

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Civil Case 85 of 2005

EVELYN NKIMA MBUBA.....PLAINTIFF

VERSUS

FRANKLIN IRERI KAMWERIRIE.....1ST DEFENDANT

JAMLICK MURITHI MWENJE.....2ND DEFENDANT

JUDGMENT

This is a peculiar case. The plaintiff is the wife of first Defendant. The pleadings shows that the land parcel No. Magumoni/Itugururu/534 was in February 1980 registered in the name of first Defendant. In 1999 the plaintiff filed a caution claiming as licensee. The caution was removed under court order in HCC Misc. 63 of 2005 at Meru. Then on 10/6/2005 the 2nd Defendant became registered as proprietor. This suit was filed in this court on 4/7/2005. The plaintiff's evidence is that she is the wife of first Defendant within whom she has given birth to 5 children. The parcel of land Parcel Magumoni/Itugururu/534 was registered in the name of her husband, the first Defendant. Her witness Njeru Kinyatta gave evidence that the first Defendant was married to the plaintiff and he had no land and that the land in dispute was given to the first Defendant for the benefit of plaintiff and their children. However the land was registered in the name of the first Defendant as absolute owner and no trust was noted in the register. The plaintiff produced exhibit 1- green card which shows she was claiming as licensee not as a beneficiary of a trust. Later her caution was removed under court order in Meru HCC Misc. Case No. 63 of 2005 in which the second Defendant sued the first Defendant regarding sale of suit land. The suit was terminated when both the first Plaintiff and 2nd Defendant entered into a consent for the sale of the land. The plaintiff was not involved in these proceedings. In answer to the plaintiff the first Defendant denied the allegations made by the plaintiff. He said the land was his and he had sold it to 2nd Defendant who urged that court to remove the caution registered by plaintiff against the land. He confirmed that he sold land to 2nd Defendant and had received money. Purchaser had sued for refund of money or the land. Purchaser had sued for refund of money or the land. This land had been brought under the provisions of Registered Land Act Cap. 300 on 4.2.1980. When the first Defendant was registered as first proprietor of the parcel of land his title was absolute and indefeasible under Section 27 and 28 of the Act. In the case of Kanyi Vs Muthiora 1984 KLR 712 the court of Appeal held that the title of registered owner under the Registered Land Act (Cap 300) is free from all interests except all those shown in the register together with such overriding interests that exists and are not required to be noted in the register. There is no evidence here that the land was registered subject to any trust. When the plaintiff registered a caution in 1999 she claimed as licensee. She did not take any action to enforce her claim as cautioner until she heard the first Defendant had sold the land. In the meantime the first Defendant sold the land to 2nd Defendant. He said the plaintiff had been served with a notice of she said suit at Meru but this is not true. She was not a party to suit. Notwithstanding the plaintiffs claim either as beneficiary of a trust or as a licensee were not proved. The first defendant was therefore entitled to exercise rights of ownership as stated in the said Act. The law regarding to the family property between husband and wife is now stated in the Court of Appeal case of Icharia Vs Icharia Civil Appeal. A married woman does not acquire rights over her husband's property by virtue of marriage. She must prove her contribution to the acquisition or purchase or substantial improvement. In this case she says that the land was given by members of husband's family because the first Defendant had no land on which to settle his family. It was a gift. The first Defendant has now married another wife and has sold the land for valuable

consideration to a third party the 2nd Defendant. It is the courts finding that the prayer in the plaint that the transaction between the Defendants be cancelled and the register to remain as before is not proved. The 2nd Defendant purchased the land for valuable consideration and obtained a court order though by consent of first Defendant to enforce his purchase of land. The plaintiff does not pray for anything for herself.

I find no trust proved against the first Defendant in favour of the plaintiff and her children. On the issue of the removal of her caution there is no evidence whether she was notified of proceedings. First defendant said that they sent her a notice but no proof was produced. However a licence is terminated by a notice and therefore it does not interfere with the rights of a proprietor. The issue of marriage is denied by first defendant and the court cannot be left to presume marriage.

Considering all these issues I find the plaintiff's case was not proved and I dismissed the same. No order as to costs.

Dated this 8th April, 2008.

J. N. KHAMINWA

JUDGE

8/4/2008

Khaminwa – Judge

Njue – Clerk

Evelyn plaintiff – present

Two defendants present.

Read in open court

J. N. KHAMINWA

JUDGE