Menjo v Menjo & 3 others (Environment & Land Case E008 of 2021) [2023] KEELC 18584 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18584 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAPSABET

ENVIRONMENT & LAND CASE E008 OF 2021

MN MWANYALE, J

JULY 6, 2023

BETWEEN

GILBERT KIPRUTO MENJO ..... PLAINTIFF

AND

JOB KIPLIMO MENJO ..... 1ST DEFENDANT

JOHN TIJI ..... 2ND DEFENDANT

JACKLINE GALO ..... 3RD DEFENDANT

EMILY JEPKEMBOI ..... 4TH DEFENDANT

JUDGMENT

1. The plaintiff Gilbert Kipruto Menjo *vide* his plaint dated December 2, 2021 sued the defendants, and sought orders of:

    a. Mandatory injunction to refrain 1st and 2nd defendants refraining them from selling, misusing and/or interfering in any manner whatsoever with all that parcel of land known as Nandi/kaiboi/38, while the 3rd, 4th and 5th defendants forthwith from developing to pull down and/or remove any structures on the said parcel of land.

    b. An eviction order directing the plaintiff to evict he 3rd, 4th and 5th defendants from all that parcel of land known as Nandi/kaiboi/38.

    c. Costs and interest of the suit

    d. Any other relief the court may deem fit and just to grant.

2. Plaintiff's case and evidence. It is the plaintiff's case are the joint registered owners of Nandi/kaiboi/38, while the plaintiff descried himself as the biological son of the 1st defendant while the 3rd, 4th and

5th defendants were purchasers of the matrimonial home. The plaintiff avers that Nandi/kaiboi/38 measuring 30 acres is a matrimonial land belonging to the family who are the beneficiaries.

3. It was the plaintiffs further case that his father the 1st defendant had without the consent of their mother and theirs as his children had sold to the 3rd, 4th and 5th defendants.

4. The plaintiff further pleads that unless the 1st and 2nd defendant were restrained from disposing off the suit property to the 3rd, 4th and 5th defendants. The plaintiff and his siblings and their mum would be rendered homeless.

5. On the strength of the above, the plaintiff sought for the prayers set out in paragraph 1 of this judgment.

6. The plaintiff testified as PW1. It was his testimony while adopting his witness statement dated December 1, 2021 that his mother had left for the United States of America in the year 2000 and that his father used the opportunity to dispose off the matrimonial land and went to cohabite elsewhere.

7. That his father never involved his mother when selling the said land neither was he and his siblings involved in the sale. The sit property is what the plaintiff depended on. The witness produced the documents in the list of documents dated December 2, 2021 as P Exhibit 1 to 6.

8. In cross – examination, the plaintiff stated that his claim was based on matrimonial property but he was neither a spouse of the 1st or 2nd defendant. He stated that the property belonged to the 1st and2nd defendant and each defendant had a clear boundary. She stated that his mother was financing the case before court, but that the mother is now deceased having returned to Kenya in April 2022 and having passed on 3 months later. He conceded that succession could only be done upon the demise of a person and that a proprietor can decide how to use their property.

9. On re-examination, he stated that the 1st defendant was his father and the 2nd defendant his uncle.

10. PW2 Victor Kipkoech Menjo testified and adopted his witness statement, dated December 11, 2021 and stated that it was his wish to stop the sale of the ancestral land as pleaded in the plaint.

11. On cross – examination, PW2 stated that the claim was a matrimonial property, and that he was not a spouse of the 1st defendant but a son thereof and a nephew of the 2nd defendant.

12. He stated that the defendants have clear boundaries and that they were no proceeding between them. He conceded that proprietor can deal with property as they wish, and that a person cannot inherit from a person who is alive.

13. In re-examination, the witness state that he was raised in Nandi/kaiboi/38. He started that the property had not been subdivided, and each of the families had its place on the ground.

