



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 297 OF 2017

MONICAH MUTIO MUNGUTIPLAINTIFF

VERSUS

PETER KIKUBI MUNGUTI1ST DEFENDANT

JONATHAN MUEMA MWANIA.....2ND DEFENDANT

RULING

1. In the Application dated 2nd October, 2017, the Defendants are seeking for the following orders:

- a. That suit herein filed on 11th July, 2017 be dismissed at this Honourable Court has no jurisdiction to determine this matter.***
- b. That in the alternative the suit be dismissed for being an abuse of the process of the court.***
- c. That costs of this Application and the suit be provided for.***

2. The Application is premised on the ground that the Plaintiff is seeking for a declaration that the suit property is a matrimonial property; that the jurisdiction of declaring a property a matrimonial property is for the High Court and not the Environment and Land Court and that the transfer of the suit property to the 2nd Defendant was ordered by the High Court in Succession Cause No. 261 of 2011.

3. According to the 1st Defendant's Affidavit, the suit land is not matrimonial land; that the suit land was originally registered in the name of their late mother, Katuva Munguti and that the Estate of the late Katuva sold 3.1 acres of the land to the 2nd Defendant.

4. It is the 1st Defendant's deposition that by the Rectified Certificate of Confirmation of Grant dated 12th November, 2015, the High Court ordered that the 3.1 acres of the suit land be transferred to the 2nd Defendant; that the Plaintiff never set aside the said order and that in any event, the Land Laws (*Amendment*) Act, 2016 did away with the issue of spousal consent.

5. In response, the Plaintiff deponed that she is married to the 1st Defendant; that through their marriage, their matrimonial home was located on a parcel of land known as Muthetheni/Nyaani/293 which was later sub-divided into parcel numbers 664 and 665 and that she has throughout her marriage occupied and tilled the suit land.

6. It is the Plaintiff's case that as at 11th June, 2014 when her husband and his brother, as the administrators of the Estate of Katuva Munguti, sold a portion of the suit land to the 2nd Defendant, the said land was already matrimonial property; that whether the property is matrimonial land or not is a question of fact that can only be determined on evidence and that the suit cannot be determined on the basis of an Application.

7. The Plaintiff finally deponed that in any case, this court having an equal status with the High Court can transfer the suit to the correct court.

8. In his submissions, the Defendants' advocate submitted that the jurisdiction of declaring a property a matrimonial property is for the High Court; that the Succession Act provides what an aggrieved Interested Party should do where it is alleged that a grant has been issued fraudulently and that it is the Succession Court that should address the issues raised by the Plaintiff.

9. In his submissions, the Plaintiff's advocate submitted that the Plaintiff is challenging the sale of a parcel of land known as Muthetheni/Nyaani/293 for being irregular, null and void; that the Matrimonial Property Act only provides for the procedure to be followed by a spouse in having a declaration of rights to a property declared and that no particular court is identified for that purpose.

10. In her Complaint dated 7th July, 2017, the Plaintiff averred that she is married to the 1st Defendant; that during the subsistence of their marriage, they acquired various parcels of land including Muthetheni/Nyaani/665 (*the suit land*) and that the suit land forms part of matrimonial property.

11. The Plaintiff further averred in the Complaint that in November, 2016, the 1st Defendant transferred to the 2nd Defendant the suit land and that the said sale was illegal, null and void. The Plaintiff is seeking for a declaration that the suit land was matrimonial property and for the cancellation of the title that was issued in respect of the suit land.

12. The Plaintiff's claim is that the suit land is matrimonial property, and as such the same could not have been transferred to the 2nd Defendant without her consent and the consent of the children of the marriage.

13. However, the 1st Defendant has exhibited a Rectified Certificate of Confirmation of a Grant in respect of the Estate of the late Katuva Munguti *alias* Anna Katuva Munguti. The said Certificate of Confirmation of a Grant was issued by the High Court in Machakos Succession Cause No. 261 of 2011 on 12th November, 2015.

14. The Rectified Certificate of Confirmation of a Grant that was issued in Succession Cause No. 261 of 2011 shows that 3.1 acres of Muthetheni/Nyaani/293 was part of the Estate of the late Katuva, and was transferred to the 2nd Defendant by an order of the court.

15. If indeed the said land was part of the matrimonial property and not the Estate of the late Katuva, then the Plaintiff's recourse is in having the order of the High Court in Succession Cause No. 261 of 2011 set aside. This court cannot, *vide* this suit, annul an order that was made by a court of concurrent jurisdiction.

16. In the circumstances, I am in agreement with the Defendants' submissions that the transfer of the suit land to the 2nd Defendant can only be nullified by the court in Machakos Succession Cause No. 261 of 2011 and not otherwise.

17. For those reasons, I strike out the Plaintiff's suit with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25TH DAY OF JANUARY, 2019.

O.A. ANGOTE

JUDGE