



**REPUBLIC OF KENYA**

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

**ELC NO. 19 OF 2021**

**{Formerly Environment and Land Court at Kisii Case No. 105 of 2014}**

**BEATRICE KERUBO BOSIRE.....PLAINTIFF**

**=VRS=**

**EVANS OMOSA BOSIRE.....DEFENDANT**

**JUDGMENT**

The Plaintiff is the wife of the late Paul Bosire Joel Araka who he married in 1992, 4 years after his first wife died in 1988. After living with Paul Araka for 18 years the said Plaintiff's husband passed on in 2014. Prior to his death, the deceased had acquired some properties most of it in the lifetime of his first wife One Yunuke Nyambeka Bosire who had died earlier. Before he passed on in 2014, the suit property L.R. NO. MATUTU SETTLEMENT SCHEME/152, which he had bought in 1969, was registered in his name on 22<sup>nd</sup> December 2011. It was later transferred to the Defendant herein which the Defendant told the court was done after wide consultations and with the consent of the Defendant's siblings and his father but in the absence of the Plaintiff and her children after the latter failed to turn up for the meetings which culminated in this Decision.

It is claimed by the Plaintiff that this transfer could not have been effected or sanctioned by the deceased because on 3/9/12 the deceased together with the Plaintiff filed Kisii High Court Petition No. 30 of 2012 against the Defendant challenging the transfer for having been effected under unclear circumstances, without the consent or knowledge of the registered owner (the deceased), without the requisite consent of the Land Control Board, without a Sale Agreement and without making provisions for the other members of the family.

The Honourable Attorney General and the Land Registrar, Nyamira were the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively. The said Petition was filed through the firm of Zablon Mokuia and Co. Advocates. The orders sought therein were the cancellation of the transfer and an order reverting the suit land to Paul Bosire Joel Araka, the original registered proprietor. The Verifying Affidavit and the Affidavit in support of the Petition were both signed by the Plaintiff herein who deponed that she had the authority of the deceased to file the Petition on behalf of both of them.

The Defendant herein filed a response to the Petition and refuted all the allegations of fraud and averred that the suit property was transferred to him allegedly after the Plaintiff started disposing off properties that his late father had jointly acquired with his (Araka's) late first wife. He also claimed that his late father was so sickly and unable to control his faculties at that time and could not even have fixed his thumbprint to the (court) documents. He said that the suit property had an outstanding loan of Kshs. 30,000/= which was paid by his siblings and one Orora Advocate before it was transferred to him with his father's blessings.

However, the Defendant did not categorically say that it was his father who transferred the suit property to him but that he had his father's power of Attorney that enabled him to effect the transfer, which was done above board and with the full knowledge of the Plaintiff. He said that the transfer of the suit property to himself was meant to forestall what he called the wanton wastage of the same by the Plaintiff. Of much significance is the averment that the property was transferred to him for the interest of the "larger family" and that the same was registered in the Defendant's name to hold it in trust for himself and his siblings.

In a very strange twist of events, that Petition was withdrawn vide a Notice of Withdrawal dated 10<sup>th</sup> March 2014 only 4 days to the filing of the current suit. The Notice of Withdrawal was curiously filed by a complete stranger to the suit since the firm of Oguttu Mboya and Co. Advocates that drew and filed the Notice of Withdrawal was not on record for the Plaintiff herein.

Of course, the suit by the first Petitioner who had by then died only a month earlier must have abated 11 months later.

I must also mention that there are documents to show that on 26/02/14 a burial dispute suit was filed herein in the Principal Magistrate's Court, Keroka being Civil Suit No. 39 of 2014 pitting the Plaintiff and her 2 brothers in law, Samwel Maranga Araka and Elkana Mogire Araka against the Defendant herein and one Richard Bosire and Jemima Bosire who I believe are all siblings. The Plaintiff was asking for orders that she be allowed to be the one in charge of the burial of the deceased (Paul Bosire Joel Araka) and that the place of burial be the suit property. Nothing is said about the outcome of that case.

