



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 135 OF 2016

STELLA C. TALLAM.....1ST PLAINTIFF

LINDA ROTICH.....2ND PLAINTIFF

VERSUS

JOHN K ROTICH.....1ST DEFENDANT

GEORGE KIMANI KARIUKI.....2ND DEFENDANT

JUDGMENT

(1st plaintiff being wife to 1st defendant; 1st defendant disposing of land to the 2nd defendant without the consent of the 1st plaintiff; defendants not entering appearance and not filing any defence; Matrimonial Property Act providing that consent of spouse is mandatory in a disposition; sale nullified; property to revert back to the previous proprietorship with an entry that the 1st plaintiff has a beneficial interest as spouse).

1. This suit was commenced through a plaint which was filed on 21 April 2016 against one defendant, namely John K. Rotich. The 1st plaintiff averred that she is the wife of the said John K. Rotich whereas the 2nd plaintiff is his daughter. The suit as originally filed sought orders to have John K. Rotich restrained from selling, or dealing, in any way with the land parcels Nakuru Municipality/ Block 20/320 and the land described as Chagaiya Settlement Scheme Plot No. 172. The plaintiffs contended that the properties were acquired during the marriage between the 1st plaintiff and John K. Rotich but that Mr. Rotich was now negotiating to sell. It does appear that a sale was actually completed on 11 April 2016 for the property Nakuru Municipality/ Block 20/320, a few days before this suit was filed. Owing to this development, the plaintiffs amended their plaint to include the purchaser of the said property, one George Kimani Kariuki as 2nd defendant. Neither Mr. Rotich nor Mr. Kariuki entered appearance to this suit nor filed defence despite being duly served with summons to enter appearance. Neither did they appear at the hearing of this suit despite being duly served with the hearing notices. In this suit, the plaintiffs have asked for the following orders :-

(a) A declaration that the transfer and registration of the 2nd defendant as the proprietor of that parcel of land known as title number Nakuru Municipality Block 20/320 is invalid, null and void.

(b) An order to compel the Nakuru District Land Registrar to cancel the 2nd defendant's title to Nakuru Municipality Block 20/320 and register the 1st plaintiff, 1st defendant and their son Collins Kigen as joint proprietors of the land.

(c) An order compelling the 2nd defendant to vacate and give vacant possession of Nakuru Municipality Block 20/320 to the plaintiffs.

(d) A permanent injunction restraining the 1st defendant either by himself, his agents, servants, employees, tenants or otherwise howsoever from alienating, selling, gifting, charging and/or transferring Chagaiya Settlement Scheme Plot No. 172 or dealing with the said land in any manner whatsoever prejudicial to the plaintiff's interests.

(e) Costs of this suit.

(f) Any other relief that this Honourable Court may deem fit to grant.

2. In her evidence, the 1st plaintiff testified inter alia that she is the wife of John Rotich (the 1st defendant) whereas the 2nd plaintiff is his

daughter but from another mother. She testified that the land parcel Nakuru Municipality/ Block 20/ 320 was vacant land when it was allotted to them by the Government. The allotment letter came on 15 September 1992 in the name of John Rotich. They then developed a house together and rented it out to the 2nd defendant. All this time the title had not yet been processed. She testified that they agreed between herself and her husband that the title would be processed in her name, and her husband wrote a handwritten note and a letter dated 18 September 1998, to the Commissioner of Lands, asking him to process title in her name. She stated that the title was eventually processed in the year 2016 but it came out in the name of the 1st defendant. The 1st defendant then executed a transfer of the property to herself (1st plaintiff) , her son, and himself, jointly. It however appears that the same was never registered. She later did a search in April 2016 and found the land transferred to the 2nd defendant instead. On the other land in the plaint, she stated that it is Plot No. 172 in Timboroa, and measures over 100 acres, but the title is yet to be processed. She mentioned that her husband has sold most of it to different buyers and she produced one sale agreement with one Alice Chelimo Korir for 2 acres from land described in the agreement as Chegeta Settlement Scheme Plot No. 173. The agreement is dated 4 August 2015.

3. With the above evidence, the plaintiff closed her case.

4. I invited Mr. Konosi, learned counsel for the plaintiff to file written submissions which he did. I have considered these in my judgment. He inter alia referred me to Article 45 (3) of the Constitution; Section 28 (a) and 93 of the Land Registration Act, 2012; and Section 6 of the Matrimonial Property Act, 2013 and provided several authorities.

