



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 2 OF 2017

GRACE WANJA MUCHEMI.....APPLICANT

-VERSUS-

PAUL GITONGA MURIUKI.....RESPONDENT

JUDGMENT

BACKGROUND

1. By the Originating Summons dated 12th January, 2017 as filed herein on 13th January, 2017, Grace Wanja Muchemi (*the Applicant*) urges the court to determine some four questions framed as follows:

1. *Whether a declaration should issue to the effect that the Respondent is registered as owner of land parcel No. Kirimukuyu/Ngandu/857 and as trustee for the Applicant for the land and other family businesses;*
2. *Whether a declaration should issue to the effect that the Applicant has beneficial interest in land parcel No. Kirimukuyu/Ngandu/857 and other properties*
3. *Whether the Respondent should be restrained from dealing with the suit land without the (Applicant's) consent and the disposal for other matrimonial properties; and*
4. *Who should pay the costs of these proceedings.*

2. The Originating Summons which is supported by an affidavit sworn by the Applicant is premised on the grounds:

- (i) *That the Respondent – Paul Gitonga Muriuki is the Applicant's husband;*
- (ii) *That the Respondent is the registered proprietor of land parcel No. Kirimukuyu/Ngandu/857;*
- (iii) *That the parties bought the land jointly through their earnings from the joint family business;*
- (iv) *That the parties agreed that the property be registered in the Respondent's name;*
- (v) *That the Respondent is a trustee of the property both for himself and on behalf of the Applicant;*
- (vi) *That the property is matrimonial property where the parties do farming;*
- (vii) *That of late the Respondent has started selling the property behind the Applicant's back and has been dealing with the land and other family businesses secretly.*
- (viii) *That the Applicant has seen the Respondent bringing brokers to the suit land and the same is in danger of being disposed off;*
- (ix) *That the Applicant has requested the chairman of the Land Control Board Mathira West not to grant consent for any transaction over the land.*

(x) That the Applicant had acquired other properties with the Respondent over the years but from the year 2009, the Respondent started disposing off the same after entering into an extortion scheme in which he sends all his money to one Julius Miriti.

(xi) That the Respondent has sold the family's 3 cars and 3 prime properties worth millions of shillings and sent the proceeds thereof to the same strangers; and

(xii) That the Applicant holds a stake in the matrimonial property and has contributed to its acquisition and development.

3. Paul Gitonga Muriuki (*the Respondent*) is however opposed to the Applicant's prayers. In his Replying Affidavit sworn on 20th March, 2017, and filed herein on 21st March, 2017, he avers that he is the sole registered proprietor of L.R No. Kirimukuyu/Ngandu/857 measuring 0.405 Ha. having purchased the same in the year 2011 from his personal earnings without any input from the Applicant.

4. The Respondent further avers that the land in question is his individual property as the same was not procured from joint earnings and therefore does not amount to matrimonial property. He further avers that he has already sold the parcel of land to one Edward Njoroge Mwangi at a consideration of Kshs.1 million and that this suit has been maliciously instituted for the sole purpose of preventing the registration of the transfer into the purchaser's name.

THE APPLICANT'S CASE

5. At the trial herein the Applicant called a total of three witnesses who testified in support of her case.

6. PW1 – Grace Wanja Muchemi is the Applicant herself and the wife to the Respondent. She told the court that they have 3 children one of whom was still a minor with the Respondent and that they have been engaged in a water purification business together. PW1 told the court that she is the one who operates the shop from which they sell the water and that from the proceeds of the business, they had bought 3 parcels of land including the suit property together with some motor vehicles.

7. PW1 testified that the Respondent has since sold all the other properties and the motor vehicles and run down their business without her approval. She came to learn that the proceeds from the sale were being sent to one Julius Miriti via Mpesa to help the Respondent secure positions in the army for his relatives.

