



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 59 OF 2015

ROSE WANJIRU NGARE.....PLAINTIFF

VERSUS

JULIUS NGARE MACHARIA.....DEFENDANT

JUDGMENT

A. INTRODUCTION

1. The Plaintiff filed this suit vide a plaint dated 12th May, 2015 and filed on even date praying for Judgment against the defendant for Orders;

a) A Declaration that the defendant holds Land Parcels Nos. KABARE/NJIKU/1049 and PLOT NO. 32 LOCK-UP KIMUNYE in trust for himself the plaintiff and their Children

b) Determination of the said trust in such a way that Land Parcel KABARE/NJIKU/1049 is shared equally among the plaintiff and the defendant and their 5 Children namely Charity Wachira Anthony Mwaniki Macharia, Caroline Karini, Samwe lChomba and Francis Kariuki in equal shares and/or in any other way the court may deem fit and just and Plot No. 32 LOCK-UP KIMUNYE to be registered jointly among the Plaintiff, defendant and their said 5 children and/or in any other way this Honourable Court may deem fit and just.

c) Any other relief this Honourable Court may deem fit and just to grant

d) Costs and interest of the suit at court rates

2. The parties herein vide a consent recorded before this Court on 28th September, 2016 reached a settlement with respect to the property Land Parcel No. **KABARE/NJIKU/1049**, where they agreed to share the same into portions giving the Plaintiff 13/4 acres and the defendant 1 acre. However, in respect to **Plot No. 32 LOCK-UP KIMUNYE**, the parties herein failed to reach a settlement and the same proceeding to hearing, thus the subject of this decision.

B. BACKGROUND

Plaintiff Case

3. The plaintiff Rose Wanjiru Ngari (PW1) testified as the only witness in support of her case. She stated that she got married to the defendant on 29th November, 1986 and together they were blessed five (5) issues of the marriage. She confirmed having reached a settlement with regard to Property **NO. KABARE/NJUKI/1049** and that the remaining issue is with respect to **PLOT NO. 32 LOCK-UP KIMUNYE** Market (hereinafter referred to as the subject property) which she alleges that she jointly acquired the same with the Defendant. It is her position that she contributed towards the acquisition of the subject property, in that they purchased the same from the proceeds of the farm No. KABARE/NJUKI/1049, where they used to do farming.

4. On being asked about plot No. 48 and 49 Divas-South Village, Kirinyaga County, she states that the said plots were registered in the name of the defendant and that the same were surrendered to their First Born daughter one Charity Wawira Ngari in return for her payment of school fees for other children.

5. Further she denied any knowledge of the alleged sale of **Plot No. 32 LOCK-UP KIMUNYE** to one Stephen Mburu. She states that the land is registered in the defendants name and she is not aware of any sale.

6. In respect to the defendant having another wife, she confirms knowledge of the same, however she alleges that the said woman came after

they had acquired **Plot NO. 32 LOCK-UP KIMUNYE** and therefore the same should be shared equally between herself and the defendant.

7. In support of her case she produced her list of documents, and relevant to the issue in question are the minutes from the Kirinyaga County Council dated 12th June, 1997 which converted the said Property from shelters into a Lock-up and placed the ownership in favour of the Defendant and the letter dated 4th November, 2016 from Lands Department, County Government of Kirinyaga confirming that the subject property was still registered in the defendants name with a caution registered in her favor.

Defendants Case

8. The defendant **Julius Ngari Macharia (DW1)** testified as the only witness in support of her case. He stated that he is a businessman and previously worked as a teacher before joining K.F.A. He testified that he got married to the plaintiff who is his first wife in the year 1983 and together they were blessed with five issue of the marriage and that he has married a second wife by the name Stella Kawira, whom together they were blessed with two issues of the marriage. He confirmed that they reached a settlement in respect to Land **Parcel No. KABARE/NJIKU** where they subdivided it in two portions, 13/4 for the plaintiff and 1 acre for him and his second wife.

9. In respect to **Plot No. 32 LOCK-UP KIMUNYE**, he states that he bought the same from one Gichori Makondu as a shelter and later converted it to a lock-up belonging to the County Council of Kirinyaga. He states that he build a stone structure in the property and that he bought the property without the contribution of the plaintiff.

