



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 18 OF 2014

R C.....PLAINTIFF

VERSUS

D K S.....DEFENDANT

JUDGMENT

By an amended plaint dated 24th March 2017 the plaintiff herein sued the defendant seeking the following orders;

- a) A declaration that 11.5 acres comprised in all that parcel of land known as NANDI/ [Particulars Withheld] is and/or deemed as matrimonial property.
- b) A permanent injunction restraining the defendant, his agents, servants and/or any person acting on his behalf or directions from alienating, selling and/or in any other way detrimental interfering with the plaintiffs legal ownership and the portion comprised in the suit parcel of land as may be declared by this honourable court according to the contribution by the parties.
- c) Any other relief this honourable court may deem fit to grant.
- d) Costs of this suit and interests.

Plaintiff's case

During the trial, the parties relied on their filed statements which were accordingly adopted as their evidence in chief.

It was the plaintiff's evidence that she was legally married to the defendant on 28th December 2001 pursuant to the provisions of Cap 151, laws of Kenya (now repealed). She stated that they were blessed with three (3) issues of the marriage. The union was however subsequently dissolved on 9th December 2016 owing to marital differences vide Milimani Divorce Cause no. 573 of 2015. It was the plaintiff's evidence that the reason she moved the instant court was to determine the question of the legal ownership of the suit parcel of land as against the purported new owner as the defendant had alleged to have sold the suit land to a 3rd party.

The plaintiff stated that while she was working in Nairobi as a Public Health officer, she used to send money to her brother SY to buy for her the suit plot. It was her evidence that she deposited money in her brother's Cooperative Bank account for the purchase of the land. She further stated that she met one Ruth Chepchirchir Saina who was selling land and agreed to sell to her some portion. She produced a sale agreement dated 11/9/07 and several deposit slips totaling to 1.28million. The plaintiff also stated that she was present when the final instalment was paid to the vendor. She testified that her name was inserted in the agreement by the advocate who prepared it in the presence of all the witnesses. This was because they had not included the plaintiff's name initially.

It was the plaintiff's evidence that the court had granted orders dated 3/2/14 to the effect that no dealings with the suit land until this suit is heard and determined. It is the plaintiff's case that she and the defendant contributed towards the purchase of the suit parcel of land comprised in that parcel of land known as NANDI/ [Particulars Withheld] measuring 40 acres, from which parcel they acquired a total of 11.5 acres. It is further the plaintiff's case that she and the defendant have been in use and possession of the suit parcel of land for the benefit of the family since the year 2007. She therefore prayed that the amount she contributed be deemed as purchase price of the suit land.

On cross examination the plaintiff reiterated her evidence and stated that the names RC and RJS are her names. She stated the idea of buying the land was hers and that the defendant sent her some money in contribution for the purchase of the land.

The plaintiff also confirmed that she paid Kshs. 840,000/ through her brother SY. And the defendant only contributed kshs. 120.000/ only.

PW2 gave evidence and supported the plaintiff's testimony that she had sent him money to buy the suit plot totaling to Kshs. 840,000/. He produced the bank statements and pay in slips to confirm the same.

Plaintiff's Submissions

It was Counsel's submission that the plaintiff's evidence on how the suit parcel of land was acquired remained unchallenged by the defendant. Counsel further submitted that it is not in dispute that the parties herein were indeed husband and wife and the difference in the names, RJ and RS as raised in cross-examination is therefore a non-issue.

Ms Isiaho Counsel for the plaintiff submitted that the plaintiff told the court that when the sale agreement dated 11th September 2007 was drawn by M/S Ngala & Co. Advocates, both her and her estranged husband were not present and that they were however represented by their representatives wherein SKY appeared on her behalf.

Counsel further emphasized that the plaintiff explained why her name was inserted by Ngala Advocate as she had realized during the signing that her name had been inadvertently left out and the same was done in the presence of the witnesses. She further submitted that it is worth noting that the bank statements produced by PW2 correspond with the bank deposit slips produced by PW 1 which clearly indicate the depositor as RS, the plaintiff herein therefore corroborating the plaintiff's evidence.

Ms Isiaho Counsel for the plaintiff took issue with the defendant's evidence during cross-examination that the defendant purportedly sold the suit parcel of land during the pendency of this suit. It was further her submission that the defendant did not produce any evidence from western union and/or provide evidence to confirm that records of several years were not available from Western Union.

Counsel further questioned why the defendant did not set aside, vary and/or appeal against the injunctive orders issued on 3/2/2014 in favour of the plaintiff if indeed the land in question was solely purchased by him. Counsel also questioned what document the defendant used to enter into the agreement dated 13/3/2017 without the involvement of the co-owner; the plaintiff and why the defendant failed to disclose to one CHRISTOPHER KIBIWOTT about the pendency of the current suit at the time of entering into the agreement dated 3/3/2017.

