



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 781 OF 2017**

**NNK.....PLAINTIFF**

**VERSUS**

**JNK.....DEFENDANT**

**JUDGMENT**

By a Plaint dated **28<sup>th</sup> September 2017**, the Plaintiff brought this suit against the Defendant seeking for orders that;

- a) A permanent injunction be issued against the Defendant restraining him, his agents, servants and/ or any other persons claiming through the Defendant from alienating, selling or in any way disposing or taking possession of L.R Ruiru/Ruiru east Block x (Githunguri) xxxx or at all.***
- b) An injunction order prohibiting the Defendant from interfering with the Plaintiff and the children's quiet possession of L.R Ruiru/Ruiru East Block x (Githunguri) xxxx.***
- c) Cost be met by the Defendant.***

In her statement of Claim, the Plaintiff averred that she was married to the Defendant on **4<sup>th</sup> June 1983** at [particulars withheld] Catholic Parish and they were blessed with three children who are now adults. She further averred that the Defendant and herself jointly purchased the suit property and were registered as co-owners. She contended that the Defendant has purported to subdivide the suit premises and sell to third parties without her consent despite the fact that it is their matrimonial home. She urged the Court to allow her prayers as sought.

The suit is contested and the Defendant filed a Defence and Counter Claim and sought for the following orders in his Counter Claim.

- a) That the Land Parcel No. Ruiru/Ruiru East Block x (Githunguri) xxxx, be subdivided into two between the Plaintiff and the Defendant in a manner that the Plaintiff to hold plots No. A,B,C,F and G and the Defendant to hold Plot No. D,E,H,J and K and each party to meet the cost of acquiring their respective title to his/her won portion.***
- b) That the restriction registered on Land Parcel No. Ruiru/Ruiru East Block x (Githunguri) xxxx, on 22<sup>nd</sup> May 2017, be removed or deregistered forthwith and any other encumbrance placed thereon.***
- c) That the Plaintiff be condemned to pay the cost of this suit.***

In his Statement of Defence, the Defendant denied the allegations made in the Plaint and further denied that the Plaintiff contributed towards the purchase and acquisition of the suit property. However, he admitted that the same is jointly registered between the two of them. It was his contention that as a registered owner, he equally has rights over the suit property and further contended that the suit is frivolous, vexatious and raises no triable issue.

Further in his Counter claim, the Defendant reiterated the Contents in his Defence and averred that since the suit property is registered between the Plaintiff and himself in equal shares, the same translates that each party holding the land in half share and that it should be subdivided into two equal portions so that each party can have his/her own entitlement. He further averred that the suit property has already been subdivided into 10 plots and each party occupies and farms on his/ her distinctive known portion and in equal share and the same are enumerated so that the plaintiff acquires plots No. A, B, C, F and G while the Defendant acquires plots No. D, E, H, J. Further that since the suit property is matrimonial property, the same should be subdivided jointly between the parties. He further averred that the fact that the Plaintiff has refused to sign mutations forms has frustrated his efforts, Further that he owns another property which is ancestral land and his children are entitled to it. It was his contention that the Plaintiff has illegally lodged a restriction and urged the Court to allow his claim.

Though the Defendant entered appearance and filed a Defence and Counter Claim, he did not testify and only the Plaintiff testified for

herself and closed her case.

## **PLAINTIFF'S CASE**

**PW1 ANK** adopted her witness statement dated **9<sup>th</sup> October 2017**, and further testified that the suit property holds a matrimonial home and that there was intention of developing the rest of the plot in future. Further that the property was in joint names of the Defendant and Plaintiff. It was her testimony that she bought the land and that she has been doing domestic farming.

It was her testimony that she is a teacher and had been staying in school. However at some point, she saw people depositing building material on the subdivided land when she visited her matrimonial home. That they told her they had bought the said land from her husband who is the Defendant herein. However, the purchasers did not have any title deeds. She further testified that though she had two adult children who were married, the suit land is matrimonial home and that she would wish to give some portion of it to their children. She further testified that her husband was alcoholic and allowing him to keep half of the suit property would only result in him selling it to buy alcohol.

It was her further testimony that though her husband moved to the servants quarter, they are not divorced and that she still thought that the property could be salvaged. She stated that her husband owns another land in Othaya and that the title deed is in his name but has leased it to his family and that he gets some money which is enough for his upkeep. Further that the suit property is the only matrimonial home and they have no other. That she did not feel insecure in her own Compound and urged the Court to order the purchasers to move out.

