



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 168 OF 2014**

**BMO.....PLAINTIFF**

**VERSUS**

**MO**

**JL.....DEFENDANTS**

**JUDGEMENT**

By a plaint dated 20<sup>th</sup> July 2009, the plaintiff avers that she is the absolute registered proprietor of all that parcel of land designated as L.R. NO. KAKAMEGA/IGUHU/XXX measuring approximately 0.47 Ha whose boundaries are clearly demarcated on the ground. The plaintiff avers that the defendants illegally, wrongfully and without any colour of right, consent and or authority trespassed unto the plaintiff's land parcel L.R. NO. KAKAMEGA/IGUHU/XXX and occupied the same. That following the defendants' wrongful occupation of the plaintiff's parcel of land aforesaid, the plaintiff sued the defendants at the Ikolomani Land Disputes Tribunal, which ruled in the plaintiff's favour and the award of the said tribunal was adopted as judgment of the court vide KAKAMEGA CM Award No. 112 OF 2006. The plaintiff has on numerous occasions verbally requested and pleaded with the defendants to vacate the suit land but the defendants have refused, neglected and or otherwise failed to vacate the same and continue in such refusal thus necessitating this suit. The plaintiff further avers that the defendants have threatened and intend, unless restrained by this honourable court, to continue or remain in wrongful occupation of the suit land and or to trespass thereon. By reason of the foregoing, the plaintiff has and continues to suffer loss and damage as she has inter alia, been deprived of the use and quiet enjoyment of the suit land. The plaintiff's prayer is for this honourable court to;

(a) Order and or declare that the plaintiff is the rightful owner of land parcel L.R. NO. KAKAMEGA/IGUHU/XXX and is entitled to exclusive, peaceful and unimpeded possession and use thereof and to issue an order that the defendants be evicted from the said parcel of land.

(b) Issue a permanent injunction perpetually restraining the defendants from alienating, laying claim to, trespassing onto, utilizing, developing, carrying out any works on, constructing and or in any other manner dealing with land parcel L.R. NO. KAKAMEGA/IGUHU/XXX and or interfering with the plaintiff's peaceful and exclusive ownership, possession and or used thereof.

The 1<sup>st</sup> defendant avers that the plaintiff and the 2<sup>nd</sup> defendant are his wives, and it is on this understanding that all these parties occupy and utilize the suit land. The 1<sup>st</sup> defendant avers that the correct position is that the parcel of land forming the subject matter was actually acquired by way of sale by the 1<sup>st</sup> defendant and that the plaintiff being the mother of the 1<sup>st</sup> defendant's son called WO caused the said parcel of land to be registered in the joint name of the plaintiff and the said WO under the pretence that the 1<sup>st</sup> defendant would sell the property. The plaintiff resides on land parcel L.R. NO. KAKAMEGA/IGUHU/XXX while 2<sup>nd</sup> defendant lives on land parcel L.R. NO. KAKAMEGA/IGUHU/XXX. They are both his wives and he asks that the status quo be maintained. The 2<sup>nd</sup> defendant corroborated the 1<sup>st</sup> defendant's testimony. The defendants submits that this is a matrimonial matter and this court should not entertain the same.

This court has carefully considered the evidence and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

*“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”*

Section 26 (1) of the Land Registration Act states as follows:

*“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –*

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

It is not in dispute that the plaintiff is the registered owner of parcel of land designated as L.R. NO. KAKAMEGA/IGUHU/XXX. The preliminary issue to be determined is whether or not this is matrimonial property and if so whether this court has jurisdiction. I have perused the exhibits produced in court and find that the suit land was first registered in the 1<sup>st</sup> defendant’s name, then transferred to the 2<sup>nd</sup> defendant and her son then finally to the plaintiff. The 1<sup>st</sup> defendant gave evidence that he acquired the said land in 1994 from Zacharia. All these transactions took place during his marriage to the plaintiff and then to the 2<sup>nd</sup> defendant. The plaintiff is still married to the 1<sup>st</sup> defendant and resides at his ancestral land. The 2<sup>nd</sup> defendant is also still married and resides on the suit land. I find this is matrimonial property without a doubt. Section 7 of the Matrimonial Property Act recognises ownership of matrimonial property according to the contribution of either spouse towards its acquisition. Section 7 states as follows: -

**“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.”**

Section 2 of the Matrimonial Property Act defines contribution to be both monetary and non monetary. It 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;

The question to be answered is whether the plaintiff could properly bring the present proceedings before the Environment and Land Court. **Section 17** of that Act provides for actions for declaration of rights to matrimonial property. Subsection (1) thereof states:-

**“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 former spouse of the person.”**

**“Spouse”** is defined in **section 2** of the Act as **“a husband or a wife”**.

In these circumstances, the plaintiff’s claim in respect to the suit property lie in other civil proceedings before the High Court under the *Matrimonial Property Act, 2013* with the requisite jurisdiction, not before this court. For those reasons I strike out this suit with no orders as to costs as the parties are a family.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9<sup>TH</sup> DAY OF MAY 2019.**

**N.A. MATHEKA**

**JUDGE**