From the Defendant's own admission, this is a case of express trust. In his own words, the property was transferred to him for the interest of the larger family and the same was registered in the Defendant's name to hold it in trust for himself, the Plaintiff and his siblings. According to the Black's Law Dictionary, 9<sup>th</sup> Edition; a Trust is defined as:

***“The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”***

Under Section 66 of the Land Registration Act, 2012:

(1) A person acquiring land, a lease or a charge in a fiduciary capacity may be described in that capacity in the instrument of acquisition and be registered with the addition of the words "as trustee", but the Registrar shall not enter particulars of any trust in the register.

(2) An instrument that declares, or is deemed to declare, a trust, or a certified copy, may be deposited with the Registrar for safe custody; but the instrument or copy shall not form part of the register or be deemed to be registered.

(3) Where the proprietor of land, a lease or a charge is a trustee, the proprietor shall hold the land, lease or charge subject to any unregistered liabilities, rights or interests to which it is subject by virtue of the instrument creating the trust, and for the purpose of any registered dealings, the proprietor shall be deemed to be the absolute proprietor, and no person dealing with the land, a lease or a charge registered under this section shall be deemed to have notice of the trust, nor shall any breach of the trust create a right to indemnity under this Act.

Sub-section (1) of the Act says that a person holding land in a fiduciary capacity as a Trustee "may" be described as such in the instrument of acquisition and be registered with the words "as trustee". Although these words are missing in the Title to the suit land, the Defendant admits that he was registered the proprietor of the suit land in a fiduciary capacity. Consequently, there is no doubt that there exists an express Trust which was the intention of the Defendant and all the family members that participated in the Decision to have the land registered in the name of the Defendant as proprietor.

#### **So, who are the beneficiaries under the Trust?**

The Defendant has listed the following as his siblings: -

- (a) Richard Bosire.
- (b) Jemimah Bosire.
- (c) Rose Bosire.
- (d) Beatrice Bosire.
- (e) Stella Bosire.
- (f) Stephen Bosire.
- (g) Eric Bosire.
- (h) Late Gladys Bosire.
- (i) Late Irene Bosire.

The Defendant is the 10<sup>th</sup> member of that house. But only 8 of them are alive. The last 2 died without families.

From the house of his step mother (the Plaintiff herein) the Defendant has listed his step brothers and sisters as follows: -

- (i) Brian Masese.
- (ii) Eunice Bosire.
- (iii) Brenda Bosire.
- (iv) Ayub Bosire.

Of course the Plaintiff being the 5<sup>th</sup> member of that house.

Although the Defendant has given a list of other properties acquired by the deceased, this court is only interested in the suit property since it

has no jurisdiction to deal with succession matters. We are only concerned with the suit property because in his oral evidence, the Defendant was graceful and candid enough to volunteer information to the court to the effect that he was registered the proprietor of the suit property for himself, his siblings as well as the Plaintiff and her children. This therefore leaves the court with only one issue. What is the entitlement of each of the beneficiaries of the trust?

The Defendant admits that prior to his demise, his late father had put up a permanent house for the Plaintiff in 2009 just as he had done for his first wife. The Defendant does not even deny that the Plaintiff is his stepmother. He and his siblings have never shown any disrespect to the Plaintiff and the latter acknowledges that fact. The Defendant only prefers that the Plaintiff relocates to their father's ancestral land and leave him and his immediate siblings on the suit property to avoid friction in future. Having put up a house for her on the suit property, it was not the Deceased's wish that the Plaintiff should not have a portion out of the suit property.

The suit property besides having permanent houses also has tea bushes. I believe by making the proposal that the Plaintiff relocates to the ancestral land, the Defendant means well but the Plaintiff is not agreeable and equally for good reasons. The beauty of it all is that there are still other properties which as I said earlier on, I am not seized of the jurisdiction to distribute now that the registered owner thereof is deceased. Concerning the properties the Plaintiff is alleged to have disposed of, no evidence has been placed before court and even if the same were brought, it would not affect the issue of the Trust herein. Maybe the succession cause.