Ms Isiaho also wondered why the said purchaser was not enjoined into these proceedings. She therefore submitted that the plaintiff has proved her case against the defendant to the required standard and that the court should grant the orders as prayed.

Defendant's Case

The defendant gave evidence and stated that the plaintiff is his estranged wife and that he is the one who purchased the suit parcel of land solely through one MATHEW BOIT vide the sale of land agreement dated 11th September, 2007 while he was working in Tanzania. It was his evidence that he and the plaintiff were not present when the agreement was drafted but they were represented by his father and the plaintiff's brother PW2. He stated that he did not have the original agreement as it is in the plaintiff's house.

The defendant further testified that when he finally saw the agreement the plaintiff's name was not on the agreement but later the name was fraudulently inserted in the agreement. It was his evidence that he gave the plaintiff Ksh 600,000/ when she went to Tanzania which money he stated that the plaintiff sent to her brother for the purchase of the suit plot. The defendant also stated that he sent the plaintiff additional money through western Union and later came to meet the seller. He produced a copy of a deposit slip which he paid into the account of the seller for Kshs. 440,000/. He also produced an affidavit by Ngala Advocate dated 21/7/17 disowning the insertion of the plaintiff's name in the agreement for sale of the suit land.

The defendant stated that he sold the land on 13/3/17 to one Christopher Kibiwot Ngetich for Kshs. 2,500,000/ without consulting the plaintiff because she did not have a stake in the suit land. He prayed that the plaintiff's suit be dismissed with costs. The defendant's witness DW2 gave evidence and stated he is the one who informed the defendant that the late Ruth Saina was selling the suit land. He confirmed that the amounts were given to SY PW2 herein who is the plaintiff's brother. He also stated that he would not know whether the plaintiff paid any money as it was a family issue.

On cross examination by Counsel for the plaintiff he confirmed that they were called inside the advocates office whereby the plaintiff also signed the agreement. In reexamination he stated that they were paying the monies on behalf of the parties.

Defendant's Written Submission

Counsel for the defendant reiterated the evidence of the defendant and stated that the suit land had been sold to a third party. He stated that the defendant testified that he bought the land single handedly without the contribution of his estranged wife, and that the plaintiff herein was only a vessel to channel the agreed consideration to the vendor but who also elected to use her brother one SKY who was a resident of Eldoret to channel the said consideration.

It was Counsel's submission that the plaintiff is using this case as a ground to file a case in the High Court for division of matrimonial property. Counsel further submitted that the insertion of the plaintiff's name in the agreement was fraudulent and as such she should not benefit from an illegality.

Counsel therefore listed the issues for determination by the court as follows.

1. Whether the plaintiff and the defendant were joint purchasers of the suit land.

2. Whether the defendant had the capacity to dispose the land to other third parties

3. Whether the plaintiff has discharged the burden of proof

Counsel referred to the Registered Land Act which Act has since been repealed stating that a land sale agreement must be written / executed by both parties and attested by a competent advocate. It was Counsel's submission that the plaintiff did not establish any proprietary interest in the suit land and that the issue of distribution of matrimonial property can be ventilated elsewhere.

On the issue whether the defendant could dispose of the suit land Counsel submitted that the defendant was under no obligation to consult the plaintiff as he single handedly bought the suit land therefore it did not form part of matrimonial property.

Counsel finally stated that the plaintiff failed to demonstrate her assertions of contribution to the suit land and therefore her case should be dismissed with costs to the defendant.

Analysis and Determination

This is a case where the plaintiff is seeking for a declaration that 11.5 acres comprised of all that parcel of land Known as NANDI / [Particulars Withheld] be deemed as matrimonial property. The plaintiff further sought for an injunction restraining the defendant from interfering with the plaintiff's legal ownership of the portion comprised in the suit parcel of land pending the declaration of the contribution by the parties.

Before I embark on the determination of the issues, I would like to deal with the jurisdiction of the court to hear and determine this matter as Counsel for the defendant stated that this court does not have jurisdiction to entertain this matter.

Article 162 of the Constitution provides for the creation of the Environment and Land Court as one of the Superior Courts in Kenya. It provides as follows :-

162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

Pursuant to the above provision Parliament created the Environment and land Court vide the Environment and Land Court Act, Act No. 19 of 2011 which established the jurisdiction provided by the Constitution at Section 13 of the Act. The said section provides as follows:

13. (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes?

