Plaintiff- he stated during examination in chief on 10th February 2010 that they

moved to the Suit Land in 1991. He also used the houses built on the land for business/lodging. But he later asked the Defendant to relocate the children after he realized that they were being exposed to bad habits due to living in close proximity with lodgings. He moved out but the children and the Defendant refused to move to Uruku home. The Defendant refuted this. Such property which was purchased before the marriage does not *per se* become matrimonial property simply by virtue of marriage. This position is enacted in Section 13 of the Matrimonial Property Act which states:

“Subject to this Act and any agreement between the spouses before the marriage, marriage does not affect the ownership of property other than matrimonial property to which either spouse may be entitled, or affect the right of either spouse to acquire, hold or dispose of any such property.”

Except however, a spouse who makes contribution towards its improvement of such property acquires beneficial interest to the extent of the contribution. See Section 9 of the Matrimonial Property Act which provides that:

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

The question becomes; has the Defendant proved that she has made improvements to the suit property?

[10] It is not in doubt that at one time, the 3rd Plaintiff, the Defendant and their children lived in the suit land. The 3rd Plaintiff moved out in 1991 and also asked the Defendant and the children to relocate to Uruku home after he realized that the children are being affected by living in close proximity to lodgings. During the subsistence of marriage between the 3rd Plaintiff and the Defendant, the children and the Defendant had occupation rights and enjoyed legitimate expectation to live on the suit land. But, the question that has now arisen is whether the Defendant who is now divorced from the 3rd Plaintiff acquired any beneficial interest on the suit land. The Defendant claimed that she has put in value of Kshs. 300,000 on the Suit Land. She claimed that she took a loan and used part of it towards improvement of the suit premises. She also stated that although she knew that she was building on the 2nd and 3rd Defendants (that is 1st and 2nd Plaintiff) property, she could not allow to remain in falling rooms. She also told the court that she quit her teaching job in order to run the shop on the suit premises and made good profits from the shop and obtained good rent from the suit premises. She claimed that she used the profits from the shop to repay the loan she had taken, pay school fees and meet other family needs. The 3rd Plaintiff also claimed to be the one who ran the shop and he paid school fees. She did not produce receipts to prove her claim although the 3rd Plaintiff produced some receipts to show that he was paying school fees and medical expenses for the children. The receipts do not show that he paid fees all the time and could be that the Defendant paid part of the school fees. In the presence of clear evidence, this can be regarded as contribution through management of the family business whose proceeds are used for the benefit of the family, as per Section 2 of the Matrimonial Property Act. It is startling that the number of rooms on the suit property was in doubt. The fundi who built them stated that he built 6 rooms and extended a shop. The 3rd Plaintiff said that he had 11 rooms on the property while the Defendant stated that she improved 20 rooms and extended the shop. A photo of the shop was provided. The 3rd Plaintiff only acknowledged that the Defendant constructed a toilet and a slab. But presentation of evidence in this case is not an example of well litigated case. A visit of the *locus in quo* would have been most profitable. This kind of a squirm is problematic. And so, with a lot of trepidation, I state that there is a shade of doubt on the type of contribution she made in the improvement of the suit land. The evidence produced is not convincing enough. On the other hand, she cannot be liable for trespass or for profits accrued from August 1997 because she entered on the suit land while they were still married. She also stayed upon the land on the basis that it was matrimonial property. In light of the above, she will keep what she has reaped already from the property and will not be liable for trespass. One surprising thing is that the Plaintiffs bought the property when she was already living on it and they ought to have carried out due diligence to establish the true status of the property and whether there were persons living on it and their status. In fact these

purchasers knew that the Defendant was living on the land and was the wife of the 3rd Plaintiff. Issue of notice, actual or constructive will arise. For that reason, I make the following findings and orders:

- a) The suit property land parcel NO. NTIMA/IGOKI/[particulars withheld] is not matrimonial property.
- b) The Defendant shall yield vacant possession of the land parcel NO. NTIMA/IGOKI/[particulars withheld] within 60 days.
- c) The orders on trespass and mesne profits are denied.
- d) Given the nature of the case and the conduct of the parties, each party to bear its own costs.

Dated, signed and delivered in open court at Meru tis 20th day of September 2017

F. GIKONYO

JUDGE

In the presence of:

M/s. Kiome advocate for defendant

Mr. Ngeno advocate for Mr.Mutunga advocate for plaintiffs

F. GIKONYO

JUDGE