



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 10 OF 2017

JOYCE MUTETHYA KIMANTHI.....APPELLANT

VERSUS

TIMOTHY KIMANZI KIIVA.....1ST RESPONDENT

JOSIAH MALOMBE KIMANZI.....2ND RESPONDENT

JOYCE KAVISI MALOMBE.....3RD RESPONDENT

(Being an Appeal against the Judgment and Decree of the Chief Magistrate's Court at Kitui in CMCC No. 298 of 2005 by

Hon. Mrs. M. Murage, CM and delivered on 2nd June, 2016)

JUDGMENT

1. By an Amended Complaint dated 23rd August, 2007, the Appellant herein sought for the following orders in the lower court:

a. A declaration that the 1st Defendant holds title to land parcel numbers Matinyani/Kalimani/231, Matinyani/Kalimani/224 and Kyangwithya/Tungutu/1153 in trust to the Plaintiff.

b. A mandatory injunction directing the 1st Defendant to transfer undivided shares in land parcels numbers Matinyani/Kalimani/231, Matinyani/Kalimani/224 and Kyangwithya/Tungutu/1153 to the Plaintiff.

c. A mandatory injunction directing the 2nd and 3rd Defendants to transfer undivided shares in land parcels numbers Matinyani/Kalimani/899 to the Plaintiff and 1st Defendant.

d. Costs of the suit; and interest.

2. In her Judgment of 2nd June, 2016, the trial Magistrate held that the 1st Defendant was the absolute proprietor of the suit properties. In respect of parcel of land number Kyangwithya/Tungutu/1153, the trial Magistrate held that the Plaintiff (*the Appellant*) was aware of the litigation involving the same parcel of land in CMCC No. 58 of 2015 hence the Appellant should pursue the remedy in that suit.

3. As regards parcels of land Matinyani/Kalimani/231 and 224, the trial Magistrate held that the 1st Defendant held the two parcels of land in trust for both families and that it was unjust and unfair to disregard the second wife who would be made destitute for being a non-party in the suit. The trial Magistrate ordered the 1st Defendant to transfer half share of the parcel of land number Matinyani/Kalimani/224 in favour of the Appellant.

4. As regards the mandatory injunction sought by the Appellant, the trial Magistrate held that the 2nd and 3rd Defendants were *bona fide* purchasers for value. The trial Magistrate dismissed the Petitioner's suit.

5. Aggrieved by the trial Magistrate's Judgment, the Appellant has filed an Appeal on the following grounds:

a. That the learned Magistrate erred in law and in fact in failing to find that the court lacked jurisdiction to hear and determine the matter on land on the basis of value and legal issues raised.

b. That the learned Magistrate erred in law and in fact by failing to find that the properties are neither ancestral nor inherited as

they were acquired by the active contribution of the Plaintiff who upto date is the one in active possession and occupation of land parcels Matinyani/Kalimani/231, Matinyani/Kalimani/ 224, Matinyani/Kalimani/899 and Kyangwithya/Tungutu/ 1153.

c. That the learned Magistrate erred in law and in fact in failing to find that the lack of Sale Agreement and valid Land Control Board consent between the Defendants in respect of Matinyani/Kalimani/899 rendered the covenant between the Defendants void, invalid and illegal.

d. That the learned Magistrate erred in law and in fact in failing to find that the lack of Sale Agreement and valid Land Control Board consent between the Defendants in respect to Matinyani/Kalimani/899 rendered the covenant between the Defendants void, invalid and illegal.

e. That the learned Magistrate erred in law and in fact in failing to find that the lack of spousal consent by the Plaintiff in respect of Matinyani/Kalimani/899 rendered the transfer between the Defendants void, invalid and illegal.

f. That the learned Magistrate erred in law and in fact by finding that the 1st Defendant's second wife was entitled to rights, shares and interests in the spousal property which was solely acquired by the contribution and effort by the Plaintiff and the 1st Defendant prior to the alleged co-wife being married.

g. That the learned Magistrate erred in law and in fact by failing to find that the spousal interests are overriding interests and establish trust in matrimonial property and the learned trial Magistrate erred in law and in fact by failing to find that the property are neither ancestral nor inherited as they were acquired by the active contribution of the Plaintiff who upto date is the one in active possession and occupation of land parcels Matinyani/Kalimani/231, Matinyani/ Kalimani/224, Matinyani /Kalimani/899 and Kwangwithya/Tungutu/1153 cannot be conveyed without the consent of the Plaintiff as the spouse.

h. That the learned Magistrate erred in law and in fact by finding that it would be unfair to make an order which would render the second wife destitute yet there was no such claim or pleading for determination now was the co-wife party to the suit.

i. That the learned Magistrate erred in law and in fact by failing to find and hold that the 1st Defendant had been convicted of fraud involving matrimonial property and the land parcels.

j. That the learned Magistrate erred in law and in fact by disregarding the evidence of the Plaintiff and giving undue consideration to the Defendants testimony.

k. That the learned Magistrate erred in law and in fact by disregarding the authorities by the Plaintiff failing to apply the correct legal principles and doctrines giving undue consideration to the Defendants testimony.

