



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 521 OF 2017**

**(Formerly Nairobi ELC 1272 of 2016)**

**ANNAH NYAMBURA SAUTI.....PLAINTIFF**

**VERSUS**

**WILSON SAUTI MAIPURU.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR, KAJIADO NORTH.....2<sup>ND</sup> DEFENDANT**

**AND**

**PAUL SOKORO MATHIA .....INTERESTED PARTY**

**JUDGEMENT**

By an Amended Plaint dated 20<sup>th</sup> October, 2018, the Plaintiff prays for judgment against the Defendants for:

- a) General Damages;
- b) An order for the revocation of the Certificate of Title Deeds issued in respect of Land Reference No. Ngong/ Ngong/ 87596; 87597; 87598; 87599; 87600; and 87601 emanating from Title No. NGONG/ NGONG/ 8343 and cancellation of any entries made against the said parcels of land.
- c) An order directing that the suit property be transferred to the Plaintiff's name.
- d) An order compelling the Officer Commanding Police Division (OCPD) – Ngong Division and the Officer Police Station (OCS) – Kiserian Police Station to ensure that the orders are fully complied with.
- e) A permanent injunction order against the 1<sup>st</sup> Defendant by himself, his agents, servants and personal assigns restraining his and/or themselves from further interfering, entering, alienating, wasting, transferring, subdividing and/or dealings with the land known as all that parcel of land formally known as Land Reference Number NGONG/ NGONG/ 8343 and /or any resultant subdivisions thereof ( hereinafter referred to as ' suit land' ) situated in Kajiado County pending the hearing and final determination of this suit and
- f) Costs of this suit and interest of (a) above.

The 1<sup>st</sup> Defendant filed an Amended Statement of Defence including a Counterclaim dated 20<sup>th</sup> November, 2017 where he denied the averments in the Plaint except for the descriptive. The 1<sup>st</sup> Defendant denied paying dowry to the Plaintiff's father. He confirmed being the registered owner of LR Ngong/ Ngong/ 8343 measuring 0.40 hectares having acquired the same through inheritance. The 1<sup>st</sup> Defendant further confirmed having been married to the Plaintiff then a mother of two and later marrying a 2<sup>nd</sup> wife with whom they have two children. He explained that the subdivision and subsequent procurement of titles was well intended and at all times consented to amongst all the parties. Further, that to subdivide, undertake survey works, physical planning and necessary consents required funds which were acquired through sale of LR No. Ngong/ Ngong/ 87597 with the consent of the Plaintiff. He contended that Paul Sokoto Mathia bought parcel number Ngong/ Ngong/ 87597 from Peter Kariuki Ndungu, a surveyor who had undertaken the works and been paid through the said parcel of land. He insisted he is the indefeasible owner of the resulting portions and states that he is not a fraud. He claimed the Plaintiff by virtue of being a school teacher acquired several unknown properties secretly and he has no issue with it. He reiterated that he is entitled to distribute his land to the beneficiaries as per the Masai Customary Rites. Further, he confirmed that numerous discussions were held to resolve underlying issues with the Plaintiff. In the Counterclaim, he sought for the following prayers:

i. The Plaintiff's suit be dismissed with costs.

ii. The land parcel bearing Title No. NGONG/ NGONG/ 87597 already bought by Paul Sokoto Mathia the interested party herein be confirmed and possession and peaceful occupation be granted to Paul Sokoto Mathia without interference by the Plaintiff, her agents and or servants.

iii. The 1<sup>st</sup> Defendant being the registered owner of all the resultant sub divisions i.e NGONG/ NGONG/ 87596; 87598; 87599; 875600; 875601 do distribute the said resultant portions as he wills.

