



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Civil Suit 22 of 2006

CICILY MUTHONI.....APPELLANT

VERSUS

JACKSON IRUNGU.....1ST RESPONDENT
JACKSON NDONYI GITHUMBI.....2ND RESPONDENT

J U D G M E N T

The Appellant Cecily Muthoni was the plaintiff in the Resident Magistrate's court Wanguru while the Respondent herein was the defendant. She had sued him and another for a permanent injunction to restrain them and their agents from evicting her or in any other way interfering with her quiet possession of a residential plot in **Kiandegwa W-6** which she claims to have purchased together with the 1st defendant. In paragraph 3 of her plaint, she stated that she and the 1st defendant had cohabited together for 3 years. According to her, she was therefore his wife.

On his part, the 1st defendant/Respondent denied having been married to the Appellant. He also maintained that the plot in question was his and that he had not bought it with the help of the Appellant. He said he had sold it to the 2nd defendant who was therefore entitled to the same. He urged the court to dismiss the case before the subordinate court and also this appeal. The viva voce evidence adduced before the trial court by the plaintiff was to the same effect. She produced some photographs which she and 1st defendant had been taken with her parents. On cross-examination by counsel for the defendant, she revealed that she had previously been married to on Joseph Karugi with whom she had 3 children. She also admitted that the said marriage which was a customary law one was never dissolved. In her own admission therefore, she had no capacity to marry any other man while her first marriage had not been dissolved. This is what the learned trial magistrate found and is the position in law. The Appellant lacked the requisite capacity to get married to the Respondent herein because her marriage to Joseph Karugi had not been dissolved. The learned trial magistrate in his judgment also therefore held that the Married Women Properties Act did not apply in this case. He

proceeded to dismiss that suit with no order as to costs.

Being dissatisfied with that dismissal, she moved to this court on Appeal through Magee & Magee Advocate. He proffered 8 grounds of Appeal which I nonetheless find it unnecessary to replicate here for purposes of this judgment. I have however considered the same. Both counsel proceeded by way of filing written submissions. I have considered the contents thereof carefully. This Appeal raises basically the same issues raised before the learned trial magistrate. Was there a legally recognized marriage between the Appellant and the Respondent. My answer to this is a resounding NO!

As stated earlier, the Appellant had no legal capacity to marry any other person since her marriage to one Joseph Karugi was still subsisting. That notwithstanding even her short stint of cohabitation with the Respondent cannot in my considered view create an inference of a presumption of marriage. A presumption of marriage calls for more than 2 individuals living under the same roof. The parties had no children together; they adduced no evidence of any activity in which they were held out as husband and wife e.g. had the appellant adopted the Respondent's name? Did they hold any accounts together? Had their respective families and neighbours accepted them as husband and wife? Had the defendant/Respondent publicly held out the plaintiff/Appellant as his wife? There are many other criteria that the court would need to look into in order to satisfy itself as to whether a presumption of marriage had been created but it is not necessary to go to those details here. The curt and precise truth here is that the circumstances here do not disclose any form of marriage between the Appellant and the Respondent. That being so, I must agree with the learned trial magistrate that the Married Women Property Act does not apply in this matter.

The other issue for decision is whether the Appellant and Respondent had bought the plot in question together. There is absolutely no evidence that they did. The sale transaction was purely between the seller one Michael Gicharu and Jackson Irungu Mwangi who is the Respondent. The Appellant name did not feature anywhere in this agreement. There is nothing to show that she contributed any money towards the purchase price. The court cannot presume that she made any material contributions to the purchase of the plot in absence of any evidence to that effect.

My finding therefore is that the Appellant had no case before the trial court and her claim was properly dismissed. Her appeal to this court has no merit either. I dismiss the same with costs to the Respondent. The injunctive orders issued earlier are hereby vacated.

W. KARANJA
JUDGE

Dated, signed and delivered this 21st day of June 2010.

In presence of:-

Mr. Mugo P.N. for Mr. Maina Kagio for Respondent.

Both parties also present.