6. The Appeal proceeded by way of written submissions. The Appellant's advocate submitted that the trial court heard this matter in 2016 when it did not have jurisdiction to handle the matter and that the 1st Defendant sold the parcels of land numbers Matinyani/Kalimani/899 and 1153 secretly without the consent of the Plaintiff and the consent of the Land Control Board. It was submitted that to circumvent the Plaintiff's consent, the 1st Defendant used to be accompanied by the second wife instead of the Plaintiff.

7. It was submitted that the learned Magistrate made findings on issues which were not in the pleadings; that the findings that the 1st Defendant held the suit land in trust for the Plaintiff and her co-wife was erroneous as there was no Counter-claim or any evidence in that regard and that the learned Magistrate was wrong to find that the Plaintiff's co-wife would be rendered destitute yet there was no evidence led in court of her contribution or acquisition or development of the suit properties.

8. It was submitted by the Appellant's advocate that the learned Magistrate failed to analyse the Plaintiff's evidence and the filed pleadings and gave undue consideration the Defendants' testimony. According to counsel, the trial court made findings in respect to which there was no Counter-claim as regards parcel of land No. Matinyani/Kalimani/231 and Matinyani/Kalimani/224.

9. Counsel submitted that the learned Magistrate took into consideration extraneous issues of co-wives and apportioned property to the house of the 1st Defendant yet this was not a succession cause and that the trial court failed to consider the key issue of contribution as a basis of the claim for matrimonial property.

10. On the Respondents' behalf, it was submitted that the Appellant did not demonstrate that the suit properties were acquired by the Appellant and the 1st Respondent through purchase and that there was no evidence to buttress the assertions that there was no Sale Agreement and a valid consent from the Land Control Board between the Defendants in respect of parcel of land Matinyani/Kalimani/899 hence void.

11. It was submitted that the 1st Respondent was the registered owner of parcel of land Matinyani/Kalimani/899 and that the requisite consent from the Land Control Board to sell the land to the 2nd and 3rd Defendants was obtained.

12. The Respondents urged that there was no evidence tendered in court to show that the Appellant contributed towards the acquisition of the suit properties; that the Appellant testified that her home is on land parcel number Matinyani/Kalimani/224 and that there was no evidence to show that parcel of land Matinyani/Kalimani/899 is used as a family home.

13. It was submitted that in light of the fact that parcel of land number Matinyani/Kalimani/899 was not a matrimonial property, the 1st

Respondent did not require the consent of the Appellant before transferring the same to the 2nd and 3rd Respondents. According to the Respondents, the Appeal lacks merit and should be dismissed with costs.

Analysis and findings:

14. The Appellant commenced a suit against the Respondent in the lower court vide a Plaint dated 29th July, 2005. The Plaint was subsequently amended on 23rd August, 2007. In the Plaint, the Appellant averred that she is the legal wife of the 1st Defendant having been married under the Kamba Customary Law in August, 1956.

15. It was the Appellant's case in the lower court that during the existence of the said marriage, they acquired several portions of land jointly with the 1st Respondent and that the said portions of land included Matinyani/Kalimani/231, 224, 899 and 1153.

16. The Appellant pleaded, and informed the trial court, that the said parcels of land are all registered in the names of the 1st Respondent to hold in trust for her and their issues of marriage; that they have established their matrimonial home on parcel of land known as Matinyani/Kalimani/224 and that the 1st Respondent does not have a legal right to dispose of the suit properties without her consent.

17. The Appellant informed the court that on or about 12th March, 2004, the 1st Respondent transferred to the 2nd and 3rd Respondents land parcel number Matinyani/Kalimani/899, and that the said transfer was fraudulent, and was executed by misrepresentation.

18. The Appellant's prayers in the lower court was to have the sale of parcel of land number 899 cancelled and for a declaration that the 1st Respondent holds parcels of land number 231, 224 and 1153 in trust for her.

