



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KAJIADO

ELC CASE NO. 35 OF 2019

(FORMERLY ELC No.445 of 2015 MILIMANI)

CECILIA NJOKI GICHURU.....PLANTIFF

VS

STEPHEN GATHUKA GITARI.....DEFENDANT

JUDGEMENT

By a Complaint dated 22nd May, 2015 and filed on 22nd May, 2015, the Plaintiff prays for judgment to be entered against the Defendant and orders sought granted for:

- (a) Permanent injunction orders restraining the Defendant from interfering, selling, wasting, destroying, trespassing or in any other way interfering with the Plaintiff land No. KAJIADO/OLCHORO-ONYORE/3295.
- (b) That the Hon. Court do grant orders to protect and preserve the Land Title No. KAJIADO/OLCHORO-ONYORE/3295.
- (c) Cost of the suit in the Cause.

The Defendant filed a Defence and Counterclaim dated 23rd June, 2015, on 20th July, 2015 where he denied the averments in the Complaint and sought for the Plaintiff's suit to be dismissed with cost and judgment entered on the counterclaim for:

- (a) An order that the Defendant be allowed to sub-divide land title No. KAJIADO/OLCHORO-ONYORE/3295 amongst his two families.
- (b) Costs of the counter-claim.
- (c) Such further or other relief as this honorable court may deem fit and just to grant.

The matter proceeded for hearing where each party had one witness.

Evidence of the Plaintiff

The Plaintiff as PW1 testified that she got married to the Defendant in 1967 under customary law and together they had ten (10) children. She explained that the Defendant was registered as owner of land parcel number KAJIADO/OLCHORO-ONYORE/3295 hereinafter referred to as the 'suit land', which he held in trust for herself and his children. She contends that the Defendant secretly sought to sell the suit land making her to register a caution on it. Further, that through a consent agreement entered on 6th April, 2006, between the Defendant and herself, she agreed to withdraw caution over the suit land for purposes of sub division between them. She avers that vide the said consent agreement dated 6th April, 2006, they agreed that the suit land is her property including the children, on condition that she withdraws caution on Land Parcel No. Kajiado/Olchore-Onyore/6387 to enable the Defendant to undertake transactions on it. PW1 testified that jointly with the Defendant they acquired the suit land measuring 10 acres but the Defendant sold 2 acres of it despite resistance from her. The Plaintiff produced various documents including Certificate of Title for Kajiado/ Ol choro Onyore/ 3295; Two Sale Agreements between Defendant and Third Parties, Valuation Report, Agreement and Correspondence as her exhibits.

Evidence of the Defendant

The Defendant as DW1 testified that he married the Plaintiff in 1967 and his second wife, Mutanu Mwikali (now deceased) in 2002 together with whom they had 5 children who are now minors. It was his testimony that he was chased away from the suit land by the Plaintiff's son where he resided together with his deceased wife and children, and was threatened not to set foot thereon. He explained that Land Parcel No. Kajiado/Olchore-Onyore/6387 was sold to purchase another property which was subsequently acquired by government and its proceeds shared among the whole family including the Plaintiff. He sought for the suit land to be subdivided between his two families but the Plaintiff chased him away from the said land hence he is seeking court intervention and assistance over its sub division. The Defendant produced Certificate of Title for Kajiado/ Ol choro Onyore/ 3295 and Birth Certificates for some of his minor children as his exhibits.

The Plaintiff filed her submissions but the Defendant failed to do so.

Analysis and Determination

Upon consideration of the Plaintiff, Defence including Counterclaim, Witnesses Testimonies, Exhibits and Submissions, the following are the issues for determination:

- Whether the Plaintiff is entitled to orders sought in the Plaintiff.
- Whether the Defendant is entitled to orders sought in the counterclaim.
- Who should bear the costs of the suit.

As to whether the Plaintiff is entitled to orders sought in the Plaintiff. The Plaintiff sought for a permanent injunction to restrain the Defendant from interfering, selling, wasting, destroying, trespassing or in any other way interfering with her land parcel No. KAJIADO/OLCHORO-ONYORE/3295, and for orders to protect as well as preserve the said title. It is not in dispute that the Defendant is registered as proprietor of the suit land. It is further not in dispute that the Defendant and Plaintiff were married in 1967 under customary law and have ten (10) issues from the said union. It is also not in dispute that the Defendant married a second wife (now deceased) whom they had five (5) children. The main issue in dispute is the Plaintiff's contention that the Defendant seeks to subdivide the suit land which belongs to her and the children. From the evidence before Court, the Plaintiff as PW1 testified that the suit land is registered in her husband's name but he was holding the same in trust for her including the children. She confirmed residing thereon. She did not deny that her children are all adults. She insisted that the Defendant married a second wife and moved from the suit land. However, in cross examination, it emerged that there was an allegation that the Plaintiff and her son wanted to kill the Defendant culminating in the matter being reported to the Kiserian Police Station. The Plaintiff produced an Agreement made before a local chief demonstrating how they had agreed to share the two parcels of land. The Defendant as DW1 testified that land parcel number Kajiado/ Ol Choro Onyore/ 6387 was sold to purchase some property in Syokimau which property was acquired by the government. Further, that the proceeds from the said acquisition were used by the Family. It further emerged in evidence that the Plaintiff and the Defendant's marriage is still subsisting though they were currently separated. From the evidence of both parties including the documents produced, to my mind it seems this is a case for division of matrimonial property and will refer to the various legal provisions governing the same.