The Plaintiff filed a Reply to 1<sup>st</sup> Defendant's Defence where she reiterated the contents of her Complaint, denied the averments in the said Defence except for the descriptive. She contended that she has an overriding interest on the suit land primarily for being the spouse to the 1<sup>st</sup> Defendant and as a sole developer of the said land. She insisted that the matrimonial property was acquired during the subsistence of the first marriage between the 1<sup>st</sup> Defendant and herself hence the 1<sup>st</sup> Defendant is viewed to hold it in trust for her. She denied having granted her consent for the subdivision of the suit land and transfer of Ngong/ Ngong/ 87597 to a third party. She averred that the 1<sup>st</sup> Defendant acquired consent through fraudulent means to subdivide the suit land and thereafter dispose of Ngong/ Ngong/ 87597.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not file any Defence.

### **Evidence of the Plaintiff**

The Plaintiff as PW1 testified that she got married to the 1<sup>st</sup> Defendant in 1974 in accordance with Maasai Customary Law. She confirmed that they had five children from the marriage. She explained that at the time of her marriage, she had one child whom the 1<sup>st</sup> Defendant adopted. It was her testimony that the 1<sup>st</sup> Defendant was allocated the suit land NGONG/ NGONG/ 8343 by his father. Further, that they had resided on the suit land where their matrimonial home is situated until the year 2000 when the 1<sup>st</sup> Defendant deserted it and married a second wife. She testified that she had developed the suit land by putting up a permanent house, connected water and electricity. She denied granting consent to the 1<sup>st</sup> Defendant to subdivide the suit land into eight portions of an 1/8 of an acre each and transferring of one portion to the Interested Party. It was her explanation that the portion transferred to the third party is within her matrimonial home. She contended that the 1<sup>st</sup> Defendant should only get one portion of the resultant subdivision but the rest should revert to her and the children. She further claimed to have severally registered cautions to protect her interests in the suit land and was not consulted by the Land Registrar when the same was removed. She denied granting consent for subdivision of the suit land while deliberating on the dispute at Kituo Cha Sheria (a non-governmental organization) and insisted she was misled by the 1<sup>st</sup> Defendant to sign the transfer forms for land parcel number NGONG/ NGONG/ 87596 and Application for Land Control Board Consent. She confirmed that she gave a copy of her Identity Card to Kituo Cha Sheria.

PW2 Daniel Mosiro who is a step brother to the 1<sup>st</sup> Defendant stated that on 6<sup>th</sup> November, 2016 there was a family meeting involving the Plaintiff, 1<sup>st</sup> Defendant, their five children including some other persons to deliberate on subdivision of NGONG/ NGONG/ 8343. It was his testimony that there was an agreement that the 1<sup>st</sup> Defendant would subdivide suit land into seven portion among his five children, Plaintiff and himself. He claimed it was the 1<sup>st</sup> Defendant's idea to subdivide the said land. Further, a month later the 1<sup>st</sup> Defendant changed his mind and sought to subdivide the suit land between the families of the two wives. It was his testimony that their late father had allocated the 1<sup>st</sup> Defendant land for the benefit of the Plaintiff. In cross examination, he was at pains to explain that at the time of the allocation of the land by their father, he was only twelve (12) years old. Further, that the 1<sup>st</sup> Defendant had other brothers who were older than him. The Plaintiff later produced various documents including a Copies of Caution; Letter dated 6<sup>th</sup> November, 2016; Transfer Forms for land parcel number NGONG/ NGONG/ 87596 and Application for Land Control Board Consent as her exhibits.

### **Evidence of the Defendants**

The 1<sup>st</sup> Defendant as DW1 confirmed that he was married to the Plaintiff under Maasai Customary Law in 1974. He explained that the suit land belonged to him. Further, that there was a dispute when he was subdividing it, making him move to Ngong Town. He sought for the court to uphold the eight subdivisions which emanated from land parcel number NGONG/ NGONG/ 8343. He confirmed that he transferred one portion to the Surveyor as consideration for the exercise; allocated three portions to the Plaintiff; two portions to his second wife and retained two portions. It was his testimony that they deliberated over the dispute with the Plaintiff through a family meeting and even proceeded to Kituo Cha Sheria where the Plaintiff agreed to take three portions as he retains four. It was his testimony that they furnished various documents including PIN; ID; and three passport photographs to Kituo Cha Sheria. He further explained that the Plaintiff later changed her mind claiming she was misled. He insisted he educated all his children and none is complaining. He denied having agreed to keep 1/8 of an acre while the Plaintiff retained the rest of the resultant subdivisions. He further denied ever meeting PW2 whom he claimed they had not spoken with for 30 years. He contended that they had disagreements with the Plaintiff. Further that his father allowed him to marry a second wife. It was his testimony that he developed the suit land by building houses, connecting water including power and fencing it. Further, that he reared livestock and poultry thereon. He produced various documents including Transfer of Land Documents and Letter from Kituo Cha Sheria dated 16<sup>th</sup> September, 2016 as his exhibits.