The Plaintiff told the court that she occupies 10 Acres out of the 32 Acres of the entire suit property, L.R. NO. MATUTU SETTLEMENT SCHEME/152 but the Defendant disputes this and claims that she occupies only 8 Acres.

The position the parties herein and the people they quietly represent is an unfortunate one. It is a scenario actuated by mistrust, suspicion, fear, anxiety and uncertainty. This uncertainty on the part of the Plaintiff is demonstrated by the fact that on 13<sup>th</sup> April 1999 she swore an Affidavit with the Deceased deponing that she was the wife of Paul Bosire Joel Araka. And as if that did not suffice, 3 years later, on 3<sup>rd</sup> June 2012 she walked through the isles with the Deceased to leave no doubt as to the union.

When the Deceased died on 12/02/14, the Plaintiff filed a burial suit on 26/02/14 as she feared that she was not going to be involved in the burial arrangements of her Husband. This notwithstanding that in the Newspaper Notice of the burial, she had been named as the widow to the Deceased. This is not uncommon in Kenya where a subsequent wife feels unwanted and she must assert her position due to "enemies" all around her.

Here is a man who for 35 years had a wife with whom he brought up 10 children. They both did the best to educate their children and even invest for them. Unfortunately, death struck and did so at an age that the man felt he could not live alone. He was 56 years old by then. He needed a companion. His children could not fill the gap that was left by their late mother. The deceased had to get another wife. This happened to be the Plaintiff. The Plaintiff on the other hand wanted children of her own. The latter had to be maintained by the deceased. To bring them up he had to get back to his properties part of which had been contributed to by the late first wife.

The Defendant and his siblings must appreciate the contribution that was made to their father's last days on earth by their stepmother for 18 years and be grateful to her. The 2<sup>nd</sup> wife and her children may not have enjoyed the youthfulness of the deceased. The 2<sup>nd</sup> wife underwent several difficulties of living with a man whose health was failing and was forced to take extra care of his health more than the 1<sup>st</sup> one did for the first one lived with a man who was very energetic and would do a lot of things for himself.

The Plaintiff on the other hand must appreciate that the Defendant's mother had also contributed to the acquisition of the property she found, either in their purchase or in form of their development. But she also got her own children who it was partly the responsibility of their father to bring up, educate, clothe and ensure that they also grew and were as responsible as their step brothers and sisters.

Therefore, when it comes to the determination of the Trust herein, a delicate balancing act is quite critical.

### **What are the factors to consider?**

We must weigh the children's interests as well as their respective mothers' contribution.

It must be taken into consideration that the Plaintiff's children did not benefit as much as their stepbrothers and sisters, but on the other hand the children of the late wife found their father without much wealth and/or assets. Their upbringing must therefore have been meeker. However, this case must have been eased by the fact that although there is mistrust, there is on the other hand respect for one another and this court has an obligation to ensure that whatever decision is made, the same does not put into jeopardy or bring to an end this mother/step children respect.

Courts must always operate in a manner that allows for proper co-existence. We must also safeguard the relationship of brothers and sisters. To do so, I wish to assure the Defendant and his siblings almost all of whom live abroad that it is still practical for them to harmoniously live in the neighbourhood of their stepmother and stepbrothers and sisters. This is as long as they do not listen to the wrong people who may want to take sides.

### **Who then is entitled to what?**

The Defendant has asked the Court to consider the contribution of his late mother, Yunuke Nyambeka Bosire towards the acquisition and/or the improvement of the suit property. This case cannot be decided appropriately without looking at the provisions of the Matrimonial Property Act of 2013. **Section 14** of the **Matrimonial Property Act, No. 49 of 2013** provides;

*'Where matrimonial property is acquired during marriage—*

***(a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse”***

Here are 2 wives who no doubt have contributed to the acquisition and/or improvement of the suit property though at different times. In addition, this must be taken into account. Although the first wife is deceased, her children are still alive. The second wife together with her children are alive but the usual difficulties in determining what constitutes non-monetary contribution and the value of such non-monetary contribution come into play. There should be clarity on process, documentation, and management of expectations.

