



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 7 OF 2015

1. MONICAH NYAMBURA KAMANDE

2. KLAAS HENDRICK KAMINGA.....PLAINTIFFS

VERSUS

1. ZAWADI HAMISI JUMA

2. ATTORNEY GENERAL.....DEFENDANTS

JUDGMENT

1. The Original plaintiff, Monicah Nyambura Kamande moved this court by way of a Plaint dated 15th January, 2015 seeking for judgment against the defendant, Zawadi Hamisi Juma for the following prayers:

i. A declaration that the plaintiff is the bona fide proprietor of all that piece of land comprising Nought Decimal Six Nought Four (0.0604) of a hectare or thereabout situate in Municipal Council of Mombasa and being subdivision Number 9927 (Original Number of Section 1/9927 (MN)).

ii. Prohibitory injunction restraining the defendant whether by herself, her servants or agents from entering, occupying or remaining in occupation or in any way dealing with all that piece of land comprising Nought Decimal Six Nought Four (0.0604) of a hectare or thereabout situate in Municipal Council of Mombasa and being subdivision Number 9927 (Original Number of Section 1/9927 MN). IN THE ALTERNATIVE a mandatory injunction to issue ordering the defendant to remove herself from the suit property.

iii. A declaration that the defendant make good any loss or damage that may have occurred to all the property belonging to the plaintiff during the period the defendant has been in occupation of the suit property.

iv. Any other remedy the court deems fit to grant.

v. The defendant be compelled to pay the cost of this suit.

2. The plaintiff pleaded that she was at all material times the registered proprietor of the suit property, the same having been transferred to her by her husband Mr. Klaas Hendrick Kamanga sometimes in March, 2013 for a consideration of “love and affection” for her benefit and that of a son who was a minor. That the defendant is the estranged wife of the said Mr. Klaas Hendrick Kamanga and have been separated for about 6 years during which period the defendant was residing in Kisauni and sometimes in Kigali, Rwanda. That the plaintiff has been living on the 2nd floor of the said property before and after the transfer up to 9th December, 2014 when the defendant together with the Assistant Chief, Shanzu and Administration police moved into the property and evicted the plaintiff on the strength of the court order issued on 8th December, 2014 by the children’s court. The plaintiff averred that she obtained orders from the children’s court to enable her re-enter the property, but was reluctant to do so due to security concerns poised by the defendant against the plaintiff and her son. The plaintiff averred the since 9th December, 2014, the defendant has placed 3rd parties in the property who she is using to thwart the plaintiff’s chances of re-entry into the property.

3. In response to the plaintiff’s claim, Zawadi Hamisi Juma, the 1st defendant filed a defence and raised a counter-claim dated 6th June 2015 and which was amended on 21st June, 2016. The 1st defendant denied the plaintiff’s claim and prayed for the plaintiff’s suit to be dismissed and for judgment against the plaintiff (defendants in the counter-claim) jointly and severally for the following orders:

a. A declaration that the parcels of land No.9927/I/MN and 9926/I/MN and all the development therein are the matrimonial home/properties of the plaintiff and 2nd defendant.

b. An order for rectification of the register to issue directing the Registrar of Title, Mombasa to cancel the registration of parcel No.9927/I/MN in the name of the 1st defendant.

c. An order for division of the parcel of Land No.9927 and 9926/I/MN on equal shares between the plaintiff and the 2nd defendant and an order that the Land Registrar, Mombasa Count do issue two separate titles in respect of the said subdivisions and in the alternative the matrimonial property be sold and the proceeds of the sale together the rental income be equally shared between the plaintiff and the 2nd defendant.

d. Costs of the suit and the counter-claim.

e. Any other relief this Honourable Court may deem fit and proper to grant.

4. The 1st defendant (plaintiff in the counter-claim) filed her witness statement dated 19th July, 2017 together with a bundle of documents. The matter came up on several occasions for the hearing of the plaintiff's case, but the same did not proceed due to non-attendance by the plaintiff and on 2nd December, 2019 the plaintiff's case was dismissed.

5. The 3rd defendant, the Attorney General filed a defence to the counter-claim dated 1st March 2018 and filed in court on 13th March 2018. The 3rd defendant generally denied the counter-claim, adding that the requisite notice as required in the Government Proceedings Act was not served.