5. From the pleadings and evidence, this appears to be one of those sad cases where a husband sells property that was acquired during marriage without informing his spouse or without seeking her consent. In this case, the plaintiffs have sought orders over two properties, one being Nakuru Municipality/ Block 20/320 and the other being Plot No. 172 in Chegeta Settlement Scheme. I am afraid that I cannot make any orders over the land in Chegeta Settlement Scheme. Firstly, I have no document to show that this land is actually owned by the 1st defendant or the 1st plaintiff. If the plaintiffs could not access the documentation, there would have nothing easier than to call an officer from the Ministry of Lands and Settlement to give evidence on its ownership. Ownership of land especially that in a Settlement Scheme, is proved by tabling documentary evidence. I am afraid that oral evidence is not good enough in the circumstances. Secondly, the alleged buyers of this property have not been enjoined in this suit. It will not be fair to make orders that are adverse to a person who is not a party herein as that will be in breach of the rules of natural justice. In any event the agreement that has been displayed shows the land Chegeta Settlement Scheme Plot No. 173 and not Plot No. 172 as noted in the plaint. It is not therefore very clear to me which particular land is owned by the 1st defendant or which land the plaintiffs want orders over. Given the above, I will contain myself to the land parcel Nakuru Municipality/ Block 20/320 and reference hereinafter to “the suit property” or “the property” will be reference only to the land parcel Nakuru Municipality/ Block 20/320.

6. I am persuaded from the evidence tendered that the land parcel Nakuru Municipality/Block 20/320 was acquired during the marriage between the 1st plaintiff and the 1st defendant. The 1st plaintiff testified that she was in gainful employment, and has continued being in gainful employment, and that she, together with her husband, developed a house in this land although they did not reside here. This property to me constitutes matrimonial property as defined by Section 6 of the Matrimonial Property Act, which provides as follows :-

6. Meaning of matrimonial property

(1) For the purposes 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.

7. My view of the facts, is that the property falls within the definition of Section 6(1) (c), that is, immovable property jointly owned and acquired during the subsistence of the marriage, thus constituting matrimonial property. Although Mr. Konosi pointed me to Section 28 (a) of the Land Registration Act, this was repealed, thus not operative. The said Section provided for spousal rights as overriding interests. But it doesn't matter, the 1st plaintiff's rights are adequately protected by the Matrimonial Property Act. Under the said statute, matrimonial property is treated in a special manner. Section 12 (1) specifically bars the alienation of matrimonial property without the consent of the other spouse. The said provision is drawn as follows :-

12. Special provisions relating to matrimonial property

(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.

8. I do not need to belabour the above. In a monogamous marriage, one spouse cannot deal with an interest in matrimonial property without the consent of the other spouse. In our case, no consent was sought, or given, for the sale of the land parcel Nakuru Municipality/ Block 20/230. The sale and transfer of the said property by the 1st defendant to the 2nd defendant is thus null and void and must be cancelled.

9. What then should happen to the property? The plaintiffs in their plaint have sought an order that the property be registered in the names of the 1st plaintiff, the 1st defendant and their son Collins Kigen, as joint proprietors. I am not persuaded to grant this order as prayed. What informs me to take this path is that the plaintiff was quite economical with the facts relating to her family and her relationship with her husband. Save for the mention that the 2nd plaintiff is daughter of the 1st defendant from another mother, no evidence was led as to whether the 1st defendant is married to another woman or not, or whether he is married to the mother of the 2nd plaintiff , or where the mother of the

2nd plaintiff may be. Neither was any evidence led as to whether the 1st defendant has other children with the mother of the 2nd plaintiff, or indeed other children with the 1st plaintiff. Given this lacunae in evidence, there may very well be other spouses who may also have an interest in the subject property. I am also not convinced as to why the 1st plaintiff's son should be registered as proprietor of this property while leaving out the other children of the 1st defendant including the 2nd plaintiff. As I mentioned, no evidence was led as to how many children the 1st defendant has, or the 1st plaintiff has, and without a good explanation as to why it is Collins Kigen, and not any of the other children who ought to be registered as proprietor of the property, it will be unsafe to grant this order, as it may end up favouring one child over the others, without them having consented or having had an input in this case.

10. What is not in doubt is that the 1st plaintiff, as spouse of the 1st defendant, has a beneficial interest in the property. Pursuant to the provisions of Section 7 of the Matrimonial Property Act, ownership of matrimonial property vests in the spouses according to their contribution, and is to be divided between the spouses if they divorce or their marriage is otherwise dissolved. The whole of Section 7 is drawn as follows :-

7. Ownership of matrimonial property

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.

11. I have no evidence that the 1st plaintiff and 1st defendant's marriage has been dissolved and my presumption is that the marriage still subsists. I could probably have made declarations on the division of the property if the 1st plaintiff had filed suit inter alia pursuant to the provisions of Section 17 of the Matrimonial Property Act, which is drawn as follows :-

17. Action for declaration of rights to property

(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.