In Kenya, land ownership is disproportionately skewed toward men. In our case here, we may not be able to tell whether the suit property could have been acquired jointly between the late Paul Bosire Joel Araka with the Deceased Yunuke Nyambeka Bosire. Women in this part of the country do not insist on joint property being registered jointly. However, the Defendant has testified that his mother contributed towards the purchase of the suit property. Where the husband holds all the power in the marriage, it could be futile for the wife to insist on having her name on the property.

Ensuring a fair division of matrimonial property is a key part of protecting women’s rights within the context of marriage. Such fair division also provides an important lens into how women’s economic contributions, including their unpaid domestic and care of children and other family members, are valued in society.

The Law of Succession Act does not clarify the right to matrimonial property during succession and has not provided for a common means of protection of women’s property rights which their children should be entitled to in case of a remarriage by the widower. The Legislature ought to have ensured the Act works in tandem with the Matrimonial Property Act of 2013 and the Land Registration Act of 2012.

There is also no consistent system of proving and calculating contributions to the acquisition of properties by spouses in our laws.

Luckily, the 2013 Matrimonial Property Act recognized that married women have the same rights as married men, a bold step from the previously used colonial English 1882 Married Women’s Property Act. The 2013 Act recognizes monetary and non-monetary contributions made by both spouses to matrimonial property and assets.

The 2013 Matrimonial Property Act recognized that married women have the same rights as married men. Most importantly, it recognizes monetary and non-monetary contributions made by both spouses to matrimonial property and assets. Also, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) calls on states to recognize the value of indirect, including non-monetary, contributions made by a spouse to property acquired during a marriage. Consequently, spouses’ share or ownership of matrimonial property is based on the contribution each makes towards its acquisition or improvement, and when called upon to do so, the court divides the property based on each spouse’s contribution. The non-owning spouse should be compensated to the extent of their share of the value of the improvements.

In most cases, courts interpret this to mean that parties must show proof of their contribution. This has had the result of court’s ruling that for property to be adjudged matrimonial, the spouse who claims to have contributed must show proof of such contribution.

Besides the 2013 Act defining contribution as both monetary and non-monetary, including:

1. domestic work and management of the matrimonial home;
2. childcare;
3. companionship;
4. management of family business or property; and
5. farm work .

The law does not provide for what types of evidence must be submitted to the court by a spouse claiming non-monetary contributions, which in practice, puts women at a considerable disadvantage as their contributions are more often non-monetary. It is more challenging to provide concrete evidence of non-monetary contributions, to value them and to justify such valuations, especially since the law does not provide directives on how to do so.

The lack of clarity and guidance to the court in the Act itself only increases this burden. This means that even with the new law in place, most women face a likelihood of being granted very few assets following an unfavourable eventuality, leaving them unable to provide for themselves and their children who are vulnerable.

In a paper entitled “**Once You Get Out, You Lose Everything” Women and Matrimonial Property Rights in Kenya by Human Rights Watch** it is well observed:

***“The emphasis and requirement to provide receipts to establish proof of contribution during marriage discourages women from laying claim to matrimonial property. Aside from big purchases such as land, real estate, and vehicles, no one keeps receipts of smaller purchases over the course of their marriage. Furthermore, some women may not have knowledge of how to preserve the integrity of receipts, if they had them.....Some property is valuable but not documented e.g. household items such as smart TVs. Some receipts with no name and only the warranty is registered. And don’t expect to keep receipts forever. Most receipts are***

lost.....

