



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

LAND & ENVIRONMENT 85 OF 2012

WILFREDA AWINO OPIYO.....PLAINTIFF

VERSUS

PASCAL OMOLO AGILA.....DEFENDANT

J U D G M E N T

1. By a plaint filed here on 25/10/2012 and dated 24/10/2012, the plaintiff – **WILFREDA AWINO OPIYO** – asks the court to restrain the defendant – **PASCAL OMOLO AGILA** – whether by himself, his employees, servants, workers or agents from disposing off, selling, alienating, transferring, dealing or in any other way interfering with the land parcel NO.**SIAYA/HONO/6**. Costs are also asked for.
2. It appears clear that the plaintiff and the defendant once lived together as husband and wife on the basis of a marriage contracted under African Christian & Divorce (Act Cap 151). They however separated at some point and have lived their separate lives for several decades now.
3. Land Parcel No **SIAYA/HONO/6** is registered in the defendants name but the plaintiff says she gave the defendant Kshs.2900/= to purchase it way back in 1972. The defendant intends to sell it and has already commenced transactions with two people. The plaintiff is opposed to such sale. She says that land parcel No. **SIAYA/HONO/6** (Suit land hereafter) is family or matrimonial property and should not be sold. It appears that neither her nor their children of the marriage had been consulted before the intended sale.
4. The suit is meant to forestal the intended sale and any other unilateral dealing with the land by the defendant. The order prayed for is precisely meant to achieve that end.
5. The defendant is opposed to the suit. The suit land is his, he said, having acquired it in 1991 long after separating with the plaintiff. He said he wants to sell the suit land so that he can set up a home at his ancestral land at Simor in Ugenya for himself and his children. He further said that the plaintiff has no beneficial or legal interest in the suit land.
6. The court heard this matter on 22/5/2013 and 31/7/2013. The plaintiff reiterated more or less what the plaint contains.

The defendant did the same by reiterating what the defence contains. It is clear that according to the defendant the suit land is not matrimonial property. He acquired it alone, he said, long after the plaintiff had left matrimonial home. He would therefore like to proceed with sale and to have the restriction placed on the property at the land's office lifted.

7. The plaintiff called their two children – Roseline Atieno Omolo (PW2) and Vincent Oduol Omolo (P.w.3) – as witnesses. It is clear they are opposed to the intended sale. They are on their mother's side.

8. I have looked at what was placed before me. It seems to me that I should determine the following:-

- (I) Is the suit land family or matrimonial property?
- (ii) When was the suit land acquired, 1991 or earlier?
- (iii) Does the plaintiff have interests in the said property?
- (iv) Is the plaintiff entitled to the prayers sought?

9. This suit was filed when the new regime of Land Laws had come into force. It was also filed under the new constitutional dispensation. And as I write this judgment, a new statute – the matrimonial property Act, 2013 – is in force. It follows therefore that I must cast my eyes far and wide. The new regime of land laws has to apply and, if the suit land is found to be matrimonial property, the Matrimonial property Act, 2013, must also apply. And of course, all this must happen while having regard to constitutional underpinnings concerning property rights.

10. But first, a look at the issues.

(i) Is the suit land Matrimonial property?

This issue requires consideration of what matrimonial property is. The Land Registration Act, 2012, mentions matrimonial property at Section 28 without defining it. The Land Act, 2012, defines only one kind of matrimonial property viz: Matrimonial home. It defines it as any property owned or leased by one or both spouses and occupied by both spouses as their family home. Quite clearly, this is not the kind of property we are dealing with here. The property in this case has no home. The definition of Matrimonial property is to be found at Section 6 of Matrimonial Property Act, 2013 which also contains a more elaborate definition of matrimonial home than is to be found in Land Act, 2012.

12. Section 6 of Matrimonial Property Act, 2013, defines Matrimonial Property as the matrimonial home or homes, household goods and effects in the matrimonial home or homes, and immovable or movable property jointly owned or acquired during the subsistence of the marriage.

13. The Blacks Law Dictionary, Ninth Edition, talks of Marital Property and defines it as property acquired during marriage and that is subject to distribution or division at the time of marital dissolution. It says that it is property generally acquired after the date of the marriage and before a spouse files for separation or divorce.

14. In this case, it is common ground that the plaintiff and the defendant lived together as husband and wife before 1975. The marriage was contracted under African Christian and Divorce Act (Cap 151). The plaintiff says she gave money for the purchase of the property in 1972. The defendant says he acquired the property in 1991.