### **Submissions**

In her submissions, the Plaintiff reiterated her claim and insisted that it was valid as she had contributed to the developments on the suit land which is registered in the 1<sup>st</sup> Defendant's name. She submitted that she had acquired an interest over the suit land which clearly fall within the ambit of matrimonial property. Further, that distribution of the suit land should be equal. She further submitted that the 1<sup>st</sup> Defendant inherited the suit land with a rider that the matrimonial property is between herself and himself and not the purported second wife whose marriage did not subsist during that time. She further submitted that the 1<sup>st</sup> Defendant's action of subdividing and selling a portion thereof

was irregular. She relied on Article 45 (3) of the Constitution and the decisions of **Florence Wairimu Kanyora Vs Njoroge Kinyanjui (2005) eKLR** and **Cosmas K Muthembwa Vs Eunice Kyalo Muthembwa** to buttress her averments.

The 1<sup>st</sup> Defendant in his submissions contended that he did not deceive the Plaintiff into a trap by obtaining her documents for ill purposes. He insisted that the Plaintiff in her conduct and statement which was adopted in court as evidence consented to the happenings as well as subdivisions. He further submitted that he is the registered owner of the resultant subdivisions and a prayer for revocation of the said titles so as to revert to the Plaintiff's name has no basis in law as this would be tantamount to disinherit him. Further, that since the Plaintiff submits that this is a matrimonial property cause, and relied on the legal provisions relating to distribution of the same, then she cannot claim the whole of the land. Further, that the Plaintiff is estopped by the doctrine of estoppel. He reiterated that the Court can hence not order for revocation of titles and direct that the suit land be transferred to the Plaintiff. The 1<sup>st</sup> Defendant further submitted that there is no legal basis for a permanent injunction as they are still married. Further, the court has no jurisdiction to interfere with such family arrangements unless called upon by an aggrieved party. He insisted that the Plaintiff had not suffered any damages since he is the registered proprietor of the suit land. To support his arguments, he relied on various decisions including **Republic V Institute of Certified Public Secretaries of Kenya Ex parte Njeru Geteria (2010) Eklr**; **Serah Njeri Mwobi V John Kimani Njoroge (2013) eKLR**; **Alice Chemutai Too V Nickson Kipkurui Korir & 2 Others ( 2015) eKLR**; **EMN V NM ( 2018) eKLR**; **WKM V JWM (2019) eKLR**; **Nguruman Limited V Jan Bonde Nielsen & 2 Others CA No. 77 ( 2014) eKLR**; **Kenya Power and Lighting Limited V Philip A M Kimondi ( 2018) eKLR** to buttress his averments.

### **Analysis and Determination**

Upon consideration of the Amended Plaintiff, Amended Defence including Counterclaim, Witness Testimonies, Exhibits and rivaling submissions, the following are the issues for determination:

- Whether the Plaintiff is entitled to orders sought in the Plaintiff.
- Whether the 1<sup>st</sup> Defendant is entitled to orders sought in the counterclaim.
- Who should bear the costs of the suit.

