REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. APPEAL NO. 8 OF 2018

KELLEN CIUMWARI.....1ST APPELLANT

MARTIN MUCHANGI NJAGI.....2ND APPELLANT

VERSUS

NJAGI WACHIRA.....RESPONDENT

(Being an appeal against the judgement and decree of the Hon. V.O. Nyakundi (S.R.M.)

dated 13.03.2018 in Embu CMCC No. 306 of 2015)

JUDGEMENT

1. The disputants in this appeal are close family members. The appellants – **KELLEN CIUMWARI** and **MARTIN MUCHANGI NJAGI** – are wife and son respectively to the respondent – **NJAGI WACHIRA.** The respondent had sued the appellants in the lower court, EMBU, seeking to evict them from Land parcel **No. GATURI/NEMBURE/12717** ("suit land" hereafter) and relocate them to land parcel **No. GATURI/NEMBURE/14191.** In a judgement delivered on 13/3/2018 by Hon. V.O. Nyakundi (Senior Resident Magistrate, Embu) the respondents suit was allowed. The outcome of that suit is what gave rise to this appeal.

2. In the lower court, the respondent had pleaded that he owned the then larger parcel Gaturi/Nembure/781 which he later decided to sub divide for the purpose of distribution to his family during his lifetime. According to the respondent, the appellants had occupied and cultivated the suit land but he had decided to relocate them to Land parcel no. Gaturi/Nembure/14191, which is one of the resultant parcels from the subdivision. The appellants however refused to execute the transfer forms and also resisted relocation. This prompted the respondent to file the lower court matter seeking forcible eviction and relocation of the appellants.

3. The 1st appellant – **KELLEN CIUMWARI** – was of the view that parcel No. 781 was matrimonial property and she was therefore supposed to be consulted before its subdivision but she was not. She averred further that the respondent had even sold a portion of that land to a third party without her spousal consent. According to her, parcel No. 781 was not subdivided for distribution to the family. She said that the purpose of the subdivision was to enable the respondent to sell some of it and therefore render her homeless and destitute.

4. The appellants further said that the land to which they are meant to be relocated is already occupied by two other sons who are both issues of the marriage between the respondent and 1st appellant. They opposed their eviction and relocation also for the reason that they have settled on and developed the land from which they are supposed to be moved.

5. The determination of the lower court matter was hinged on two issues viz:

§ *Whether the respondent is the owner of the suit land.*

§ *Whether spousal rights are overriding interests as envisaged under Section 28 of the Land Registration Act.*

The court found that the respondent is the owner of the suit land and further observed that the appellants had not shown that they had settled on and/or developed the land. On whether the 1st appellant had spousal rights over the suit land, the court found that as the appellants had already been offered another land, they could not be said to have been divested of their rights. The lower court suit was therefore decided in favour of the respondent and each side was to bear its own costs.

6. The appeal before this court is based on 10 grounds as follows:

1) That the Learned Senior Resident Magistrate erred in law and fact when he failed to appreciate that the suit property constituted

a matrimonial property.

2) That the Learned Senior Resident Magistrate erred in law and fact when he failed to appreciate that the first appellant had spousal or rights over the suit property when he ordered that she be evicted from the suit land.

3) That the Learned Senior Resident Magistrate contradicted himself when he correctly held that the 1st appellant had spousal rights over the suit property but proceeded to order her eviction form the suit land.

4) That the Learned Senior Magistrate erred in law and fact when he failed to appreciate that the 2nd appellant had extensively developed his portion of land within the suit property whereas he was born and has lived with his family all their lives.

5) That the Learned Senior Magistrate erred in law and fact by holding that there was no evidence of the appellant's occupation and use of the suit property whereas the evidence tendered before him was glaring.

6) The Learned Senior Magistrate erred in law and fact by holding that it was the appellant's duty to prove that they were in actual occupation and using the suit property whereas it was the respondent's evidence in Embu CMCC No. 306 of 2015 that the appellant's were in actual occupation and using the suit property.

7) The Learned Senior Magistrate erred in law and fact in addressing and determining extraneous issues that had not been pleaded by either party.

8) The Learned Senior Magistrate erred in law and fact by filing to direct himself to the fact that the suit property is ancestral land, held by the respondent in trust of his family, the appellants herein inclusive.

9) That the Learned Senior Magistrate erred in law and fact in failing to consider that parcel land number Gaturi/Nembure/14191 was fully occupied and developed by other family members of the respondent.

10) That the judgement was against the weight of the evidence tendered.