8. PW1 further testified that the Respondent's behaviour was unusual and they had sought treatment for him at two rehabilitation centres from where he was diagnosed to be suffering from depression. The only property the Respondent was yet to sell was the suit property. PW1 told the court that while the property is registered in her husband's name, the same was purchased from the proceeds of their joint business. She filed this suit after learning that there were people visiting the land as potential buyers and who were already harvesting the nappier grass therefrom.

9. PW 2 – Peter Muriuki Mahiga is a resident of Mathira West and the father to the Respondent. He told the court that the Applicant herein is his daughter –in-law.

10. PW2 testified that the suit property is registered in the Respondents name after he purchased it from his brother-in-law. He told the court his son purchased the land from the proceeds of the business which they run jointly with the Applicant in Nairobi and Karatina.

11. PW2 further told the court that sometime in the year 2009, he came to learn from his siblings and friends that the Respondent had entered into bad company and that he was now selling things and using money irrationally. There were some 5 to 6 conmen who had totally confused the Respondent. In a small span of time, the Respondent had sold all his 3 vehicles and withdrawn over Kshs.10 million from his water business account. The only property his son's family still had was the suit property and it is the wife who now runs the family business.

12. PW3 – Joseph Githinji Gikaria is a businessman in Karatina and a cousin of the Respondent. He told the court that sometime in the year 2009, the Respondent introduced him to some men who claimed to be army officers who could help recruit young men into the army at a fee. One of them was named Julius Miriti.

13. PW3 testified that he became suspicious of the men and tried to warn the Respondent from associating with them but the Respondent kept following them and giving them money. At one point, the Respondent sold his plot in Ruiru and was paid a sum of Kshs.3.5 million in the presence of PW3 who was a witness to the sale agreement. PW3 told the court he was later surprised to learn that the Respondent's wife and father were unaware of the transaction. When they accosted the Respondent and asked him what had happened to the money, he told them the property belonged to him and he could do as he wanted with it.

14. PW3 told the court they suspected that the Respondent had given the money to Miriti and the other strangers as PW3 had once seen him forward a total of Kshs.160,000/- to the said Miriti. PW3 further told the court that the Respondent's behavior had changed over time and that one night, he observed him slaughter a chicken at midnight and practicing some strange things.

THE RESPONDENT'S CASE

15. Despite filing a response to the Originating Summons, the Respondent did not attend court on the date slated for the hearing and thus called no evidence in support of his case.

ANALYSIS AND DETERMINATION

16. I have carefully considered the pleadings filed herein, the testimonies of the Applicant's witnesses and the evidence adduced at the trial. I have equally considered the submissions and authorities placed before the court by Ms Thungu, Learned Counsel for the Applicant.

17. The Applicant herein is the sole wife to the Respondent. It is her contention that in the course of their union with the Respondent, they did acquire jointly all that parcel of land known as Kirimikuyu/Ngandu/857 even though they did agree that the same be registered solely in the name of the Respondent.

18. It is the Applicant's case that since the year 2009, the Respondent has developed a tendency of unilaterally disposing off their properties. In that respect, she is now apprehensive that the Respondent may proceed in the same manner to dispose off the suit property thereby leaving her and their three children destitute.

19. Accordingly and on the basis of the said joint acquisition, the Applicant urges this court to declare that she has a beneficial interest in the suit property and that the Respondent was registered as proprietor of the same as a trustee for herself and family. It is further her prayer that if the court determines that she has such beneficial interest in the suit land, then the Respondent should be restrained from dealing therewith without her consent as a spouse.

20. In support of her case, the Applicant testified that together with her Respondent husband, they run some three businesses namely, Learners Hub Bookshop at Karatina, Aberdare Range Brand Mineral Water Company as well as Kaiaba Grocery Shop situated at River Road in Nairobi. She told the court that she has been married to the Respondent since 1993 and that they have been blessed with three children one of whom was still a minor.