10. In addition he states that he sold the subject property to one Stephen Mburu at a price of Ksh 500,000/= which amount has been paid in full and that Stephen Mburu is in occupation of the subject property and that he has in fact transferred the ownership to him. In support of this allegation, he produces the sale agreement and acknowledgement slip, however in respect to the transfer documents he states that he doesn't have any evidence to that effect.

11. Further, he states that he had another plot NO. 48 DIVA SOUTH measuring 30 by 90 feet which he transferred to the Plaintiff his first wife and another plot No. 49- DIVA SOUTH of equal measure which he transferred to his first born daughter in return for payment of school fees to other children.

12. In sum, he alleges that he acquired **Plot No. 32 Lock-up Kimunye** alone without the contribution of the Plaintiff and that he has in fact sold the subject property to one Stephen Mburu who has in fact paid him the entire purchase price and has in fact transferred the property to him.

Submissions

13. The plaintiff filed their submission dated 12th September, 2018 and filed on even date, reiterating the position that the subject property **Plot No. 32 LOCK-UP KIMUNYE** was acquired during the subsistence of their monogamous marriage between her and the defendant and that she contributed towards the acquisition of the subject property and thus entitled to equal shares.

14. Further she refuted the defendant allegations that the subject property has already been sold to one Stephen Mburu as alleged by the defendant, referring to the letter dated 4th November, 2016 from the Kirinyaga County Lands department confirming that the property is registered in the name of the defendant with a caution registered in her favour. And sought that the suit be allowed as prayed.

15. The defendant in his submissions has argued that the Court does not have the Jurisdiction to handle the matter as provided or under Article 62(2)(b) of the Constitution and section 13(2) of the Environment and Land Court Act, arguing that the issues raised should have been addressed in the HIGH Court/Lower Court under the Matrimonial Property Act adding that the Plaintiff Prayer (b) in the plaint does not find any support in Law.

C. ISSUES ARISING

The follows are the issues arising

- i) Whether the Court has Jurisdiction**
- ii) Whether the Plaintiff is legally married to the Defendant**
- iii) Whether the suit property is a Matrimonial Property?**
- iv) Whether the suit property was sold by the defendant.**
- v) Is the Plaintiff entitled to the prayers sought?**

D. ANALYSIS OF THE ISSUES

i) Whether the Court has Jurisdiction

16. **Article 162(2)(b)** of the Constitution states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, section 13 of the Environment and Land Court Act expounds on the jurisdiction of this

Court as follows:

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) Relating to land administration and management;

(d) relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

17. The Matrimonial Property Act 2013 at section 17 provides as follows:

“(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1) -

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

18. In interpreting the above section the Hon. Justice Nyamweya in **Jane Wambui Ngeru v Timothy Mwangi Ngeru [2015] e KLR** noted in this respect that -

“No particular Court is identified by the Act, and can therefore be any Court that has been given jurisdiction to hear matrimonial disputes. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3). The Marriage Act of 2014 in addition provides that the courts that will hear matrimonial causes arising under the Act are resident magistrate's courts and within the limits provided under the law as to their jurisdiction.

It is thus the current legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this Court. The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to land.”

19. This Court therefore adopts a similar position and finds that it has the Jurisdiction to adjudicate this matter as the same relates or involves land, and therefore the defendants submissions in this regard has no basis.

ii) Whether the Plaintiff is legally married to the Defendant.

20. It is not disputed from the evidence on record that the plaintiff and the defendant entered into marriage. The Certificate of Marriage adduced by the plaintiff is sufficient proof that indeed they entered into marriage under Customary law. From the marriage certificate, it indicates that the Plaintiff and the defendant married each other on the 29th November, 1986. The Defendant in his testimony stated that he married the Plaintiff in the year 1983 and together they have 5 issues of the marriage.

21. The Defendant further told the Court that he married a second wife by the name Stella Kawira under the customary marriage and together they have two issues of the marriage. However, he never told the Court the exact time he took in the second wife. The Plaintiff however in her testimony told the court that the Defendant has been staying with another woman for about eight (8) to ten (10) years that is from the time she was being re-examined in Court on 9/10 2018 by her advocate. Subtracting 10 years from 2018, means the defendant married the second wife in the year 2008 or thereabout.