Section 7, 8 and 9 of the Matrimonial Property Act provides as follows: **7. Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.**

8. (1) If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the - a) matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and (b) matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives. (2) Despite subsection (1)(b), where it is clear by agreement of the parties that a wife shall have her matrimonial property with the husband separate from that of the other wives, then any such wife shall own that matrimonial property equally with the husband without the participation of the other wife or wives.

9. Where one spouse acquires property before or during the marriage and the property acquired during the 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'

In the case of **WKM V JWM (2019) eKLR**, the Court held that issues pertaining to sharing of matrimonial property can only be dealt with upon dissolution of marriage. In associating myself with this decision as well as the provisions of the Matrimonial Property Act and based on the facts before Court, I am unable to make a determination on division of the suit land which is matrimonial property. However, I will proceed to determine whether the Plaintiff has made out a case for having a beneficial interest over the suit land.

The Plaintiff contended that they had agreed that she retains the title to the suit land. She produced an agreement to that effect. However, on perusal of the Certificate of Title which she furnished in court, the Defendant is still registered as the proprietor of the said land. Further, there is no indication he was holding the said title in trust for her including the children. In line with the said analysis, I wish to make reference to section 25 and 26(1) of the Land Registration Act which provides that: **25 (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject— (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register. (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee. 26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all**

courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.’

In the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** where the Court held as follows: ‘ **the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.’**

See also the case of **Christopher Kitur Kipwambok vs Vipulratilal Dodhia & 3 others.**

In associating myself with these decisions, the legal provisions cited above as well as the evidence before me, I find that the Defendant is indeed the registered proprietor of land parcel number Kajiado/ Ol Choro Onyore/ 3295 but the Plaintiff as his wife has established she has acquired beneficial interest thereon as she contributed to its development. On the issue of a permanent injunction, I note the suit land is where the Plaintiff and Defendant’s matrimonial home is situated. In line with the principles enshrined in the celebrated case of **Giella v Cassman Brown Co. Ltd 1973 E.A. 358**, I will proceed to decipher whether the Plaintiff has established a prima facie case to warrant the orders sought. Since the Plaintiff resides on the suit land and explained that she contributed to the developments thereon. Further, noting that the suit land was acquired during the subsistence of their marriage, but the Defendant has not sought to evict her therefrom and only sought to subdivide it between herself and the second wife’s family, I opine that she has not established a prima facie case as against the Defendant who is the current registered proprietor to warrant the said orders of a permanent injunction. The Defendant in his evidence confirmed he sought to subdivide the land and distribute to members of his family. It is against the foregoing that I find the Plaintiff has not proved her case on a balance of probability and will decline to grant the orders as sought in the Plaintiff.

As to whether the Defendant is entitled to orders sought in the counterclaim. The Defendant sought an order to be allowed to sub-divide land title No. KAJIADO/OLCHORO-ONYORE/3295 amongst his two families and costs. In his evidence, DW1 confirmed he was married to two wives but the second one is since deceased. He explained that the children from the second marriage are minors and he resides with them at Mathari. Further, it is well-wishers currently supporting them. The Plaintiff as PW1 insisted the suit land belongs to her and that the Defendant was not entitled to subdivide it. From the excerpt from the Matrimonial Property Act which I have cited above, I opine that since this was a polygamous union, then the Plaintiff and Defendant are entitled to share the same after which the Defendant can proceed to divide his share to the second family. From the evidence tendered in court, I note the suit land is eight (8) acres and since it was acquired during the subsistence of the marriage between the Plaintiff and the Defendant, and with the Defendant confirming that he wants to subdivide it and distribute to his two families, then it is my considered view that the same can be shared equally as I already held that the Plaintiff is only entitled to beneficial interest over it. It is against the foregoing that I find that the Defendant has actually proved his case as per the Counterclaim and will proceed to enter judgement in his favour.

Who should bear the costs of the suit.

I note the fulcrum of the dispute herein revolves around ownership of land between husband and wife. While associating myself with the principle as established in the case of **P V Patel v L P Patel [1965] EA 560** where the Court held that in matrimonial proceedings except where it is shown that a wife has a sufficient separate estate, she will not be condemned to bear the costs of the suit and in this instance the Plaintiff having not demonstrated that she held a separate estate, I will direct that each party bears their own costs.

It is against the foregoing that I proceed to make the following final orders:

- i. The Plaintiff’s suit be and is hereby dismissed.
- ii. The Defendant be and is hereby directed to subdivide and transfer a half a portion of land parcel number Kajiado/ Ol Choro Onyore/ 3295 to the Plaintiff within Ninety (90) days from the date hereof, failure of which the Land Registrar, Kajiado North will be at liberty to register the Plaintiff as the proprietor of the said parcel of land.
- iii. Each Party to bear their own costs.

DATED SIGNED AND DELIVERED AT KAJIADO THIS 18TH DAY OF MAY, 2021.

CHRISTINE OCHIENG

JUDGE