7. The appeal was canvassed by way of written submissions. The appellants filed their submissions. The appellants filed their submissions on 11/6/2021. The trial magistrate was faulted for failing to appreciate that the suit property was matrimonial property. The 1st appellant was said to have been married to the respondent in 1973 and the respondent settled her on the suit property. The respondent was said to have been working away from home while the 1st appellant remained on the suit land tending and managing it. The suit land was also said to be ancestral land and the subdivisions done happened during the subsistence of the marriage between the respondent and 1st appellant.

8. The appellant's position is that as the land is matrimonial property she has spousal rights protected by law. She invoked Section 28 of the Land Registration Act which recognizes such rights as overriding interest. She sought reliance also on the case of Lilian Wairimu Kimotho Vs Samuel Njogu Kimotho & Another [2020] eKLR. The case of Kanyi Vs Muthiora [1984] KLR 712 was cited to drive home the point rights arising from possession and occupation of land amount to overriding interest which do not require nothing on the register.

9. Further, the trial magistrate was said to have contradicted himself by holding that the 1st appellant has spousal rights over the suit property and then proceeding to deny her the same rights and ordering her eviction. According to the appellant's eviction from the suit land would be unjust considering that they have lived and worked on it for a long time. They averred that the respondent himself had confirmed their presence on the land during cross-examination. That, they said, was enough evidence to confirm occupation.

10. It is further the appellants position that their dealings and connection with the suit land has given rise to a trust in their favour. They cited the case of Isaak Minanga Kiebia Vs Theuri M'Lintari & Another [2018] eKLR to reinforce their submission. The case set out the principles that the court is supposed to consider to establish whether a customary trust exists. According to them, when that is considered in light of their relationship with the respondent, a trust will be found in their favour.

11. The suit land is matrimonial property, the appellants also submitted. The 1st appellant therefore has spousal rights over it. Reference was made to Section 2 of the Land Act on definition of Matrimonial Property and Article 45(3) of the Constitution on equal rights of parties in marriage during its duration and dissolution. The cases of RNM Vs JMN & Others ELC No. 170 of 2008, MACHAKOS and CWM Vs JPM [2017] eKLR: Civil Appeal No. 142 of 2018 were cited for reinforcements. The court was asked to allow the appeal.

12. The respondent's submissions were filed on 17/6/2021. He submitted, *interalia,* that the suit land is not matrimonial property and that no evidence had been adduced to prove that it was. He denied that he intended to make the appellant's destitute or homeless and averred that parcel No. Gaturi/Nembure/14191 was meant for them. He emphasized that he has all the rights of an absolute owner afforded by Sections 24, 25, and 26 of the Land Registration Act.

13. The respondent submitted also that the appellants had not demonstrated that they were in occupation of the suit land. He was of the view that no counter-claim based on occupancy was filed in the lower court and it cannot therefore be determined on appeal. There was denial also that the trial court considered extraneous issues or that the suit land was ancestral land. The court was urged to dismiss the appeal.

14. I have considered the appeal as filed, rival submissions, and the lower court record. As the first appellate court, the duty of this court is as was spelt out in the case SELLE Vs ASSOCIATED MOTOR BOAT COMPANY LTD [1968] EA 123 where it was observed thus:

> *"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."*

15. The appellants in this case have raised ten (10) grounds in the memorandum of appeal. In my view, the grounds can be condensed into five (5) as follows:

a) Is the suit land matrimonial property in respect of which the 1st appellant has spousal rights.

b) Do the appellants occupy the suit land?

c) Is the suit land also ancestral land which the respondent can be said to be holding in trust for his family?

d) Is the parcel of land to which the respondent wants the appellants relocated also occupied by other family members?

e) Should the appellants be evicted?

16. I will go straight to the first issue, which is whether the suit land is matrimonial property in respect of which the 1 st appellant has spousal rights that would militate against her eviction? The 1st appellant pleaded that she is the wife to the respondent. In her evidence, she averred that upon her marriage to the respondent they settled on the original parcel of land as it was – Gaturi/Nembure/781 – and started working on it. She developed it herself as the respondent was away in formal employment. The development included clearing bush, planting tea, and coffee trees. It would appear that this development is now on the suit land from which the respondent want her evicted. It seems clear that her matrimonial home is on that portion of land also.