22. The Court therefore is inclined to reach a finding that the plaintiff entered into a customary marriage with the defendant, which marriage still subsist to date, save for the addition of another wife by the Defendant in the year 2007/2008 thereabout making the marriage polygamous

ii). whether the suit property is a Matrimonial Property?

23. From the available Evidence, the remaining suit Property **Plot Number 32 LOCK-UP KIMUNYE** which is in dispute was acquired by the defendant on 12th June, 1997. This is evident from the Kirinyaga County Council Minutes produced by the plaintiff. It is during this period that the said property was converted from shelters to Lock-ups and the same issued to the Defendant by the Council. The said property is registered in the name of the Defendant to date.

24. The Plaintiff and Defendant having married in the year 1986 were still legally married in the year 1997, the Defendant alleged that he purchased the subject property solely without the contribution of the Plaintiff. However, the Plaintiff in her testimony stated that after her marriage to the Defendant, she worked in their farm **KABARE/NJIKU/1049** where they lived, in which they were able to raise money to purchase the **Plot Number 32 LOCK-UP KIMUNYE** through farming.

25. Section 6 of the Matrimonial Property Act, 2013 defines matrimonial property as follows

“For the purpose of this Act, matrimonial property means:-

a) The matrimonial home or homes

b) Household goods and effects in the matrimonial home or homes; or

c) Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage

26. Section 8 of the Matrimonial Property Act provides for the protection of Property Rights in a Polygamous marriage. Section 8(1)(a) provides-

“If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the

(a) Matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and...”

27. Section 12 of the Matrimonial Property Act provides for special provisions regarding Matrimonial Property, section 12(1) provides-

(1) 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 sale, gift, lease, mortgage or otherwise.

28. Section 14 of the Matrimonial Property Act on the other hand provides for the presumptions as to property acquired during marriage. Section 14(a) states-

Where matrimonial property is acquired during marriage—

(a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and

29. Therefore there is no doubt that the subject property herein was acquired during the subsistence of the marriage between the Plaintiff and the Defendant herein. Thus, for all practical purposes, the suit property herein is a matrimonial property based on the forgoing provisions of the law and the evidence adduced.

iii) Whether the plaintiff is entitled to equal share of the subject property

30. Although the Defendant denies that the suit property was a matrimonial property and that he acquired it solely without the contribution of the Plaintiff, it is not in doubt that at the time of purchase of the suit property the Plaintiff was his only wife and she must have contributed to the wellbeing of the family which is non-monetary and the Court has to take consideration of the same.

31. Ownership of matrimonial property is described under Section 7 of the Matrimonial Property Act as;-

“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

32. Section 9 of the Matrimonial Properties Act recognizes that both monetary and non-monetary contribution should be taken into account in determining contribution. The Act recognizes the equal status of spouses.

33. Contribution is defined by **Section 2 of Matrimonial Property Act** to mean monetary and non-monetary contribution. And non-monetary contribution includes:-

a. Domestic work and management of the matrimonial home;

b. Child care;

c. Companionship;

d. Management of family business or property; and

e. Farm work;

“Family business” means any business which-

a) is run for the benefit of the family by both spouses or either spouse; and

b) generates income or other resources wholly or part of which are for the benefit of the family;”

34. **Article 45 (3)** of the Constitution provides for the equal rights of parties to a marriage at the time of the marriage, during the marriage and at the dissolution of the marriage. **Article 60(1)(f)** provides for the elimination of gender discrimination in law, customs and practices related to land and property in land. The Court in the case of *C.M.N...Vs...A.W.M, ELC Nairobi No.208 of 2012 (2013) e KLR* 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 require the Court to apply the principle of equality instead.....”

