



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 253 OF 2009 (O.S.)

LILIAN WAITHIRA MUIRURI.....PLAINTIFF

VERSUS

ZACHARIA MUGENYO KABURU.....DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff, **Lilian Waithira Muiruri**, brought this suit by way of Originating Summons dated **29th August, 2009** seeking a determination by the court on the following issues:

- i. **Whether the properties acquired by the plaintiff and defendant herein and held jointly and/or severally by both or either of them and acquired after the marriage in or about 1962, and in particular Land Parcel No Gilgil Karunga Block 3/703, Gilgil Karunga Block 10/18 and Gilgil Karunga Block 10/28 can be declared by this honourable court to be matrimonial properties**
- ii. **Whether the family assets and/or properties mentioned in (i) above can be shared equally between the plaintiff and the defendant and/or the list made of distribution of the aforesaid family assets and/or properties bearing in mind the circumstances of the case and particularly Gilgil Karunga Block 3/703, be allocated to the plaintiff**
- iii. **Whether the defendant by himself, his agents and/or servants should be restrained by way of injunction from alienating, transferring, encumbering and/or in any other way disposing, dealing with the family assets and/or properties aforesaid without leave or further orders of this honourable court**
- iv. **That this honourable court be pleased to grant any such further orders and reliefs as may be just in the circumstances.**

2. **On 26th September, 2009** the plaintiff was granted a temporary injunction restraining the defendant by his agents, servants and or assigns from selling, disposing, dealing, alienating, assigning, leasing and/or in any manner whatsoever interfering with the applicant's peaceful occupation and possession of all that parcel of land known as **Gilgil Karunga Block 3/703** (hereafter referred to as the suit property). These orders were confirmed on **1st October, 2009** pending the hearing and determination of the suit.

3. The Originating Summons is supported by an affidavit by the plaintiff sworn on even date. She deposes that she was married to the defendant sometime in 1962 under Kikuyu customary law; that during the subsistence of their marriage they were blessed with 12 children who live on the family land and are dependant on it for their livelihood; that in 1964, the plaintiff and defendant jointly purchased shares in Kahuho Land Buying Company and they were allocated land parcel Gilgil Karunga Block 3/703

measuring 5.1 Hectares where they settled with their children. In 1988 the suit property was registered in the defendant's name to hold in trust for the family (**LWM1**).

4. The defendant has another wife who lives on another of the family properties namely, **Gilgil Karunga Block 10/18 and Gilgil Karunga Block 10/28**. Following a family meeting, it was agreed by both families that the plaintiff would retain the suit property while her co-wife would retain the other two family properties; that in the presence of family members including the first wife, the defendant handed over the title deed of the suit property to her which she has in her possession to date.

5. In 2005, two mobile phone service providers, **Zain Ltd** and **Safaricom Ltd**, identified the suit property as a suitable location to erect their telecommunication booster masts. The plaintiff and the defendant agreed that the money from the boosters would be paid into their joint account but when the payment was made, the defendant received, retained and used all the money by himself. In addition, the defendant has recently attempted to sell of the suit property and has even received a down payment. He has tried to get the title deed from her by all means including harassment and intimidation (**LWMIV**) and when all his efforts failed, he had a new title reissued in his name (**LWMIII**); that under the circumstances, it was only fair that the court makes a declaration of what the family assets and/or properties are and how the same should be distributed.

6. In response, the defendant filed a replying affidavit on **21st October, 2009**. He deponed that the entire suit is bad in law, incompetent and fatally defective as a wife cannot institute proceedings for division of matrimonial property in the lifetime of her husband when she had not filed divorce proceedings.

7. He admitted that he had another wife, **Hannah Wambui Mugenyo** who also had 12 children. He deponed that he solely purchased shares in Kahuhu Land Buying Company, was allocated the suit property and also purchased Gilgil/Karunga Block 10/59. He denied having convened any meeting to share out the family property.

8. On the issuance of a new title, he deponed that he reported the loss of his title deed to Gilgil police station and to the District Officer (D.O) Gilgil and the plaintiff was summoned but denied knowledge of its whereabouts prompting him to initiate the process of obtaining another title deed; that since it was improper to have two existing title deeds, the plaintiff should surrender the original title for cancellation and destruction.

9. On **18th January, 2010** directions were taken that the Originating Summons proceed by way of Viva Voce evidence; that the Originating summons be deemed to be the plaint and the replying affidavit as the defence.

10. Further directions were taken on **19th November, 2013** that the supporting affidavit to the originating summons be taken as the evidence in chief of the plaintiff and the defendants replying affidavit be treated in the same manner and parties be given a few minutes to highlight.

The Plaintiff's case.

11. When given an opportunity to highlight, the plaintiff reiterated the facts as contained in her supporting affidavit.

12. On cross examination, the plaintiff stated that she and the defendant were married in 1962 and had moved to the suit property in 1964. She explained that she did not know where the money to purchase the suit property came from but insisted that the relationship between herself, her children and the defendant was good and that he had during the subsistence of the suit paid her dowry. She stated that the defendant wanted to sell the suit property to the two phone companies and that he had other income from livestock which he occasionally shared with her and her children, but he had not been forthcoming with the income from the boosters. She insisted that she was entitled to the income from the boosters, was not opposed to the subdivision of the suit property among her children so long as the portion where the boosters are located was shared equally between her and the defendant. She stated that the defendant had handed over

the title deed to the suit property to her in the presence of family members including his late first wife. She admitted having being summoned by the D.O when she started having differences with the defendant but denied that it was because she had refused to surrender the title deed. She stated she had revealed to the D.O that she was in possession of the title deed to the suit property.

The Defendant's case

13. The defendant, **Zacharia Mugenyo Kaburu** also reiterated the facts as contained in his replying affidavit. In addition, he stated that he was 90 years old and was currently living on the land belonging to his late first wife, as the Plaintiff whom he had married in 1966 had chased him away from the suit property which property he had purchased with his first wife in 1962.

14. He further explained that his problems with the plaintiff and her children started when he harvested some trees from the suit property to finance a court matter he had in Kiambu. One of his sons, **David Kaburu**, chased him from the suit property with a panga. Sensing that there would be danger in future, he decided to subdivide the suit property among their children but they chased away the surveyors. He urged the court to issue a court order to enable him subdivide the suit property among his sons

15. He further stated that his problems with the plaintiff escalated when the two mobile provider Companies, put up their telecommunication boosters on the suit property. He denied having handed the title deed to the plaintiff but instead explained that she had hidden the same and even refused to produce it when summoned by the D.O. As a result he was forced to apply for a new title deed and was issued with another one after following due process. He was categorical that he was not selling the suit property and had no intentions of doing so contrary to the plaintiff's assertions to which she had tendered no evidence.

16. On cross examination, the defendant testified that he had taken the title deed of the suit property to the plaintiff's house but she had stolen it and when asked by the District Officer of its whereabouts, she claimed to have lost it. He reiterated that the Plaintiff had chased him away from the suit property and that is why he lived on 2 acres belonging to his late 1st wife who had already subdivided her land among their children. He explained that he was willing to subdivide the suit property as follows; 6 acres for himself and the plaintiff and the rest of the land to be shared among by their children. He was however not willing to share equally the proceeds from the telecommunication boosters as he needed this money to support himself and the children of his first wife and had always supported the plaintiff with proceeds from his livestock.

Submissions

17. After the parties closed their cases on **19th November, 2013** the court directed that the respective parties file their written submissions within 14 days and the matter be mentioned on **20th January, 2104** to take a date for judgement. In compliance with the order, the plaintiff filed her written submissions on **20th January, 2014** and the defendant filed his on **16th January, 2014**.