6. In her evidence, the 1st defendant denied the plaintiff's case and adopted her witness statement and also produced the list of documents filed. She stated that she met Mr. Klaas Hendrik Kaminga in the year 2007 and entered into a relationship in 2008. That he even converted his faith from Christianity to Islam and they got married at the Kadhi's court in Mombasa and were issued with a certificate of marriage on 14th December 2008 (D.exhibit 1 and 2 respectively). She stated that after the marriage, she moved in with the 2nd plaintiff (2nd defendant in counter-claim) in his house in Shanzu, Mombasa and that at the time, it was the only house developed on the PLOT NO. MN/I/9927. That they later had a daughter, Hendrika Samira Klaas who was born on 15th March 2009 (D.exh. 3) She stated that she frequently used to visit the 2nd plaintiff (2nd defendant in the counter-claim) in Holland where she used to assist him in his businesses. That it is from the said businesses that they were able to put up their matrimonial home comprising of a one storey building which they later converted to rental houses on Plot NO.MN/I/9927. She stated that she later visited the lands office where she found out the 2nd plaintiff had illegally and unlawfully and without her knowledge and/or consent transferred the PLOT NO. MN/I/9927 to Monica Nyambura, the plaintiff herein. She stated that she has been maintaining the rental houses (D.exhibit 5, 6, 8, 9 and 10) where she collects rental income towards her and the minor's maintenance and schooling and therefore forms part of matrimonial property. That all other matters amongst the parties had been concluded (d.exhibit 11,12 and 13).

7. Ms. Kadima & Company Advocates for the 1st defendant submitted that the plaintiffs failed to avail themselves in court while the 2nd defendant filed defence but did not call any witness to adduce evidence in support thereof. That averments in pleadings are not evidence and relied on the case of **Francis Otile –v- Uganda Motors Kampala HCCS No. 210 of 1989; Mohamed & Another –v- Haidara (1972) EA.166; Edward Muriga. Through Stanley Muriga –v- Nathaniel D. Schulter Civil Appeal No. 23 of 1997; CMC Aviation Ltd –v- Cruisair Ltd (NO.1) (1978) KLR 103; (1976-80) I KLR 835; Motex Knitwear Limited –v- Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002; Trust Bank Ltd –v- Paramount Universal Bank Ltd & 2 Others Nairobi (Milimani) HCCC No.1242 of 2002; Karuru Munyuroro –v- Joseph Ndumia Murage & Another Nyeri HCCC No.95 of 1988; and Janet Kaphiphe Ouma & Another –v- Marie Stopes International (Kenya)Kisumu HCCC NO.68 of 2007.**

8. The 1st defendant's advocates submitted that the Matrimonial Property Act of 2013 formalizes and makes provision for giving due consideration to both the monetary and non-monetary contribution of parties in a marriage and relied on the case of **NWM –v- KNM (2014)eKLR and White –v-White (2000) UKHL 54 and Njoroge –v-Ngari (1985) KLR 480**. It was submitted that at the time of the transfer of the property from the 2nd plaintiff to the 1st plaintiff and even at filing of his suit on 15th January, 2015, the 2nd plaintiff was still married to the 1st defendant as their divorce was finalized on 23rd September, 2016 as evidenced by D.exht 12 in Divorce Petition No.2 of 2015, and that no consent had been sought rendering the transfer null and void *ab initio*. Counsel cited the provisions of Section 12 of the Matrimonial Property Act which states:

“(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise ”

That in determining the distribution of matrimonial property at the dissolution of a marriage, the court ought to dispassionately scrutinize the direct and indirect contribution of each party to the marriage in acquisition and/or development of the suit properties. Further, that where property is registered singularly in the name of one spouse, there shall be a rebuttable presumption that such property is held in trust for the other spouse.

9. I have reviewed and considered the pleadings, the evidence and submissions made. The issue for determination is whether the 1st defendant is entitled to the prayers sought.

10. In this case, the plaintiff and the 2nd defendant failed to avail themselves and or any witnesses in court when the matter came up for hearing on numerous occasions. As already stated, the 1st plaintiff's case was dismissed on 2nd December 2019 for non-attendance. And

whereas a defence was filed in response to the counter-claim, no evidence was adduced in support of the same. As rightly submitted to by counsel for the 1st defendant, averments in pleadings are not evidence. They are only allegations, not evidence. Until they are proved or disproved, or there is an admission of them or any of them, pleadings are not evidence and no decision can be founded upon them. The failure to adduce any evidence by the other parties in this case means that the evidence adduced by the 1st defendant against them is uncontroverted and therefore unchallenged.

11. The dispute before this court in the counter-claim relates to ownership of the properties known as parcel Nos. 9927/I/MN and 9926/I/MN. The 1st defendant has testified that the suit property is matrimonial property. Although the 1st defendant and the 2nd plaintiff have since divorced, the 1st defendant has adduced evidence that show that the transfer of the property from the 2nd plaintiff to the 1st plaintiff was done at a time they were still married. This suit was filed on 15th January 2015 while the decree produced (D.exhibit 12) shows that the divorce in Petition No.2 of 2015 was finalized on 23rd September, 2016. I have considered the uncontroverted evidence of the 1st defendant and I am satisfied that the suit properties were matrimonial properties. Section 12 of the Matrimonial Property Act is clear that an estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form. Since there is no evidence that the consent of the 1st defendant was sought and/or obtained, the transfer of the suit property by the 2nd plaintiff to the 1st plaintiff was null and void. I am therefore satisfied that the 1st defendant has proved her counter-claim on a balance of probabilities and the same is allowed as prayed. Since the counter-claim was not contested, I make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF MAY, 2021.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE