



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 40 OF 2011

ANNAH KAKUVI MWANIAPLAINTIFF

VERSUS

ALPHONCE MBITHI MALOMBE1ST DEFENDANT

SOLOMON KYALO MUTISO.....2ND DEFENDANT

KYALO ISIKA3RD DEFENDANT

JUDGMENT

Introduction:

1. In the Complaint dated 17th February, 2011, the Plaintiff averred that at all material times, she was the second wife of the 1st Defendant having been married under the Kamba customary law in the year 1983.
2. According to the Plaintiff, during the marriage, she was working at Thika and that she gave to the 1st Defendant money to purchase parcel of land known as Mbiuni/Kabaa/1 from Muoka Munguti (*deceased*) and Ngati Munguti in the year 1993.
3. The Plaintiff averred in the Complaint that in the year 1986, she gave to the 1st Defendant money to purchase another piece of land registered as Mbiuni/Kabaa/61 from Nzioka Kilai (*deceased*); Mbiuni/Kabaa/62 from Muia Kilai, Nzioka Kilai and Muia Kilai and that they fenced off the three parcels of land.
4. The Plaintiff averred that her, together with the 1st Defendant, put up their matrimonial home on land parcel number Mbiuni/Kabaa/62 while the remaining two portions of land were utilized for cultivation and grazing; that they agreed to have the three parcels of land registered in her favour (*Plaintiff*) and that she later on realized that the 1st Defendant had caused parcel number Mbiuni/Kabaa/62 to be registered in his name.
5. The Plaintiff finally averred that the other two parcels of land have never been transferred from the previous owners; that the 1st Defendant later moved to Kangundo where he started living with his first wife in the year 2003 and that in December, 2010, the 2nd and 3rd Defendants began interfering with the parcels numbers Mbiuni/Kabaa/1 and 62 claiming that they had purchased the same from the 1st Defendant.
6. In the Complaint, the Plaintiff has sought for the following orders:
 - a. A declaration that land parcel number Mbiuni/Kabaa/1, Mbiuni/Kabaa/61 and Mbiuni/Kabaa/62 are all family lands and the 1st Defendant held Title to land parcel number Mbiuni /Kabaa/62 for the benefit of both himself and the Plaintiff and the 1st Defendant is also a beneficial trustee of land parcel number Mbiuni/Kabaa/61 and Mbiuni/Kabaa/1 for the benefit of both the 1st Defendant and the Plaintiff.*
 - b. A declaration that the secret sale and transfer of land parcel number Mbiuni/Kabaa/62 by the 1st Defendant to the 2nd Defendant is illegal null and void ab-initio and the Title Deed issued in the name of the 2nd Defendant be revoked and the Machakos Land Registrar be ordered to register land parcels number Mbiuni/Kabaa/62 in the joint names of the Plaintiff and the 1st Defendant.*
 - c. A declaration that the sale of land parcel number Mbiuni/Kabaa/1 by the 1st Defendant to the 3rd Defendant and*

Mbiuni/Kabaa/61 to any other person whatsoever by the 1st Defendant or any other person acting under him in any manner whatsoever is illegal, null and void and incapable of taking effect.

d. A permanent order of injunction restraining the 1st, 2nd and 3rd Defendants either by themselves, agents, servants, employees from selling, charging, transferring, entering upon, remaining thereon, clearing natural vegetation, sub-dividing, fencing, grazing, putting up houses/structures evicting the Plaintiff or in any other way interfering with Plaintiff's quiet possession and occupation of land parcel numbers Mbiuni/Kabaa/1, Mbiuni/Kabaa/61 and Mbiuni/Kabaa/62.

e. Costs of the suit and interest.

7. The 1st and 2nd Defendants entered appearance through their advocate on 15th March, 2011 and filed a Defence on 27th October, 2011. In their Defence, the 1st and 2nd Defendants averred that parcels of land number Mbiuni/Kabaa/61 and 62 belonged to the 1st Defendant and that the Tribunal held as much. The 3rd Defendant filed a Defence in which he generally denied all the averments in the Plaintiff.

8. Although the Defendants' advocates were served with the hearing notice for 15th October, 2019, neither the Defendants nor their advocates were in attendance on the said date. The matter proceeded for hearing in the absence of the Defendants.

9. The Plaintiff, PW1, informed the court that she is the second wife of the 1st Defendant having been married under the Kamba customary law in the year 1983; that during the pendency of the marriage, she used to work in Thika and that she gave to the 1st Defendant money to purchase parcels of land Known as Mbiuni/Kabaa/1, 61 and 62, which parcels of land bordered each other.