The Plaintiff in her suit sought for general damages, cancellation of the Certificates of Titles in respect to Land Reference No. Ngong/ Ngong/ 87596; 87597; 87598; 87599; 87600; and 87601 emanating from Title No. NGONG/ NGONG/ 8343 and transfer of the same to her. She further sought for orders of permanent injunction against the Defendants in respect to the suit land as well as costs. It is not in dispute that the 1<sup>st</sup> Defendant inherited land parcel number NGONG/ NGONG/ 8343 measuring one acre from his father. It is further not in dispute that the 1<sup>st</sup> Defendant and Plaintiff are married in accordance with the Maasai Customary Law and have issues from the said union. The main issue in dispute is the Plaintiff's contention that the 1<sup>st</sup> Defendant proceeded to subdivide Land Reference No. NGONG/ NGONG/ 8343 into Ngong/ Ngong/ 87596; 87597; 87598; 87599; 87600; and 87601 respectively without her consent and disposed of NGONG/ NGONG/ 87597 to the Interested Party. From the evidence before Court, the Plaintiff as PW1 admitted during cross examination that there was a family meeting where they had discussed the issue of subdivision of the suit land. Further, she attended meetings at Kituo Cha Sheria on how the suit land was to be subdivided and signed Transfer Forms including Application for Consent of the Land Control Board in respect land reference number Ngong/ Ngong/87596 . She however made a disclaimer insisting she was misled by the 1<sup>st</sup> Defendant to sign the Transfer Forms and furnish her documents to Kituo Cha Sheria. PW1 admitted that the 1<sup>st</sup> Defendant had a second wife. DW1 in his evidence admitted that he disposed of ? of the resultant subdivision to defray expenses emanating from the survey. He produced a letter from Kituo Cha Sheria dated 16th September, 2016 in where they had agreed with the Plaintiff on the process of subdivision and distribution of the suit land. He confirmed that the Interested Party had bought the ? of an acre for value from the Surveyor. From the evidence of both parties including the documents produced, to my mind it seems the Plaintiff had actually consented to the subdivision and that is the reason why three 1/8 of an acre had been amalgamated into one title Ngong/ Ngong/ 87596 wherein she had even signed the Transfer Form including Application for Consent of Land Control Board to that effect. From a perusal of the Letter from Kituo Cha Sheria, it is evident that the process of transfer of the said land had actually commenced. The Plaintiff and 1<sup>st</sup> Defendant contended that they had each developed the suit land. From the averments of the Plaintiff, it seems she is seeking for division of matrimonial property when their marriage is still subsisting. In the case of **WKM V JWM (2019) eKLR**, the Court held that issues pertaining to sharing of matrimonial property can only be dealt with upon dissolution of marriage. In associating myself with this decision as well as the provisions of the Matrimonial Property Act and based on the facts before Court, I am unable to make a determination on division of the suit land which is matrimonial property. Be that as it may, I will proceed to determine whether the Plaintiff has made out a case for having a beneficial interest over the suit land. From the evidence tendered in court, it emerged that the 1<sup>st</sup> Defendant's father bequeathed the suit land to him when he was already married to the Plaintiff. Further, their matrimonial home is situated therein. The Plaintiff actually admitted during cross examination that the Interested Party's land was next to the matrimonial home although she contended that it did not have an access road. Since the matrimonial home is situated in the suit land and the Plaintiff having contributed to its development, I find that she has indeed established a beneficial interest over the said land. As for the prayer for cancellation of the titles held by the Defendants including Interested Party, I note the Interested Party already holds his title and from the evidence of the 1<sup>st</sup> Defendant, it is clear that he is indeed a bona fide purchase for value. Section 24 (a) of the Land Registration Act stipulates as follows: '**subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....**'

In the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J.M. Mutungi stated that '**the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law**'.

Further in the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** the Court held as follows: '**the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.**'