19. In his Defence and testimony, the 1st Respondent informed the trial court that he married the Appellant in the year 1956. In 1970, he married his second wife with whom they have six (6) children, and that he bought all the four (4) parcels of land.

20. The 1st Respondent informed the court that he sold parcel of land number 899 in the year 2005 to pay school fees for one of his child who was in High School and that the negotiations for the sale of the land were undertaken in the presence of the Appellant and the clan members. The 1st Respondent denied having sold the land secretly.

21. After hearing the witnesses, the learned Magistrate found that indeed all the four (4) suit properties were purchased by the 1st Respondent who had two wives. In respect of land known as Kyangwithya/Tungutu/1153, the learned Magistrate found the said suit is a subject of CMCC No. 58 of 2015 in which there exist a consent Judgment.

22. The Appellant has not disputed in the Memorandum of Appeal that indeed parcel of land number Kyangwithya/Tungutu/1153 is a subject in CMCC No. 58 of 2015. That being the case, the Judgment of the lower court in respect of the said parcel of land cannot be faulted.

23. In respect of parcels of land known as Matinyani/Kalimani/231 and 224, the court found that the Appellant occupies parcel number 224 while her co-wife occupies parcel number 231. Indeed, this evidence came from the Appellant and the 1st Respondent.

24. Although the 1st Respondent's wife was not joined in the proceedings, the trial court could not close its eyes to the fact that the 1st Respondent had a second wife, with whom they had six (6) children. If indeed the 1st Respondent held the suit properties in trust for the Appellant, then he also held the same properties in trust for his second wife whom he married in the year 1976.

25. That being so, the learned Magistrate cannot be faulted for holding that it would be unfair to make any order which will disregard the second wife and make her destitute just because she was not a party to the suit.

26. That being the case, and in view of the fact that the 1st Respondent's marriage to his second wife was never disputed by the Appellant, the learned Magistrate was right in holding that each wife of the 1st Respondent was entitled to claim for a share of the land on which they have settled. The Appellant cannot purport to disinherit her co-wife and children just because she did not sue the said co-wife.

27. In the circumstances, the findings by the learned Magistrate that the 1st Respondent should transfer to the Appellant half share of parcel of land number Matinyani/Kalimani/224 but not parcel number 231 where the second wife resides was apt.

28. In respect to the sale of parcel of land number Matinyani/Kalimani/899 to the 1st Respondent, the learned Magistrate found as a fact that the sale of the said land was done on the basis of a valid Sale Agreement and after the parties obtained the consent of the Board. According to the learned Magistrate, the Appellant did not prove that the said land was sold fraudulently.

29. Although the Appellant has argued that the sale of parcel of land number Matinyani/Kalimani/899 was done without a spousal consent, the law that was in force at the time of the said sale did not provide for a spousal consent as an overriding interest over land.

30. Indeed, under the Registered Land Act (*repealed*), the consent of the spouse was not required before a spouse could sale land that is registered in his or her name. However, under Section 26 of the Act, the concept of trust as an overriding interest was recognized.

31. The 1st Respondent having settled the Appellant on parcel of land number Matinyani/Kalimani/224, and in view of the fact that the 1st Respondent required money to pay school fees for his children, he cannot be faulted for having sold parcel of land known as

Matinyani/Kalimani/899. The Appellant did not prove that the 1st Respondent held the said land in trust for her.

32. The last issue I will consider is whether the learned Magistrate had jurisdiction to determine the dispute. The issue of whether the Magistrate had jurisdiction or not was not raised at all during trial. Indeed, if the Magistrate did not have jurisdiction, then the Appellant's suit should have been dismissed anyway for want of jurisdiction.

33. Considering that this suit was filed in the year 2005, it follows that the applicable law on the issue of jurisdiction is the Registered Land Act and the Magistrates' Courts Act, and not the Environment and Land Court Act which came into operation in the year 2011.

34. Section 159 of the Registered Land Act (*repealed*) granted Magistrate's Courts jurisdiction to hear land matters in the following terms:

“159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.”

35. No evidence was placed before the trial court to show that the value of the suit properties exceeded twenty five pounds. That being so, and in view of the provisions of the Registered Land Act (*repealed*) which was the operative law as at the time the suit was filed, it is my finding that the subordinate court had jurisdiction to hear and determine the dispute.

36. Having considered the evidence that was adduced in the lower court in its totality, it is my finding that this Appeal is not meritorious. The Appeal is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF JULY, 2021.

O. A. ANGOTE

JUDGE