10. PW1 testified that upon purchase of the said parcels of land, the sellers gave them vacant possession of the same and that she put up a matrimonial home on parcel number 62 while the remaining parcels of land were used for cultivation and grazing purposes.

11. It was the evidence of PW1 that although they had agreed to have all the suit properties registered in her name, the 1st Defendant caused the parcel number Mbiuni/Kabaa/62 to be registered in his name; that she is the one in possession of the original Title Deeds and that when the 1st Defendant attempted to sell the three parcels of land, she sued him in Mwala Land Disputes Tribunal Case No. 20 of 2005.

12. PW1 stated that despite the Tribunal's Ruling in her favour, in the year 2010, the 1st Defendant secretly sold and transferred land parcel number Mbiuni/Kabaa/62 to the 2nd Defendant and that the suit properties are family lands. It was the evidence of PW1 that she no longer lives with the 1st Defendant and that the Defendants should be evicted from the land.

Submissions:

13. The Plaintiff's advocate submitted that the Plaintiff and the 1st Defendant got married sometime between 1983 and 1984 under Kamba customary law, and that the 1st Defendant has admitted that the Plaintiff was his third wife.

14. Counsel submitted that the marriage between the Plaintiff and the 1st Defendant has never been dissolved; that the Constitution of Kenya underscores that the family is the fundamental basis of Society which enjoys recognition and protection of the State and that under Article 45(3) of the Constitution, parties to a marriage are entitled to equal rights at the time of the marriage and at the dissolution of the marriage.

15. Counsel for the Plaintiff relied on the provisions of Section 93(3)(b) and 93(2) of the Land Registration Act provides that:

"93(b) Where a spouse who holds land or a dwelling house in his name undertakes individually a disposition in that land the transferee shall if that disposition is a transfer of land be under a duty to inquire of the transferor of whether the spouse(s) has consented to that transfer..."

93(2) If land is held in the name of one spouse only but the other spouse(s) contributes by their labour or other means to the productivity, upkeep and improvement of the land, that spouse (s) shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by spouse(s) shall be recognized in all cases as if they were registered".

16. It was submitted that from the Sale Agreements on record, the suit properties being Mbiuni/Kabaa/62 and Mbiuni/Kabaa/61 were purchased between 1986 and 1996 while Mbiuni/Kabaa/1 which was purchased from Muoka Munguti from 1983 up until 1985 when the Plaintiff and the Defendant were married and living together.

17. It was submitted that during the time of the purchase of these properties, the Plaintiff was working at Del Monte Kenya Limited in Thika; that the Plaintiff gave the 1st Defendant funds for the purchase of the suit properties and that a matrimonial home was built on Mbiuni/Kabaa/61.

18. Counsel submitted that under Section 2 of the Land Act, '*matrimonial home*' means any property that is owned or leased by one or both spouses and occupied by the spouses as their family home, and that although the Matrimonial Property Act came into effect in 2013, it also defines '*matrimonial home*' as any property that is owned and leased by one or both spouses and occupied or utilized by the spouses as their family home.

19. It was submitted that there is no doubt that the suit properties were acquired during the subsistence of the marriage between the Plaintiff and the 1st Defendant and that for all practical purposes, the suit properties herein are matrimonial properties and the house erected on it was a matrimonial home.

20. Counsel relied on the case of *C.M.N vs. A.W.M, ELC Nairobi No.208 of 2012 (2013) eKLR* as cited in the case of *E.N.M vs. S.M.N & another [2017] eKLR* where the court held that:

“However the legal landscape has since changed so that it is no longer a question of how much each spouse contributed towards the purchase of the matrimonial property which matters. Essentially the foregoing legal provisions seek to change the previously prevailing positions in which the Court considered the level of financial contribution made by each spouse. The legal provision in force now requires the Court to apply the principle of equality instead...”

21. The Plaintiff’s counsel finally submitted that although land known as Mbiuni/Kabaa/62 is registered in the name of the 2nd Defendant, and to which the original title is with the Plaintiff, and Mbiuni/Kabaa/61 and Mbiuni/Kabaa/1 being in the names of the previous owners since a transfer was never done, the said properties as per Section 93(2) of the Land Act, are matrimonial properties and that the Plaintiff has spousal interest over the same.

22. Counsel submitted that before any disposition of the suit properties, the spousal consent was required; that the Plaintiff in her witness statement denies ever consenting to the transfer of the suit properties and that to the extent that that was not done, the transfer of the suit properties to the 2nd and 3rd Defendants is null and void *ab initio*.

23. Counsel submitted that the 2nd and 3rd Defendants do not possess valid legal titles and that no titles passed from the 1st Defendant to the 2nd and 3rd Defendants.

Analysis and findings:

24. The Plaintiff’s claim is that she was married to the 1st Defendant under Kamba customary law, and that during the subsistence of the said marriage, she gave to the 1st Defendant money to purchase three parcels of land, namely: Mbiuni/Kabaa/1, 61 and 62.

25. According to the Plaintiff, she built their matrimonial home on parcel number 62 while the remaining two parcels of land were used for cultivation and grazing purposes. The Plaintiff has sought for an order that the three parcels of land are all family lands; that the 1st Defendant holds title to land parcel number Mbiuni/Kabaa/62 for the benefit of both himself and the Plaintiff and that the 1st Defendant is a trustee of parcel numbers 61 and 62.

26. The documents produced in evidence by the Plaintiff shows that the 1st Defendant was registered as the proprietor of land known as Mbiuni/Kabaa/62 on 22nd October, 21997. The said land was registered under the provisions of the Registered Land Act (*repealed*).

27. The official search produced in evidence by PW1 shows that parcel of land known as Mbiuni/Kabaa/62 was transferred to the 2nd Defendant on 16th December, 2010. The 2nd Defendant was then issued with a Title Deed for the said land on 24th December, 2010.

28. Considering that the suit properties, and in particular parcel of land known as Mbiuni/Kabaa/61 and 62 were registered in the name of the 2nd and 3rd Defendants under the Registered Land Act in the year 1997 and 2010 respectively, the applicable law is the Registered Land Act (*repealed*) and not the Land Registration Act or the Land Act.

29. The Plaintiff’s case is that being a spouse of the 1st Defendant, and having wholly contributed to the purchase of the suit properties, the 1st Defendant held the titles to parcels of land known as Mbiuni/Kabaa/1, 61 and 62 in trust for himself and herself, and that the purported sale and transfer of the suit properties to the 2nd and 3rd Defendants without her consent should be nullified.

30. The Registered Land Act (*repealed*) recognized the concept of trust. Section 28 of the Act provides as follows:

“28. The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

31. The 1st Defendant did not rebut the Plaintiff’s evidence that he married the Plaintiff under the Kamba customary law, and that it is the Plaintiff who, during the subsistence of their marriage, gave him money to purchase the suit properties.

32. That being the case, the 1st Defendant could only have held the titles in respect to parcels of land number Mbiuni/Kabaa/1, 61 and 62 in trust for himself and the Plaintiff, and could not sell any of the three properties without the consent of the Plaintiff.

33. Having been registered as a trustee of the Plaintiff, the 1st Defendant had no title, in the absence of the Plaintiff's consent, to pass parcel of land known as Mbiuni/Kabaa/61 and 62 to the 2nd and 3rd Defendants respectively, or at all.

34. For those reasons, I find that the Plaintiff has proved her case on a balance of probability. The Plaintiff's Plaint dated 17th February, 2011 is therefore allowed as follows:

a. A declaration be and is hereby issued that land parcel number Mbiuni/Kabaa/1, Mbiuni/Kabaa/61 and Mbiuni/Kabaa/62 are all family lands and the 1st Defendant held Title to land parcel number Mbiuni /Kabaa/62 for the benefit of both himself and the Plaintiff and the 1st Defendant is also a beneficial trustee of land parcel number Mbiuni/Kabaa/61 and Mbiuni/Kabaa/1 for the benefit of both the 1st Defendant and the Plaintiff.

b. A declaration be and is hereby issued that the secret sale and transfer of land parcel number Mbiuni/Kabaa/62 by the 1st Defendant to the 2nd Defendant is illegal null and void ab-initio.

c. The Title Deed issued in the name of the 2nd Defendant be and is hereby revoked and the Machakos Land Registrar is ordered to register land parcels number Mbiuni/Kabaa/62 in the joint names of the Plaintiff and the 1st Defendant.

d. A declaration be and is hereby issued that the sale of land parcel number Mbiuni/Kabaa/1 by the 1st Defendant to the 3rd Defendant and Mbiuni/Kabaa/61 to any other person whatsoever by the 1st Defendant or any other person acting under him in any manner whatsoever is illegal, null and void and incapable of taking effect.

e. A permanent order of injunction be and is hereby issued restraining the 1st, 2nd and 3rd Defendants either by themselves, agents, servants, employees from selling, charging, transferring, entering upon, remaining thereon, clearing natural vegetation, sub-dividing, fencing, grazing, putting up houses/structures evicting the Plaintiff or in any other way interfering with Plaintiff's quiet possession and occupation of land parcel numbers Mbiuni/Kabaa/1, Mbiuni/Kabaa/61 and Mbiuni/Kabaa/62.

f. The 1st Defendant to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF SEPTEMBER, 2020.

O.A. ANGOTE

JUDGE