14. With the testimony of the two witnesses, the plaintiff closed his case.

Defence Case And Evidence: -

15. The defendants filed a joint defence through Kogo Kimutai Advocates. It was their defence that the 3rd and 4th defendants were *bonafide* purchasers for value having entered into binding agreements for sale with the registered owners the 1st and 2nd defendants.

16. The 1st and 2nd defendants further pleaded that the sale to the 3rd and 4th defendants was so as to offset loans at Kenya Commercial Bank and NIC bank which had threaten to sell the suit property by public auction.

17. The 1st defendant further pleaded that he had to sale a part of his property so as to offset medical bills that had accrued at Eldoret Hospital.

18. The 1st and 2nd defendant deny that the suit property was a matrimonial property, and that the plaintiffs cannot stop them from selling their property.

19. The defendants further pleaded that the suit was premature as it sought to subdivide matrimonial property during the subsistence of marriage, that the suit was vexatious, frivolous and abuse of the court process.

20. Two defence witnesses testified the 1st defendant testified as DW1 while the 2nd defendant testified as DW2.

21. It was DW1's testimony that the sit was instigated by his wife thought the son. He adopted his witness statement dated January 18, 2021 as part on his evidence in chief. It was his testimony that he had sold portions of the suit property so as to educate his children. He stated he owed no one any property and the suit ought to be dismissed. He produced the documents in his list of documents dated January 7, 2022 as D Exhibit1 and D Exhibit 2.

22. In cross – examination, the witness stated that he did not live with his wife in Nandi/kaiboi/38, and that his children lived elsewhere in Nairobi but would visit him in Nandi/kaiboi/38. He had not divorced is wife but had lived apart for 20 years. He stated that his wife knew of the loans he had taken over the property.

23. In re-examination, the witness stated that his children could not direct him on how to distribute the suit property.

24. DW2 was the 2nd defendant, he testified adopting his witness statement as part of his evidence in chief. It was his further evidence that he owned the suit property jointly with his bother DW1 and they had not subdivided it.

25. It was his further testimony, that they did not owe the plaintiffs any property and prayed for the suit to be dismissed. It was his further testimony that the plaintiff had no right to direct him on how to deal with the property.

26. On cross – examination by Ms Olando, he stated that DW1 had consulted him before he sold, since the property was jointly owned. He stated that as the two owners they consulted each other on any sale. They arrangement of payment depended on the portion being sold. Hey had on one side and the other side was vacant.

27. After the testimony of the two defence witnesses, the defence case was closed.

Plaintiff's Submissions: -

28. In their submissions before court, the plaintiff have framed 3 issues for determinations, to wit,

    i. Whether the suit land which was inherited by the first and second defendants become matrimonial property.

    ii. Whether spousal consent was necessary whenever the portions of land parcel Nandi/kaiboi/38 were being sold.

    iii. Who bears the costs of the costs.

29. On issue number 1, the plaintiff submits placing reliance on section 93(2) of the *Land Registration Act* cap 3 of 2012 that the suit property is matrimonial property. Additionally the plaintiff submits that under section 2, the suit property falls within the definition of matrimonial property.

30. The plaintiff further submits that under section 9 of the *Matrimonial Property*, the 1st defendants wife acquired interest in the suit property.

31. With regard to the plaintiff's claim, the plaintiff submits that the plaintiff and his siblings were entitled to file suit, as they were the succeeding generations, and the suit property was subject to an intergenerational trust. In this regard the plaintiff cited the decision in the case of *Mbui Mukangu v Gerald Muturi Mbui* (2004) eKLR.

32. On issue number 2, the plaintiff in reliance of section 28(a) of the *Land Registration Act*, submit that spousal rights are overriding interests.

33. The plaintiff submit that even though the sit property was jointly owned by two brothers, each brother had individual interest on the property and that in respect of the 1sr defendant, he had his own family, and his wife ought to have been consulted. Under the provisions of section 93 (3) (b) of the *Land Registration Act* and reliance was placed on the decision in *EKN v A.S & 2 others* (2019) eKLR.