17. The respondent complained that the respondent subdivided the land and even sold a portion of it without consulting or involving her. She resents eviction on grounds, *interalia*, that she has spousal rights over the suit land. She avers too that the land to which she and the second respondent are to be relocated is already occupied by her other two sons and their families. According to her, the respondent wants to render her homeless. She faulted the trial court for ordering her eviction yet it had made a finding that the suit land was matrimonial property over which she had rights.

18. The respondent on his part was reluctant to accept that the 1st appellant was his wife. He then accepted that she was his estranged wife before finally accepting during cross-examination that she was his wife. He denied that the 1st appellant developed the suit land and averred that she found the cash crops – tea and coffee – already on the land. He admitted that the appellants have houses on the suit land.

19. The Matrimonial Property Act defines matrimonial property as follows at Section 6:

a) the matrimonial home or homes

b) household goods and effects in the matrimonial home or homes; or

c) any other immovable or movable property jointly owned and acquired during the subsistence of the marriage.

Section 2 of the same Act refers to matrimonial homes as

> *"…... any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property"*

Further, Section 2 of the Land Act also defines matrimonial home but interestingly it omits the aspect of *"any other attached property"* found in Matrimonial Property Act. The section provides as follows:

> *"Matrimonial home" means any property that is owned or leased by one or both spouses and occupied by the spouses as their family home."*

20. The parties are all in agreement that the suit land was acquired prior to the marriage of the 1st appellant by the respondent. But the 1st appellant says she worked on it and developed it. She has been living on it too, a fact confirmed by the respondent himself when he admitted during the cross-examination that she has a house there.

21. From all this, it appears to me clear that the suit land is where the 1st appellants matrimonial home is. It goes without saying that since matrimonial homes cannot stand or rest on air or water, the land on which they stand or rest is by logical implication the "one of the attached" properties envisaged by Section 2 of the Matrimonial Properties Act. I therefore agree that the suit land is matrimonial property.

22. But even if it is not matrimonial property – this by dint of having been acquired by the respondent before marriage – the 1 st appellant has shown that she worked on it and developed it. This then would bring it within the ambit of Section 9 of the Matrimonial Property Act which

states:

> *"Where one spouse acquires property before or during marriage and the property acquired before or during marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made."*

It stands to reason therefore, that the 1st appellant's interest on the suit land, whether one views the land as matrimonial property or not, can not be wished away. No one can legitimately do that without appearing to discriminate against her simply because she is a woman.

23. Given what I have said so far, I would answer the first issue in the affirmative: Yes, the suit land is matrimonial property. I am also saying that even if one were to argue that it is not, the 1st appellant's contribution to the development on the land entitles her to a beneficial interest by dint of Section 9 of Matrimonial Act. Either way, she needs to be consulted or involved in any fundamental decision that may affect her accrued rights or interests.

24. I now come to the second issue (issue (b), which is whether the appellants occupy the suit land. The appellants said they occupy and use the land. The respondent admitted that the 1st appellant has a house there. The 2nd appellant said he lives there and has developed his portion shown to him by the respondent himself. It seems to me more likely than unlikely that the appellants are on the land.

25. Additionally, this issue of occupation or even use of the suit land would seem to find a ready answer in the very orders that were sought by the respondent in his pleadings in the lower court. In his prayer (a) in the plaint, he was seeking forcible eviction of the appellants from the suit land and relocation to another. It stands to reason that if the appellants were not on the land, the respondent would not possibly be seeking an eviction order; for how do you evict people from a place in which they are not? It is very possible that if the appellants were not on the land, the respondent would probably have been seeking a permanent injunction to restrain them from entering, trespassing or occupying it. The answer to this issue is therefore yes; the appellants are on the suit land.

26. And now to the third issue (issue (c): Is the suit land ancestral land which the respondent is holding in trust for his family? It appears to me clear that the suit land can be said to be ancestral land. The respondent said he inherited from his father. The father appears to have got the land from his clan. But it is wrong for the respondents to assume that a customary trust will arise from the mere fact that the land is ancestral land. If there is a trust, cogent evidence would be needed to demonstrate it. It is important to appreciate that there many things in custom which change, and even cease to apply, when land becomes registered. A trust is usually indisputable when it is noted on the register. Where it is not so noted however, it is a difficult concept to prove because the law always assumes the primacy and indefeasibility of the concept of absolute proprietorship. It behoved the appellants therefore to demonstrate that a customary trust can be inferred. The fact that they are close to the respondent does not automatically give rise to a trust in respect of the suit land in their favour. I do not find prove of trust in this matter.