***Keeping receipts as evidence of contribution during the union negates the premise of marriage—trust. .... How do you say, 'I will keep these receipts?' Families are governed by a higher level of trust. The suspicion from keeping receipts eats into the family.....Judges' expectation of documentary evidence proving contribution in a society where marriage is considered sacred, pre-nuptial agreements are uncommon, and couples function as an economic and domestic unit, is impractical.***

***In one case the husband just denied the wife entry to the property. The wife was employed. She came with the police and they asked her to produce the receipts before taking anything. She had bought most of the household appliances, but she couldn't prove it. She left with only her clothes.....In polygamous marriages, it might take even longer to establish the property each wife owns with the husband. Measuring and valuing non-financial contribution by a spouse in a polygamous marriage creates added complexities. ....Doris M.'s case though not a divorce case, gives insight into how challenging it would be if the marriage is polygamous. A second wife with three children who lost everything when her husband died, Doris M. explained to Human Rights Watch the torment she was going through to claim her share of matrimonial property."***

If it is that difficult for a living spouse to prove indirect or non-monetary contribution, what about the spouse's children such as the Defendant who were young when the property was being acquired. The Defendant and his siblings are even put in a more awkward position to prove their late mother's indirect and non-monetary contribution to the suit property. Requiring them to do so would be very a tall order.

Before deciding who gets what out of the suit property, I must point out that in relation to the beneficiaries, trustees are under a duty to manage the Trust property prudently and the Court is satisfied that the Defendant has demonstrated that he has managed the trust property as a good steward, and that by being registered the proprietor he was not being greedy, he only intended to safeguard the suit property for which the Court commends him.

How then do we arrive at a reasonable proportion? As I conclude this Judgment, I must remind the parties herein that this is not a Succession Cause but the determination of a Trust.

Having found that the Defendant, his siblings and the Plaintiff and her children are all *cestui a que use le feoffment fuit fait*, as the trust property is held in trust for all of them I will then proceed to dissolve the Trust and in the first place set aside 1 Acre, which the Deceased had already given to one Geoffrey Bonchari, his grandson. That leaves us with 31 Acres. I will then give 10 Acres to the Plaintiff and her children, which she occupies to date including the 3 Acres of tea thereon being part of the 10 Acres. The living children of the first wife, the late Yunuke Nyambeka Bosire will have the rest, which is approximately 21 Acres to be shared equally among themselves. For the avoidance of doubt, the Plaintiff's portion shall be positioned where her late Husband had put up a permanent house for her while the Defendant and his siblings on the other hand shall have their late mother's house and agree amongst themselves who shall have the custody of the same. I will not make any orders as to costs.

This Judgment is therefore summarized as follows:

(a) A Declaration is hereby issued that the Defendant herein holds the property known as L.R. NO. MATUTU SETTLEMENT SCHEME/152 measuring 10.9 Hectares in a fiduciary capacity in Trust for the Plaintiff and her 4 children, himself and his 7 siblings who are alive.

(b) An order is hereby issued that the said Trust is hereby dissolved and the entitlement of the respective Dependents shall be as follows:

i) To Geoffrey Bonchari 1 Acre.

(ii) To the Plaintiff to hold in trust for herself and her 4 children viz.

Brian Masese, Eunice Bosire, Brenda Bosire and Ayub Bosire 10

Acres which she occupies to date.

(iii) To the Defendant and his siblings i.e. Richard Bosire, Jemimah

Bosire, Rose Bosire, Beatrice Bosire, Stella Bosire, Stephen Bosire

and Eric Bosire 21 Acres to be shared equally.

(c) The Plaintiff's portion shall be positioned where her late Husband had put up a permanent house for her which will continue being her property.

(d) The Defendant and his siblings shall also have their late mother's house and agree amongst themselves who shall take possession and ownership of the same.

(e) The sub-division of the parties' portions shall take care of the Tea bushes, which shall form part of the Plaintiff's portion of 10 Acres.

(f) The parcel of land known as L.R. NO. MATUTU SETTLEMENT SCHEME/ 152 shall be sub-divided to reflect (b), (c), (d) and (e) above.

(g) An order for the Rectification of the Register in respect of L.R. NO. MATUTU SETTLEMENT SCHEME/152 to reflect (b), (c), (d) and (e) above.

(h) Each party shall bear his own costs.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 8<sup>TH</sup> DAY OF FEBRUARY 2022.**

**MUGO KAMAU**

**JUDGE**

**In the Presence of: -**

**Court Assistant: Sibota**

**Plaintiff: Ms. Ndukukire**

**Defendant: Mr. Nyaberi**