The Plaintiff filed written submissions which the Court has now carefully read and considered. The issue for determination is ***whether the Plaintiff is entitled to the orders sought.***

Though the Defendant filed a defence, he did not adduce any evidence in support of his claim and therefore all the averments in his Defence and Counter Claim remain mere allegations as averments in pleadings are not evidence. The Plaintiff's evidence remains uncontroverted. In the case of **Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR, the Court cited the case of Janet Kaphiphe Ouma & Ano....Vs...Marie Stopes International (Kenya), Kisumu HCC No.68 of 2007,** and held that:-

***“In this matter apart from filing its statement of Defence, the defendant did not adduce any evidence in support of assertions made therein . The evidence of the 1<sup>st</sup> Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations....Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same.”***

Though the Defendant did not appear in court to give evidence and challenge the plaintiff's evidence, the plaintiff still had a duty of prove her case on the required standard.

It is not in doubt that the suit property is registered in the names of both the Plaintiff and the Defendant. Being the registered owners of the suit properties they both have equal rights and interest over the suit property. The Plaintiff has further averred that the suit property is matrimonial property and though the Defendant had acknowledged the said fact, he had alleged that there was another ancestral property that would act as a matrimonial property. However, no evidence was adduced in Court by the Defendant and therefore the Plaintiff's contention remain unchallenged. It is presumed that if a property is owned jointly , then the parties made equal contributions. See the case of **K.N... Vs...M P N [2017] eKLR,** where the Court held that;

***“Where a property is registered, in the joint names of the parties, there is normally a presumption that each party made equal contribution towards its acquisition (See Kivuitu -v- Kivuitu, [1991] KLR 248. The presumption is however, rebuttable by either party showing that their contributions were not equal.... In determining the beneficial interest of cohabiters who are registered as joint owners of a property, it is the duty of the court to, first ascertain the parties' actual shared intentions whether expressed or inferred from their conduct and secondly, it must determine what, in all the circumstances is a fair sharing of what they acquired in the course of the union. See Stack V Dowden (supra) and Jones V Kernott, Gissing V Gissing (1971) AC 866***

Further it is not clear whether the suit land is jointly owned or owned in Common as what was presented as proof of ownership was an official search. However, that did not indicate the nature of ownership. However, given that the land is matrimonial property, it is safe to presume that the property is held jointly. See the case of **Moses Bii ...Vs... Kericho District Land Registrar & another [2015] eKLR** where the Court held that;

***“My view is that if the register does not reflect whether land is held jointly or in common, the fallback position should be to presume that the land is held in common. Joint proprietorship, where the same has not been explicitly indicated, should only be presumed in the clearest of circumstances, where there can be no shred of doubt that the contemplation of the parties was to have the property held jointly. I for myself cannot think of such a state of affairs other than where the proprietors are spouses, though I cannot rule out other situations, but they really must be so clear as to obviate debate on it.”***

However, whether the land is held in Common or is Jointly owned, the only difference between the two would be the issue of survivorship. In this instant, it is not in doubt that both parties held interests and rights over the Suit property and therefore, they both have rights and interests over the suit property. Further, unless the same is severed, the parties are to consult each other before any dealings with the suit property.

**Section 91 of the Land Registration Act** provides;

***(1) In this Act, Co-tenancy means the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common.***

*(4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—*

*(a) dispositions may be made only by all the joint tenants;*

*(b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; or*

*(c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.*

*(5) If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.*

*(6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.*

From the above provision of law, it means that if land is co-owned, one co-owner cannot deal with the suit property without the consent of the other as no one co-owner has a better right than the other. The Plaintiff has alleged that the Defendant did sell part of the suit property without consulting her. That is contrary to what is expected of the co-owner. Therefore, the court finds that the Defendant has no right to deal with the suit property which is co-owned with the Plaintiff without her consent, The Court further finds and holds that no one owner has a superior right to the other. Further the law requires that if the Defendant needed to deal with the land, he ought to have sought the consent of the Plaintiff before he could have any dealings with the suit land. However, such consent should not be unnecessarily withheld, but the same must be sought.

It is not in doubt that the Defendant disposed of part of the suit property without the consent of the Plaintiff and consequently the court finds that the Plaintiff is entitled to the orders sought in the Plaintiff.

Having now carefully considered and evaluated the available evidence and the exhibits thereto, the written submissions, cited authorities and the relevant provisions of law, the Court finds that the Plaintiff has proved her case on the required standard of balance of probabilities.

For the above reasons the Court enters Judgment for the Plaintiff against the Defendant entirely as stated in the Plaintiff dated **28<sup>th</sup> September 2017**, in terms of prayers No **(a)** & **(b)** with costs to the Plaintiff.

*It is so ordered.*

**Dated, signed and Delivered at Thika this 15<sup>th</sup> day of June 2020**

**L. GACHERU**

**JUDGE**

**15/6/2020**

**Court Assistant - Jackline**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**By Consent of :**

**None for the Plaintiff**

**None for the 1<sup>st</sup> Defendant**

**None for the 2<sup>nd</sup> Defendant**

**L. GACHERU**

**JUDGE**

**15/6/2020**