21. Out of running the said businesses with her husband, the Applicant told the court they had acquired various properties including 3 motor vehicles and several parcels of land. The suit property was one of the parcels of land they acquired together and since the Respondent had been selling off their properties without consultation, she was apprehensive that the suit property would go the same way.

22. The Applicant's position was supported by the testimony of her father-in-law (DW 2) and that of a cousin of the Respondent (DW 3). Her two witnesses corroborated her testimony that the Respondent and herself ran joint businesses out of whose proceeds they had acquired various properties. In that respect, the Respondent's father told the court that his son had of late developed some erratic behavior and that efforts to have him treated had not yielded any fruit. DW2 was equally apprehensive that given his son's recent tendencies, he was about to sell off all the properties they jointly acquired with the Applicant and thereby leave the family destitute.

23. While the Respondent did not testify at the trial herein having absented himself from the court on the date fixed for hearing, he did file a Replying Affidavit herein in which he disputed the fact that the suit property was jointly acquired. It was his case that he had solely acquired the said property in the year 2011 and that he was free to deal therewith in any manner that he deemed appropriate.

24. In response to the Applicant's contention that he intended to sell the property, the Respondent replies in the said affidavit that he had already sold the land in question at a consideration of Kshs.1,000,000/- and that all that remained was to have the same transferred to the name of the purchaser.

25. As it were, the Respondent did not testify herein. While he insists in the Replying Affidavit that he bought the suit property solely from his own funds, he does not indicate what he does in life apart from running the businesses which his family told the court they do jointly. In the absence of evidence of a separate account or source of income from which he got the funds to acquire the suit property, it was difficult to disbelieve the corroborating evidence of his own father and cousin that the sole source of the funds was the joint family business.

26. In that respect, **Section 93 of the Land Registration Act, 2012** provides thus:

“(1) Subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or, all the spouses –

(a) There shall be a presumption that the spouses shall hold the land as joint tenants unless –

(i) a provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in, his or her name only, or that the spouses are taking the land as joint tenants; or

(ii) the presumption is rebutted in the manner stated in this subsection; and

(b) The Registrar shall register the spouses as joint tenants.

(2) If the land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered.”

27. The Respondent herein did not in fact deny the contention by the Applicant that since the acquisition of the property, the family, including the Applicant spouse have been using the same for cultivation and other farming activities. The applicant had therefore clearly contributed to the acquisition of the property not only by participating in the running of the joint family businesses but had also contributed by her labour in improving the same. I am therefore persuaded that she had acquired an interest in the land even though the same were not registered.

28. It was further clear to me that by dint of the provisions of **Section 12(1) of the Matrimonial Property Act**, “**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 sales gift, lease, mortgage or otherwise.**” The Respondent herein does not dispute that he is married to the Applicant. Nor does he dispute that he attempted to dispose off the suit property without the consent of his spouse who is the Applicant herein.

29. In the premises, I am persuaded that the Applicant has proved her case to the required standard and that the suit before me has merit. Accordingly I hereby answer the Applicant’s questions in the Originating Summons in the affirmative and make orders as follows:

- 1. A declaration is hereby made to the effect that the Respondent is registered as the proprietor of land parcel No. Kirimukuyu/Ngandu/857 as a trustee for the Applicant.*
- 2. A declaration is hereby issued to the effect that the Applicant has a beneficial interest in land parcel No. Kirimukuyu/Ngandu/857.*
- 3. A permanent order of injunction is hereby issued restraining the Defendant from dealing with all that parcel of land known as Kirimukuyu/Ngandu/857 without the consent of the Applicant.*
- 4. As the parties herein are family I make no order as to costs.*

DATED, SIGNED AND DELIVERED AT NYERI THIS 18TH DAY OF NOVEMBER, 2021.

In the presence of:

Mrs. Wahome holding brief for Ms. Ann Thungu for the Plaintiff

No appearance for the Respondent

Court assistant – Wario

J. O. Olola

JUDGE