27. It is now time to consider the fourth issue (issue d). This concerns whether the land to which the appellant are supposed to be relocated is also occupied by other family members. In the respondent's own evidence in the lower court, he admitted it is. The appellants themselves said the land is already occupied by two other members of the family. The simple answer to this issue is therefore yes, the land is occupied by other family members.

28. Finally, I now turn to issue (e), which is whether the appellants should be evicted. I have already made a finding that the 1st appellants has rights recognized by statutory law in respect of the suit land. Her matrimonial home is on the land. She occupies it. When the respondent decided to sub divide the land, he didn't consult or involve her. When he decided to sell a portion to a third party, he also didn't consult or involve her. When he made the decision to relocate her, he again failed to consult her. All this shows that if the respondent is allowed to have his way, he is ready to trample underfoot the rights of the 1st appellant. These rights are in the statutes and the respondent has disregarded them. To him, the fact of being the absolute proprietor of the suit land entitles him to behave as he pleases towards the appellants. Any right or power conferred by law is supposed to be used responsibly. And responsible use or exercise of that right or power consists in what does not injure or hurt others. It is my considered view that the respondent has disregarded, or at least treated in a cavalier manner, the 1st appellant's rights over the suit land. For these reasons, I would allow the appeal in respect of her and overturn the lower court's decision. I hereby do.

29. I now come to the 2nd appellant. It is clear to me that this one is not afforded protection by the statute law. I note however that like the 1st appellant, he lives on the suit land. He is the son of the respondent. In the lower court, he testified that his father – the respondent – showed him the portion he occupies now in 1996 and allowed him to build and farm on it. He constructed a house and started farming. He has about 800 tea bushes on it. He is raising his family there. The eviction and relocation of the 2nd appellant from the suit land would mean that he starts afresh. He would have to construct another house and plant some other tea. He would loose the income he is getting from the land since any tea he plants in the new place will not grow overnight. It is not even certain that he will have a place to plant the tea because the size of the land he is to be relocated to is said to be about one acre or less and it would have to be shared among four people – his mother, two brothers, and himself.

30. When the respondent showed the 2nd appellant the portion he occupies now about twenty-five years ago, the 2nd appellant was entitled as a son to expect that that would be his portion when the respondent ultimately distributed or shared out the land. That is why he did things – like building and planting tea – which normally belong in a place permanently. The same person who allowed and encouraged these things to happen now wants an eviction order. The 2nd appellant is resisting this and it is easy to see that he has good reasons for resisting. To me, the conduct of the respondent to the 2nd appellant is unfair; even wrongful and unconscionable. The 2nd appellant didn't show himself the portion he now occupies; the respondent showed it to him. The 2nd appellant did not build or farm on the land by force; the respondent allowed and encouraged him to do so. Now he wants to evict him.

31. My considered view is that this is an appropriate case where the court should presume and even invoke an equity in favour of the 2nd

appellant. In this regard, I would invoke proprietary estoppel against the respondent. Proprietary estoppel comes into play where a party claims a right to land belonging to another party in circumstances where the party claiming has been led to believe, by words or conduct or both, by the other party, that he has or can expect to be given an interest in the land. True, the 2nd appellant didn't mention proprietary estoppel expressly in his defence, but the substance of that defence is actually a reference to it in all but name. Proprietary estoppel can be used as a defence and also as a means to commence an action in court. In this case here, it is a defence.

32. From the defence and evidence given by the appellants in the lower court, its clear that the respondent showed the 2nd appellant the portion of land which he now wants the 2nd appellant to vacate. That is not something that took place recently. It happened about twenty-five (25) years ago. The respondent now wants the 2nd appellant to leave the land. The 2nd appellant has settled on it, developed it, and is raising his family on it. Without doubt, the 2nd appellants stand to loose financially or economically. It can not be denied also that over a long time a person develops sentimental attachment to a place he calls home. To me, what the respondent is doing is not only unconscionable but also detrimental to the 2nd appellant. That is why equity should come to the aid of 2nd appellant.

33. It is for all these reasons that I would refuse to allow the eviction of the 2nd appellant also. In this regard therefore, I would also allow the aspect of the appeal that concerns him. I hereby allow it.

34. I now come to the issue of costs. I realize that this is a delicate family affair. I would therefore hesitate to condemn one side to pay costs to the other. For this reason, I order that each side should bear its own costs both in the lower court and in this appeal.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 9TH DAY OF NOVEMBER, 2021.

In the presence of Muthoni Ndeke for Rose Njeru for appellants and in the absence of Njeru Ithiga for respondent.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

9/11/2021