35. The Court of Appeal in **MB O v J O O [2018] e KLR** in this regard noted that-

“It is necessary to state that in a marriage union, which is predicated on trust, no spouse anticipates that one day they will have to prove every contribution that they make to the marriage as that would negate the very essence of trust which is the cornerstone of marriage unions. The learned Judge having appreciated the appellant and the respondent were married for 18 years, and 15 of those years the appellant was in gainful employment; she constantly took loans, having found the only property that was acquired with joint efforts was the matrimonial home where the appellant was residing; the fact that the upon separation the respondent was able to purchase another home where he settled. For those reasons, we agree with counsel for the appellant that by virtue of a long period of occupation as a spouse, the appellant acquired beneficial interests therein; we also find for the same reasons the learned Judge erred by awarding the appellant a share of 30% of the house she has been in occupation and a mere 20% of the rental units which are in the same premises.”

36. In this case the Plaintiff has equally tendered documents showing that she has been repaying some loans jointly taken with the defendant and at most cases forced to repay the same alone. This Court in the circumstances is inclined to find that there was financial contribution from the plaintiff, including in the purchase of the suit property, even if the Plaintiff financial contribution could not be quantified, being a wife, she must have contributed to the upkeep and wellbeing of the family as envisaged in **of C.M.N...Vs...A.W.N** above.

37. The Court noting that the subject property was acquired in 1997 and registered in the name of the Defendant and that the acquisition was done during the subsistence of their monogamous marriage envisaged under the Matrimonial Property Act. The Court is therefore inclined to find that the Plaintiff is entitled to equal share of the subject property pursuant equality in marriage provided for under **Article 45(3)** of the Constitution.

iii) Whether the suit property was sold by the defendant.

38. It is apparent to the Court that the suit property herein was a matrimonial property. That being the case, the Plaintiff herein acquired an interest in the land, and thus the same is to be dealt with in accordance with the Matrimonial Property Act as envisaged under **Section 93** of the Land Registration Act, 2012, which provides-

“Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses and all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.”

39. **Section 12** of the Matrimonial Property Act provides for special provisions regarding Matrimonial Property, section 12(1) provides-

“(1)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 sale, gift, lease, mortgage or otherwise.”

40. Consequently, any dealings in terms of alienation with respect to the Subject property by the Defendant without the consent of the plaintiff is an illegality. The defendant alleges that he disposed of the said Property to one Stephen Ngumu Weru in the Year 2013. In support of his allegation he has produced a sale agreement and an acknowledgment slip attesting to the said sale. He also alleged that he has transferred the property, however he never tendered any evidence to that effect.

41. The Plaintiff on the other hand has disputed the said sale of the subject property alleging that the property is still in the ownership of the defendant. In support of her allegation, she tendered a letter dated 4th November, 2016 from the Ministry of Land, Housing and Urban

Development County Government of Kirinyaga confirming that the **Plot No. 32 LOCK UP KIMIUNYE** was registered under the defendant name with a caution registered in favor of the Plaintiff.

42. From the above evidence the Court is inclined to find that the subject property is still in the ownership of the Defendant, and that the said alleged sale by the defendant does not exist, this is buttressed by the fact that the said purchaser was not enjoined nor called as a witness in this matter.

iv) Is the Plaintiff entitled to the prayers sought?

43. The Plaintiff prayer that stands for determination is an order for declaration that the suit property herein **PLOT NO. 32 LOCK-UP KIMUNYE** is held by the Defendant in trust for himself and their children. The Court having reached a finding that the suit property herein was a matrimonial property held by the Defendant and that Plaintiff has spousal rights over the same under the Matrimonial Property Act is inclined to issue the prayer issued.

44. In the upshot, I am satisfied that the plaintiff has proved her claim against the defendant in a balance of probabilities. Consequently, judgment is entered in the following terms:

(a) A declaration that the defendant holds land parcel No. KABARE/NJUKU/1049 and PLOT NO. 32 LOCK-UP KIMUNYE in trust for himself, the plaintiff and their children.

(b) Determination of the said trust in such a way that land parcel NO. KABARE/NJUKU 1049 and plot NO. 32 LOCK-UP KIMUNYE 1049 is shared equally between the plaintiff and the defendant in equal shares.

(c) Each party to bear his own costs of this suit.

READ and SIGNED in open Court at Kerugoya this 15th day of February, 2019.

E.C. CHERONO

ELC JUDGE

15TH FEBRUARY, 2019

In the presence of:

1. Mr. Kagio holding brief for Wangechi Munene for Plaintiff – present
2. Mr. Ngigi for Defendant – present