18. When the matter came up for mention on **20th January, 2104** parties sought another mention date on the ground that there were new developments relating to the subject matter. They stated that it had emerged that the parties in this suit had been litigating over the wrong parcel of land; that the title deed held by the defendant for plot number **Gilgil Karunga Block 3/703** belonged to a neighbor **Esther Wanjiru Waiguku** and the neighbourheld a title to the defendant's land **Gilgil Karunga Block 3/704**. Counsels were given another mention date on **7th April, 2014** to decide on the next cause of action.

19. Before the mention date, Counsels for the plaintiff and the defendant recorded a consent before the Deputy Registrar on **19th February, 2014** as follows;

1. Title number LR Gilgil Karunga Block 3/703 be and is hereby issued in the name of Esther Wanjiku Waiguku

2. Title number Gilgil Karunga Block 3/704 be and is hereby issued in the name of Zacharia Muigengo Kaburu

3. The restriction in title number Gilgil Karunga Block 3/703 be and is hereby lifted and in its place a restriction be and is hereby issued in respect of Gilgil Karunga Block 3/704.

20. On the mention date Counsels for the respective parties urged the court to adopt the consent as recorded. The court did not adopt the consent and instead gave a date for judgment and stated that it would address the issue of the consent in the judgement.

21. In light of the recent discoveries and the consent signed by the parties in this suit, it is apparent that the suit property and the developments therein which are the subject of litigation in this suit, belong to a person who is not a party to this case. It is therefore evident that the suit does not raise a cause of action against the defendant as there is now no nexus between him and the suit property. This then raises the issue of jurisdiction of the court because a court is seized with jurisdiction only when the suit is brought against a party who will be legally liable as the owner of the suit property.

22. I have considered the case of **Owners Of Motor Vessel Lilian S. Vs Caltex Kenya Ltd** (1989) Klr 1, Where a similar scenario arose, and it was found that the rightful owner had to be sued for jurisdiction to arise. The court had this to say,

““Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

23. *This position was also reiterated by the court of appeal in the case of **Thuranira Karauri vs Agnes Ngeche**, Civil Appeal No. 192 of 1996 UR, where the court held that for the court to be appraised with jurisdiction on the issue of liability, the registered owner of the motor vehicle had to be sued.*

24. The parties in this suit tried to salvage this awkward position by entering into a consent. I have considered the consent as recorded and taken into consideration that the hearing of the suit has been concluded. The question in my mind is whether this consent is capable of binding a person not a party to this suit.

25. I am guided by the finding in the case of **Barclays Bank Of Kenya Ltd V Martha Karwirwa Anthony** 2008 eKLR, which relied on the decided case of **Agricultural Finance Corporation v Lengetia Limited** 1985 KLR 765. The learned judge held thus; **“Further, the plaintiff has relied on a consent entered into between the defendant and the registered proprietor in Nairobi HCCC NO. 1114 of 2006, regarding the transfer of the suit property to the defendant and the registration of the lease in favour of the plaintiff. The plaintiff is however, not a party in HCCC NO.1114 of 2006, nor was he a party to that consent. The authority which was cited by Mr. Machira, *Agricultural Finance Corporation* (supra), neatly deals with such a situation, and I can do no more than repeat the holding in that case that “as a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit or purports to give him the right to sue or to make him liable upon it”. Needless to state, that the plaintiff cannot rely on that consent”**. Emphasis supplied.

28. I agree with the views expressed by the learned judge in the above case that a party cannot be bound by a consent they are not party to. The upshot of the forgoing is that the suit as filed and litigated cannot hold. Further, the consent order recorded by the Deputy Registrar, though well intentioned, cannot be adopted as it will bind a person not a party in this suit and who has not been given an opportunity to be heard. For the above reasons, the suit is hereby struck out without costs to either party.

Dated signed and delivered in open court at Nakuru this 17th day of October, 2014.

L N WAITHAKA

JUDGE

In the presence of:

Ms Njoroge for the respondent

Mr. Lawrence Karanja for the applicant.

Emmanuel – Court Assistant