15. I didn't expect much from the plaintiff by way of documentary evidence to prove that she gave money to purchase the suit property. It seems to me that the setting of their marriage was the typical African home. Property ownership in such a home, particularly the aspect of registration of such ownership, is a predominantly male affair, even where the female spouse has made contribution towards acquisition. The more common place thing is that the female spouse plays an acquiescing role. This scenario is obviously changing for the better but at a pace which one wishes was faster.

16. But I expected that when the defendant says he acquired the suit property in 1991, he would provide a sale agreement to show that or at least call evidence from some witnesses involved. As things stand now, no sale agreement was shown and no evidence was called.

17. And while the plaintiff's position is that the property was acquired earlier than 1991, the green card availed shows some official dealing on the suit land on 21/7/1976. The title deed availed has that date too in the property section. This betrays the defendant's position that the land was acquired in 1991. It seems clear to me that though the title deed was issued in 1991, the pre-registration transactions started much earlier. I am therefore unable to believe the defendant's assertion that he acquired the suit land in 1991.

18. The marriage between the plaintiff and the defendant was a monogamous one and has not been annulled. Without annulment, that marriage is still extant in law. True, there was mention of divorce proceedings filed by the plaintiff. But it is also clear that the plaintiff did not pursue the matter.

19. We have already seen the various legal definitions of matrimonial property. The notions of spousal contribution and joint acquisition are central to the definition. The plaintiff's suit is based on claim of contribution. It may be useful to add that in ordinary parlance, matrimonial property would be property owned by a married couple. And it would be so even if only one spouse is registered as owner. In our context here, the plaintiff and the defendant are separated. But we have already seen that there has been no annulment of the marriage. Besides, I have already observed that the property seems to have been acquired earlier than 1991. The more likely scenario then, and this is the one I believe, is that the property was acquired as the plaintiff says. The defendant failed to provide pivotal evidence to show that he acquired the property in 1991 long after separating from the plaintiff.

20. The answer then to the first issue is YES, the suit land is matrimonial property and it was acquired the way the plaintiff stated. Our analysis heretofore also answers the second issue namely: When was the property acquired, 1991 or earlier. The answer is that the property was acquired earlier than 1991. It is only title deed that was issued in that year.

21. That takes us to the other issue which is the third issue. Does the plaintiff have interest in the suit property? The plaintiff still is, in law, the defendant's wife. Property concerns in the new constitutional dispensation have to be handled with circumspection in order to achieve equity and equality between and/or among spouses. Indeed, article 60(1)(f) spells out a principle of land policy in Kenya aimed at eliminating gender discrimination in law, custom, and practices related to land and property in land. The same principle is captured yet again in the same words in Section 4(2)(f) of the Land Act, 2012. This is the principle that must light the path that I must walk in deciding this matter. As a spouse, the plaintiff also has another good thing going for her. The thing is this: The plaintiff has an overriding interest as a spouse under Section 28(a) of the Land Registration Act, 2012. That Section provides for spousal rights over matrimonial property.

22. It seems to me that the defendant's alleged right to sell the property is predicated on the fact that he is the sole registered proprietor. But the fact that the property is matrimonial property where a spouse has overriding interests negates such unfettered right to sell or deal in the property while keeping the other spouse in the dark.

23. And it is not only overriding interest that counts, Section 14 of Matrimonial Property Act, 2013, envisages a situation where matrimonial property is registered in the name of one spouse only. In such a case, the registered spouse is presumed to hold the property in trust for the unregistered one. The property in this case is matrimonial property. The plaintiff therefore not only has an overriding interest under S.28(a) of the Land Registration Act, 2012, but also has a rebuttable presumption of trust in her favour under Section 14(a) of Matrimonial Property Act, 2013. The answer then to the third issue is this: The plaintiff has legally recognized interests in the suit property.

24. The final issue is whether the plaintiff is entitled to the prayers sought. The defendant is trying to sell matrimonial property without involving his legal wife. We have already seen that as a spouse, the plaintiff has recognized legal interests in the suit property. The defendant would want to wish these interests away. But as we have seen, this is not an option under the new laws. What this in effect means is that gone are the days when one spouse, solely on the basis of being the sole registered owner, would wake up and sell or dispose of matrimonial property in Kenya without involving the other spouse. No spouse has the right to wish away the interests of the other spouse. The plaintiff, in light of the foregoing,

is entitled to the prayers she is seeking.

Her case is well proved on a balance of probabilities and she is granted the injunctive relief she is seeking in the plaint, which is also referred to at paragraph 1 of this judgment.

25. Costs are also claimed but I must point out that this is a delicate family matter. Though the outcome herein will inevitably engender bitterness between the parties, more bitterness would be caused when one party starts chasing the other around for costs.

Accordingly, let each party bear his/her costs.

A.K. KANIARU – JUDGE

29/5/2014