34. On the issue of costs, the plaintiff submits that this being a case involving family members the court should issue any order directing each party to bear its own costs.

Defendants Submissions: -

35. On their part, the defendants have identified 3 issues for determination; namely;

    i. Whether the suit property is matrimonial property.

    ii. Whether the suit land was ancestral land and/or held by the 1st and 2nd defendants in trust.

    iii. Whether the 3rd, 4th and 5th defendants are bonafide purchasers for value without notice.

36. On issue number 1, the defendants placing reliance on section 6 (1) of the *Matrimonial Property's Act* submits that matrimonial properties is defined in that section. The defendant submits that a claim of matrimonial property can only be initiated by a spouse and not children. In support of this submissions the defendant places reliance on the decision in the case of *Silvia Wanjiku Kimani and another v Kimani Mairui Machungu and 2 others*. Where court held

    > " However for a claim of matrimonial property to succeed it must be adverted by a spouse and not children."

37. The defendants submits that the plaintiff was a child of the 1st defendant and not a spouse hence he did not have locus to initiate a matrimonial property case.

38. The defendant submits that spousal rights could not be transferred to the children and the plaintiff did not have locus to file the suit.

39. On issue number 2, the defendant submits that no evidence was tendered by the plaintiffs to established trust. The defendant submits that the testimony by the plaintiff that he big a child of the 1st defendant he was entitled to inherit the suit property is not sufficient to establish trust.

40. It is the defendants submission that the plaintiff did not plead trust. In support of this submissions the defendant places reliance on the decisions in the case of *Wilson Kenyanga v Joel Ombwori* civil appeal No 96 of 1998, where the Court of Appeal held that;

> " We are not satisfied that trust was pleaded. No particulars of the trust was pleaded and none was relied upon in compliance with order 6 rule 8 of the Civil Procedure Rules.....in the absence of pleading a trust, this claim cannot be permitted to be raised on decree. As a rule, relief not founded on pleadings swill not be given and cases must be decided on issues on record."

41. The defendants submit that as proprietors they are entitled to use the property as they please and the fact that the plaintiff is their child, does not change that. In support of this limbo of submissions, the defendant has placed reliance in the case of *Jemutai Tanui v Julina Jepteneny & 5 others*. Eldoret ELC Case No, 44 of 2013 as well as *Virginia Wanjiku Kirui v Prisca Waruguru Kiiru* 2002 (eKLR).

42. On issue number 3, the defendant submits that the 3rd, 4th and 5th defendants are bonafide purchasers for value without notice, and that the plaintiff had no recourse against them.

Issues For Determination: -

43. From the pleadings, evidence on record submissions of the parties and the authorities cited in support of the submissions, the court frames the following as issues for determination.

    a. Whether the plaintiff had locus to institute this suit;

        i. As a matrimonial property cause on behalf of his mother.

        ii. On his own and on behalf of his siblings against the 1st and 2nd defendants

    b. Whether the suit discloses a cause of action.

    c. Whether or not the plaintiff has proved his case on a balance of probabilities

    d. What relief ought to issue?

    e. Who bears the costs the suit?

Analysis And Determination: -

44. A perusal at paragraph 9, 10, 11, 12 and 13 of the plaint, as well as the testimonies of PW1 and PW2, the plaintiff brought the suit on behalf of his mother and his siblings. With regard to his mother, the plaintiff at paragraph 11 of his plaint pleaded that "the plaintiff avers that the 3rd, 4th and 5th defendants are now developing the suit property despite the fact that they were served with demand notices and being aware that the land is matrimonial property they have decided to continue putting up buildings."

45. At paragraph 13, the plaintiff avers "that he is prosecuting this suit on his behalf and that of other siblings and their mother who has authorized him vide authority letter dated September 7, 2021."

46. PW1 and PW2 in cross-examination also conceded that the suit property was matrimonial property. In his submission before court, the plaintiff submits that eh suit property is matrimonial property. Under section 7 of the *Matrimonial Property Act*, a suit for matrimonial property can only be instituted after dissolution of the marriage.