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

It should be appreciated that the dispute before the court is about legal ownership of the suit land as the defendant alleged in his defense that he has since sold the land to a 3rd party who is not a party to this suit. The Land Registration Act 2012 which provides for certain matrimonial property rights and co-ownership of the matrimonial home as between spouses specifically provides under Section 101 thereof that this Court has jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act.

The Matrimonial Property Act 2013 provides for the procedures to be followed when a dispute arises in respect of matrimonial property under Section 17 which states as follows:

“(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)—

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

The above provision does not specify the court to which the dispute is to be directed but we are aware that matrimonial disputes are heard in the family division of the High Court. Nothing precludes this court from hearing a matter that in touching on use, occupation and title to land.

The fact that the issue for determination is on the legal ownership of the suit land gives this court jurisdiction to handle this matter.

Having said, that I now move to the real issue for determination in this suit. Counsel for the plaintiff listed the issues for determination amongst them being whether this court has jurisdiction to hear and determine this suit which I have already disposed of above. The next issue was as to whether the sale agreement dated 13th March 2017 drafted during the pendency of this suit has any legal implications in this suit and whether a married woman can acquire property within marriage.

It is not in doubt that a woman can acquire property whether in marriage or without. The Constitution provides for such rights and the international human rights treaties also guarantees the right to property. Anybody can acquire property including *feme sole*.

When this matter was brought to court on 23/1/14 under certificate of urgency the court granted an order that the plaintiff be allowed to utilize 5 acres of the suit land and the defendant was barred from selling the suit land and to preserve the same. Parties later tried to negotiate a settlement but it was inconclusive. Counsel for the parties later recorded a consent to the effect that each party to maintain 5 acres of the suit land pending the hearing and determination of this suit. The court even encouraged the parties to pursue an out of court settlement but due to the acrimony in divorced couples, they were not able to agree. The matter therefore proceeded for hearing.

The plaintiff gave evidence and produced documents to illustrate the process of the purchase of the suit land. Her evidence was systematic and corroborated by the evidence of PW2 who was being sent money for the purchase of the suit land. The plaintiff was able to produce documents of pay in bank slips which tallied with the evidence that the parties gave. The plaintiff's demeanor was of a truthful witness.

The defendant however was not able to rebut the evidence of the plaintiff even after calling his witness DW2 who confirmed that the monies for the purchase of the suit land was being paid on behalf of both parties. He even admitted that he could not tell whether the plaintiff contributed money for the purchase of the plot since it was a family affair.

The defendant cried wolf that he was not able to produce the original agreement which did not have the plaintiff's name as it was in the plaintiff's house which he did not have access to. The Civil Procedure Rules allows for a notice to produce which he could have applied to compel the plaintiff to produce the document if he really wanted to rely on it. He failed to do so. He also failed to produce the western union receipts or evidence from the western union that he had sent money to the plaintiff.

Further the defendant just mentioned the issue of fraud in his defence and the evidence but did not specifically plead the particulars of fraud by the plaintiff. He also did not prove the alleged fraud which must be specifically pleaded and proved. There was also no evidence that he had reported the matter to the police to investigate the allegation of fraud. Therefore I find that this allegation of fraud is neither here nor there hence does not hold any water.

The defendant's evidence was hinged on the fact that he bought the land single handedly and was under no obligation to inform or consult the plaintiff when he was selling it. The fact that the suit land was bought during the subsistence of the marriage, the law required the defendant to seek the consent of the plaintiff before sale. The defendant also went against the court order barring him from selling the suit land. He entered into a sale agreement with a third party during the pendency of this suit and the order. The said purchaser was also not enjoined in this suit making it suspect as a sham to hoodwink the plaintiff and the court. The defendant might have succeeded in hoodwinking the plaintiff but not the court as the court is vigilant of parties who disobey court orders and as such has power to declare the entry into such sale agreement null and void. The defendant had no capacity to enter into a sale agreement with a third party during the pendency of this case and with a subsisting injunctive order. I therefore find that the sale agreement entered into by the defendant and the third party is null and void and is of no consequence.

Having said that the court has a simple task of declaring that the suit land is matrimonial property as it was purchased during the marriage. I will not go ahead and distribute the suit land as the applicant just prayed for a declaration that the suit land is matrimonial property to enable her move to the High Court for distribution. From the evidence on record, the documents produced and submission of Counsel, I find that the plaintiff has proved her case against the defendant and hence grant orders as prayed in the plaint. The defendant shall pay costs of this suit. The plaintiff is at liberty to move to the relevant court for distribution of matrimonial property.

Dated and delivered at Eldoret this 3rd day of July 2018.

M.A ODENY

JUDGE

Judgment read in open court in the presence of Miss Kisei holding brief for Miss Isiaho for Plaintiff and Miss Yebei holding brief for Mr. Songok for defendant.

Mr. Koech: Court Assistant.