In associating myself with the two decisions, the legal provisions cited above as well as the evidence before me, I find that the Interested Party is indeed the absolute proprietor of land parcel number Ngong/ Ngong/ 87597 and hence entitled to protection of the law in accordance with the provisions of section 24, 25 and 26 of the Land Registration Act. As relates to the remaining subdivisions which are registered in the name of the 1<sup>st</sup> Defendant, since he is the registered proprietor of the said subdivisions and no evidence having been adduced to demonstrate that he acquired the same through fraud, I find that the Plaintiff has not met the threshold set in law for revocation of his titles and will decline to do so. On the issue of general damages and a permanent injunction, it is trite that the same have to be proved. From the pleadings as well as evidence tendered in court, I note the Plaintiff still resides on the suit land which has since been subdivided. Further, that the said subdivisions are registered in the 1<sup>st</sup> Defendant name except for one portion transferred to the surveyor. It is trite that in instances where the Plaintiff seeks a permanent injunction, she has to establish a prima facie case but based on the principles enshrined in the celebrated case of **Giella v Cassman Brown Co. Ltd 1973 E.A. 358**, I find that the Plaintiff has not established a prima facie case as against the 1<sup>st</sup> Defendant to warrant the said orders of a permanent injunction. Further, I find that the Plaintiff has failed to discharge her burden of proof in regards to proving her claim for general damages and will decline to grant the same. It is against the foregoing that I find the Plaintiff has not proved her case on a balance of probability and will decline to grant the orders as sought in the Plaintiff.

As to whether the 1<sup>st</sup> Defendant is entitled to orders sought in the counterclaim. The 1<sup>st</sup> Defendant sought for the Plaintiff's suit to be dismissed with costs; the Interested Party's Certificate of title to land parcel NGONG/ NGONG/ 87597 to be upheld and for him to be granted peaceful occupation of the said land without interference by the Plaintiff, her agents and or servants. He further sought to be registered as owner of all the resultant sub divisions i.e NGONG/ NGONG/ 87596; 87598; 87599; 875600; 875601 and to distribute the said resultant portions as he wills. In his evidence DW1 confirmed that he had transferred one portion of the resultant subdivisions Ngong/ Ngong/ 87597 to the Surveyor who in turn sold it to the Interested Party. Further, that the remaining portions were still in his name. In his evidence, he confirmed that he was ready to transfer Ngong/ Ngong/ 87596 to the Plaintiff as had been agreed upon at the Kituo Cha Sheria offices. Further, that the remaining parcels were to be retained by him together with the second wife. The Plaintiff as PW1 wanted all the subdivisions revoked and the title to revert to the mother title. From my findings above, I held that the Plaintiff was only entitled to beneficial interest over the suit land since her matrimonial home is situated therein. From the evidence before court, it clearly emerged that the 1<sup>st</sup> Defendant had a second wife and since the suit land was bequeathed to him by his father and his marriage to the Plaintiff being a customary which is potentially polygamous, as a court I cannot turn a blind eye to the current circumstances and disregard the existence of another family. Since the 1<sup>st</sup> Defendant had already accepted to transfer land parcel number Ngong/ Ngong/ 87596 to the Plaintiff, I will proceed to uphold the same. It is against the foregoing that I find that the 1<sup>st</sup> Defendant has actually proved his case as per the Counterclaim and will proceed to enter judgement in his favour.

Who should bear the costs of the suit. I note this case involves family and in associating myself with the principle as established in the case of **P V Patel v L P Patel [1965] EA 560** where the Court held that in matrimonial proceedings except where it is shown that a wife has a sufficient separate estate, she will not be condemned to bear the costs of the suit, and in this instance the Plaintiff having not demonstrated that she held a separate estate, I will direct that each party bears their own costs.

It is against the foregoing that I proceed to make the following final orders:

- i. The Plaintiff's suit be and is hereby dismissed.
- ii. The Certificate of Title to land parcel number NGONG/ NGONG/ 87597 registered in the name of Paul Sokoto Mathia the interested party herein be and is hereby upheld and Plaintiff including her agents and or servants restrained from interfering with his peaceful occupation thereof.
- iii. The 1<sup>st</sup> Defendant be and is hereby directed to transfer land parcel number NGONG/ NGONG/ 87596 to the Plaintiff within Ninety (90) days from the date hereof, failure of which the Land Registrar, Kajiado North will be at liberty to register the Plaintiff as the proprietor of the said parcel of land.
- iv. Each Party to bear their own costs.

**Dated Signed and Delivered virtually at Kajiado this 18<sup>th</sup> Day of January, 2021.**

**CHRISTINE OCHIENG**

**JUDGE**