47. The marriage between the 1st defendant and the plaintiff's mother at the time of filing the suit had not been dissolved, hence a suit for matrimonial property could not have arisen and as rightly submitted by

the defendants, as was held in the decision in the case of *Silvia Wanjiku Kimani & another v Kimani Mauiruri Machungu & 2 others* where the court stated that "however for a claim of matrimonial property to succeed it must be adverted by a spouse and not children".

48. In view of the position of the law as espoused in the *Silvia Wanjiku Kimani case*, the court finds that the plaintiff lacked locus to institute the suit on behalf of his mother issue number A (i) is therefore answered in the negative.

49. On issue number A (ii) as to whether the plaintiff had locus to bring the suit on behalf of his siblings. The crux of the Plaintiffs and his siblings claim is a pleaded at paragraph 12 of the plaint, where the plaintiff seeks to stop the 1st and 2nd defendant from selling the property because he and siblings would be rendered homeless. At paragraph 10 of the plaint, the plaintiff further pleads that Nandi/kaiboi/38 as the only have they have known.

50. The plaintiff did not plead that Nandi/kaiboi/38 was registered in the names of the 1st and 2nd defendants in trust for them.

51. In their evidence before court, the 1st and 2nd defendant testified that Nandi/kaiboi/38 was gifted to them by their late father in 1981. It was incumbent upon the plaintiff to have pleaded and proved customary trust, which is recognized under section 28 of the *Land Registration Act*.

52. The court finds that although Nandi/kaiboi/38 was gifted to the 1st and 2nd defendant by their father, the plaintiff did not prove that the property was ancestral land so as to be entitled under customary trust an intergenerational trust.

53. In *Wilson Kenyenga v Joel Ombwori* 2001 (eKLR), the Court of Appeal held that "we are satisfied that trust was not pleaded. No particulars of trust were pleaded and none was relied upon in compliance with order 6 rule 8 of the *Civil Procedure Rules*."

54. The *Civil Procedures Rules* have since the decision in *Wilson Kenyanga v Joel Ombori* been amended and the new *Civil Procedure Rules* (2010) expressly provides for the same under order 2 rule 10. The plaintiff have failed to expressly plead the breach of trust as required thus lacks the requisite locus to institute the proceedings. Issue No A (iii) is answered in the negative.

55. The Court of Appeal decisions in *Nahashon Karenge & another v Lawrence Karenge* 2014 (eKLR). "There is no vested right to inheritance during the lifetime of parents. Let it be known that during the lifetime of their parents, and subject to beneficial and occupational rights, a child cannot force parents and distribute their land or assets unless the said land or assets were acquired and held in trust prior to the parent acquisition of title to the same."

56. As observed in earlier, the plaintiff has not pleaded and proved trust and in accordance to the decision in *Nahashon Karenge* above, the plaintiff and his siblings has cause of action against the defendants.

57. This position of the law had also been stated in the earlier Court of Appeal decision in *Muriuki Marigi v Richard Murigi Muriuki & 2 others*, where the Court of Appeal held as follows "the appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decide to subdivide and distribute it among them. He may not be urged directed or ordered to do it against his free will."

58. Issue (b) is of the issues for determination is answered in the negative.

Disposistion: -

59. Having found that the plaintiff lacked locus to institute the proceedings on behalf of his mother, and further having found that he had not pleaded and proven breach of trust and therefore lacked locus to institute the proceedings on his own benefit and benefit of his siblings; noting further that the Court of Appeal decisions in *Nahason Karenge and Muriuki Marigi* above that he had no cause of action against the defendant the inevitable conclusion is that the suit is hereby dismissed and the court shall not consider the other issues.

60. Given the nature of this litigation the parties being close relatives each party shall bear its own costs.

61. Judgment accordingly.

DATED AND DELIVERED AT KAPSABET THIS 6TH DAY OF JULY 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Ms. Olando for the Plaintiff