12. It will be noted from the above that one spouse is at liberty to file an action for a declaration of rights over property. But what is before me is not one such action. The suit herein is principally for recovery of title to property that was disposed of and for orders to vest such property in certain persons. The plaintiffs do not pretend that in this suit, they are asking for a division of matrimonial property, or a declaration of contributions towards the property. I will therefore desist from making any orders relating to division of this property as between the 1st plaintiff and the 2nd plaintiff. That will have to be arrived at after the court is moved through appropriate proceedings.

13. What is not in doubt is that the 1st plaintiff has a beneficial interest in the property. In such a case, Section 14 (2) of the Matrimonial Property Act applies. It provides as follows :-

(2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

14. It will be noted from the above that one spouse can protect his/her interest in matrimonial property by placing a caveat, or caution, or such other appropriate restriction. I have already mentioned that the circumstances herein militate against making an order that the property be vested jointly in the 1st plaintiff, the 2nd plaintiff and their son. I have also already demonstrated that this is not a case for the division of matrimonial property pursuant to Section 17 of the Matrimonial Property Act. I have however held that the 1st plaintiff has a beneficial interest in the said property. The best way is for her interest to be secured through a restriction noting that she has a beneficial interest as the wife of the 1st defendant and that her consent is required before any disposition can be undertaken. That to me is the most appropriate order to make in the circumstances after the cancellation of the title of the 2nd defendant.

15. The plaintiffs have also sought an order to compel the 2nd defendant to vacate the property and give vacant possession. I have no reason to deny the plaintiffs this order. Having cancelled the title of the 2nd defendant, he no longer has any interest in the property. He also cannot continue being a tenant without the consent of the 1st plaintiff. I therefore give this order for vacant possession and give the 2nd defendant 30 days upon service of this judgment and/or decree, to vacate the land parcel Nakuru Municipality/ Block 20/320.

16.. I will also give the order permanently restraining the 1st defendant from disposing off the property Nakuru Municipality/ Block 20/320 without the consent of the 1st plaintiff.

17. The plaintiffs will also have costs jointly and/or severally against the defendants.

18. I now make the following specific orders :-

(i) That this court makes no orders for or against the plaintiffs and defendants over the land described as Chagaiya Settlement Scheme Plot No. 172 and this court has not made any decision regarding the said parcel of land.

(ii) That it is hereby declared that the 1st plaintiff, Stella C. Tallam has a beneficial interest in the land parcel Nakuru Municipality/Block 20/320, as spouse of John K. Rotich, the previous registered owner.

(iii) That it is hereby declared that the sale of the land parcel Nakuru Municipality/Block 20/320 to the 2nd defendant, George Kimani Kariuki, was contrary to the provisions of Section 12 (1) of the Matrimonial Property Act, Act No. 49 of 2013, for the 1st plaintiff did not give the requisite consent to the disposal of the said property, and the purported sale is hereby declared null and void and is hereby cancelled.

(iv) That the District Land Registrar, Nakuru, is hereby directed to cancel the registration of the 2nd defendant, George Kimani Kariuki, as proprietor of the land parcel Nakuru Municipality/ Block 20/320 and the title of the said property to revert back to its previous registration.

(v) That the District Land Registrar, Nakuru, is hereby directed to enter a restriction, in the register of the land parcel Nakuru Municipality/Block 20/320, providing that the 1st plaintiff, Stella C. Tallam, has a beneficial interest in the said property as spouse, and further providing that no disposition should be registered without the consent of the said Stella C. Tallam.

(vi) That the 2nd defendant, George Kimani Kariuki, is hereby ordered to give vacant possession of the land parcel Nakuru Municipality/Block 20/320 within 30 days of service of this judgment or decree.

(vii) That the 2nd defendant, George Kimani Kariuki, is hereby permanently restrained from entering, being upon, possessing, or in any way interfering with the possession of the land parcel Nakuru Municipality/Block 20/320, without the consent of the 1st plaintiff.

(viii) That the 1st defendant, John K. Rotich, is hereby permanently restrained from selling, charging, leasing, or entering into any other disposition, over the land parcel Nakuru Municipality/ Block 20/320 without the consent of the 1st plaintiff, Stella C. Tallam.

(ix) That the 1st and 2nd defendants will jointly and/or severally shoulder the costs of this suit.

19. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 15th day of April 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Ms. Cheruiyot holding brief for Mr. Konosi for the plaintiffs.

No appearance for the defendants.

Court Assistant – Nelima Janepher and Patrick Kemboi .

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU