



REPUBLIC OF KENYA

IN The ENVIRONMENT AND LAND COURT

AT MAKUENI

E.L.C. SUIT NO. 71 OF 2017

(FORMERLY MACHAKOS ELC NO.89 OF 2013)

ANGELA SYOKWAA KIEMAPLAINTIFF

-VERSUS-

JACKSON KIEMA KIVUVA 1ST DEFENDANT

SILAS MUTIO KILONZO2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

J U D G E M E N T

1. By her amended plaint dated 17th September, 2014 and filed in court on 19th September, 2014, the Plaintiff prays for Judgement against the Defendants for:-

- a. An order of permanent injunction against the 2nd Defendant, his family members, heirs, servants, or agents barring them from entering, cultivating and/or interfering in any manner with land parcel No. 389 Muthingiini Settlement Scheme.**
- b. An order directing the 3rd Defendant's servant, the Ministry of Lands officers to cancel any title deed issued in respect of parcel No. 389 Muthingiini Settlement Scheme and do issue fresh title to the Plaintiff as a trustee for her children.**
- c. Costs of this suit.**
- d. Any other relief as the Court deems just under the circumstances.**

2. She has averred in paragraph 7 of her amended plaint that the 1st and the 2nd Defendants entered into a secret agreement to sell family land Parcel No.389, Muthingiini Settlement Scheme to the 2nd Defendant which is her matrimonial home and that of her eight (8) children. She also averred in paragraph 8 of her amended plaint that on diverse dates when the issue came to her knowledge, she reported the matter to the area chief who wrote a letter to the 1st and 2nd Defendants warning them to desist from interfering or trespassing or carrying out any transaction in Parcel Land No.389 Muthingiini Settlement Scheme before obtaining consent from the family and warning that any purported sale would be null and void.

3. In paragraph 14 of her amended plaint, the Plaintiff has averred that the 3rd Defendant's servant colluded with the 1st and 2nd Defendants to register the transfer despite the fact that the 3rd Defendant's servant had been warned/informed of the family dispute.

4. The Plaintiff's claim is denied by the 1st and 2nd Defendants' statement of defence dated 05th June, 2014 and filed in court on even date.

5. In paragraph 9 of their defence, the 1st and the 2nd Defendants have averred that there was consensus before, during and after sale, that the Plaintiff was to be moved to a separate piece of land in Makindu after she disagreed with the 1st Defendant's 3rd wife. In paragraph 12 of their defence, the two Defendants have averred that the registration of transfer in favour of the 2nd Defendant followed the due process of the law. The Plaintiff in her reply to defence dated 17th September, 2014 and filed in court on even date has reiterated the contents of her amended plaint.

6. At the hearing, the Plaintiff adopted her undated statement which was filed in court on 10th October, 2013 as her evidence in chief. Her evidence was that she and the 1st Defendant who is her husband settled in an area known as Kilungu after they got married. She revealed that Plot No.389 is where they cohabited. That the 1st Defendant later sold the said Parcel No.389 to the 2nd Defendant. She said that she reported the 1st Defendant to the area chief. The chief wrote a letter (P.Exhibit No.4) to the 1st Defendant with a copy to the Land Adjudication and Settlement office. The latter responded by writing the letter dated 12th July, 2010 (P.Exhibit No.1). The Plaintiff further sought assistance from Kituo Cha Sheria (see P.Exhibit No. 2).

7. It was also the Plaintiff's evidence that in or about October, 2010 the 1st Defendant and his agents demolished her houses upon which he evicted her and her children from the suit land. She pointed out the 1st Defendant never showed her and her children any other place to build.

8. The Plaintiff's evidence in cross-examination by Mr. Mulandi Kisabit for the 1st and the 2nd Defendants was that she and the 1st Defendant got married in 1969 and that they lived at Kilungu for about 30 years. She said that she was not aware of any loan that the 1st Defendant may have obtained from the 2nd Defendant. She agreed that she and her co-wife had dispute over the issue of witchcraft. She said that she did not know where the funds to administer a traditional oath known as "Ngaata" came from. She maintained that she was not consulted when the 1st Defendant sold the land in 2010. She added that she was residing on the land at the time of the sale of the land and that her co-wife was in Masonga where the latter had bought her own land. She said that in the year 2010, she saw the 1st, 2nd Defendants and others surveying the land. She went on to say that she did not know whether one Jonathan Ndambuki Kyema who is her son signed the sale agreement. She said that she never alluded that the 3rd Defendant colluded with his co-Defendants. She further said that she gave out money to purchase the Kilungu land.

9. On being cross-examined by Ms. Kubai for the 3rd Defendant, the Plaintiff admitted that she had no documents to show that the sale of land was between the first two Defendants. She asserted that the land belongs to her because she and the 1st Defendant bought it. She said that she has sued the Ministry of Lands for effecting the sale without spousal consent.

10. The 1st Defendant adopted his statement that he recorded on 30th June, 2017 as his evidence in chief. His evidence was that he bought land Parcel No.389 in 1971 and later sold it to his uncle in 1972. That he moved to Masongaleni after marrying a second wife. That he bought Parcel No.389 from his uncle in 1983 and later sold it in 2010. He gave the reason for the latest sale as his desire to move out of the area where the land is situated. That he had a discussion with the Plaintiff and her first born son over the sale. That the Plaintiff and her co-wife were not in good terms forcing the two to take "Ngaata" and that the money for taking the oath came from the 2nd Defendant. He produced the land sale agreements and cash advance agreements as D.Exhibit Nos. 1 to 5 respectively. According to him, he had separated from the Plaintiff by the time when he bought the land in 1983. He denied having ever seen any letter from the chief and pointed out that he only got a telephone call from the chief after he had already demarcated the land. He said that he was with the Plaintiff's son as he demarcated the land in question and that the Plaintiff was in her house.

11. The 1st Defendant's evidence in cross-examination by Ms. Kubai for the 3rd Defendant was that he did not have a title deed to the land and that he sold it on the basis of the lands book that had been issued to him by the lands department. He said that he learnt of the spousal agreement from his lawyer after he had already effected sale. He further said that in civil case No.331/10, the Plaintiff was directed to move out of the land before he could sell it. And on being cross-examined by Mr. Olieti for the Plaintiff, the 1st Defendant told the court that the 1st Defendant admitted that he knows that spousal consent is necessary before one can sell family land. He said that he did not involve the Plaintiff. He also said that he filed Makindu civil case No.331/10 and that the matter was heard in absence of the Plaintiff. He said that he demolished the house after selling the land. His evidence in re-examination was that he wasn't aware of the spousal agreement in writing before he sold the land.

12. The 2nd Defendant in his evidence adopted his statement that he recorded on 30th June, 2017. His evidence was that the 1st Defendant while in the company of his two children visited him with a request to lend them some money to be used for "Ngaata" oath. He said that the 1st Defendant and his children did not refund the money as they had promised to. That the 1st Defendant instead opted to sell the land to him. He said that the reason the 1st Defendant gave for selling the land was due to his bad relationship with the Plaintiff and other villagers. He said that he and the 1st Defendant entered into a sale agreement which was witnessed by the Plaintiff's son as well as a brother of the 1st Defendant. He said that he did not get any letter from the chief to bar him from buying the land. Like the 1st Defendant, the 2nd Defendant said that he too was not aware of the requirement of spousal agreement since the Plaintiff and the 1st Defendant were together. He revealed that the land was transferred to him.

13. The 2nd Defendant's evidence in cross-examination by Ms. Kubai was that there were trees on the farm before he bought it. He further said that there was a brick house in the farm and that the seller was to move out of the farm. He revealed that he is in occupation of the farm. He however admitted that he did not produce documents in court to prove ownership of the land. And on being cross-examined by Mr. Olieti, the 2nd Defendant told the court that he and the 1st Defendant did not enter into a written agreement when the latter and his son went to borrow money from him. He also said he had no documents to show that the Plaintiff consented to the sale. He said that the Plaintiff was not there when he and the 1st Defendant prepared a sale agreement nor did she participate in the demarcation exercise. He said that the lands officer never asked for spousal consent before he could change ownership of the land.

14. His evidence in re-examination was that he did not produce the allotment letter despite having it in his custody.

15. The Plaintiffs and the three Defendants have all filed their submissions. The Plaintiff's Counsel listed the following issues for determination namely;

a. Whether or not Parcel No.389 Muthingiini Settlement Scheme is and/or was the matrimonial home (and/or property) of

the Plaintiff and the 1st Defendant.

b. Whether or not the sale of Parcel No.389 Muthigiini Settlement Scheme by the 1st Defendant to the 2nd Defendant is legal and/or illegal.

c. Costs of the suit

16. On their part, the 1st and the 2nd Defendants through their Counsel on record framed five issues for determination. The issues were:-

1. Whether or not Parcel No.389 Muthigiini Settlement Scheme was matrimonial property.

2. Whether the 1st Defendant and the Plaintiff consented to the sale of the disputed parcel of land.

3. Whether or not the sale and transfer of Parcel No.389 Muthigiini Settlement Scheme from 1st Defendant to the 2nd Defendant was regular and lawful?

4. Whether or not the prayers sought herein by the Plaintiff can be granted by the Honourable Court?

5. Who should bear the costs of this suit?

17. On his part, the 3rd Defendant framed two (2) issues for determination namely:-

i. Whether spousal consent was required in transferring the suit property from the 1st Defendant to the 2nd Defendant herein?

ii. Who should pay the costs of the suit?

18. The issues as framed by the Plaintiff and the three Defendants are more or less similar and in my judgment, I will address the issues together.

19. On the issue of whether or not Parcel No. 389 Muthigiini Settlement Scheme is matrimonial property, the Plaintiff's Counsel cited Section 2 of the Land Act No. 6 of 2012 which defines what constitutes matrimonial property. The Counsel went on to submit that from the evidence on record, the suit property is matrimonial property within the meaning of Section 2 of the aforementioned Land Act.

20. On their part, the 1st and the 2nd Defendants submitted that under Section 7 of the Matrimonial Property Act, 2013, it was upon the Plaintiff to prove the contribution that she made towards the acquisition of what she claims to be matrimonial property. Their Counsel pointed out from the evidence that was adduced, it is clear that the Plaintiff contributed nothing towards the acquisition of Parcel No.389 Muthigiini Settlement Scheme.

21. The Counsel for the 3rd Defendant is silent on whether or not the said suit property is matrimonial property.

22. On whether or not the Plaintiff consented to the sale of the suit property and/or the legality or illegality of the sale of the said Parcel No.389 Muthigiini Settlement Scheme by the 1st Defendant, the Plaintiff's Counsel extensively quoted the provisions of **Section 93(2) (3) and (4) of the Land Registration Act** which provides as follows:-

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

(3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house-

(a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or

(b) The assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.

(4) If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3) (b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition”

23. The Counsel went on to submit that a reading of the Act and the above quoted Section and using the “mischief rule” as a tool of

interpretation, it is clear that the intention of the legislative is to curb the sale of matrimonial property and/or home by one spouse without the knowledge of the other spouse. The Counsel pointed out that the 1st Defendant ought to have sought the Plaintiff's consent before he sold the suit property to the 2nd Defendant.

24. Regarding the contention by the 1st and the 2nd Defendants that they only recently came to learn that the Plaintiff's consent ought to have been sought as not only afterthought but as a defence of ignorance of the law which is not sustainable.

25. The Plaintiff's Counsel went on to submit that the agents of the 3rd Defendant went ahead to register the 2nd Defendant as the proprietor of suit property in total disregard of their duty to enquire about the Plaintiff's right over the same. The Counsel termed the sale of the suit property without seeking the Plaintiff's consent as illegal and a violation of her rights. Arising from the above, the Counsel submitted that under the Provisions of Section 26 of the Land Registration Act No.3 of 2012, the court is enjoined to cancel the registration of the 2nd Defendant as the proprietor of the suit property. The above mentioned **Section 26 of the Land Registration Act** provides as follows: -

“ the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.”

26. It was the Counsel's further submissions that it is worth noting that Sections 28(a) and 93 of the Land Registration Act No.3 of 2012 were repealed by the Land Laws Amendment Act No.28 of 2016. However, under the provisions of Section 23(3) of the Interpretation and General Provisions Act, the court is enjoined to make a conclusion of the case based on the above repealed sections.

Section 23(3) of Interpretation and General Provisions Act provides as follows:-

“Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not-----

a. Revive anything not in force or existing at the time at which the repeal takes effect; or

b. Affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

c. Affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

d. Affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

e. Affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”

The Counsel cited the case of **P.N.N. vs. Z.W.N [2017] eKLR**.

27. The Counsel further submitted that should the court be inclined to rule otherwise, it will find that the Land Laws Amendment Act in amending Section 28 and 93 of the Land Registration Act, referred all disputes relating to matrimonial property to be decided under the Provisions of the Matrimonial Property Act No.49 of 2013.

28. The Counsel added that Matrimonial Property Act, in any case, recognizes and protects the Plaintiff's rights towards the suit property and more or less underpins the repealed sections of the Land Registration Act specifically in Section 2 where “contribution” is defined as:-

“**contribution” means monetary and non-monetary contribution and 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 Counsel further cited Section 6, 7, 12 and 14 of the Act.

29. It was also the Counsel's submission that the Plaintiff's rights as guaranteed by the constitution and as emphasized by legislation have been infringed and as such she merits redress before this court in line with the maxim, *ubi jus ibi remedium* "- for every wrong the law provides a remedy."

30. On the other hand, the Counsel for the 1st and the 2nd Defendants submitted that the Land Registration Act No.3 of 2012 was enacted in the year 2012 yet the cause of action arose in the year 2010. The Counsel was of the view the Land Registration Act cannot be applied retrospectively. Like the Plaintiff's Counsel, the Counsel for the 1st and the 2nd Defendants cited Section 23(3)(c) of the Interpretation and General Provisions Act chapter 2.

31. The Counsel further cited the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** where the Supreme Court held that;

"The general rule for non criminal legislation is that all statutes other than those which were merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislative."

32. The Counsel added that the same position was echoed in the case of **P.N.N vs. L.W.N [2017] eKLR**.

33. The Counsel for the 3rd Defendant submitted that the suit property was transferred from the 1st to 2nd Defendant in the year 2010 while the Land Registration Act was enacted in the year 2012 and as such, the law does not operate retrospectively and that the provision of spousal consent was not a requirement as at the time of transfer. The Counsel relied on the case of **Peter Kagunza Adaji vs. Shikukuu Martin Maiyo & another [2017] eKLR** Mwangi Njoroge, J held that;

"Spousal consent is a recent development in Kenya under Land Act 2012, and that it had no application whatsoever to the sale of land which predated the statute. I therefore find that no proof of express trust or implied trust was brought to court by the 2nd defendant and that such trusts do not therefore exist. The suit property was therefore not matrimonial property. Further even if it were matrimonial property at the time of the transactions, the provisions of the Matrimonial Property Act 2013 could not apply as the Act has not been shown to have retrospective effect. The applicable law in that case was only the Married Women Property Act and the Registered Lands Act. The upshot of the above is that no consent of the 2nd defendant was required at the time of the sale agreements between the plaintiff and the 1st defendant."

34. On the issue of costs, the Plaintiff's Counsel submitted that the same should be awarded to the Plaintiff as she had proved her case against the Defendants on a balance of probabilities. On the other hand, the Counsel for the 1st and the 2nd Defendant's submitted that since the Plaintiff had failed to appeal against the orders issued against her in Makindu PMCC No.331 of 2010 – Jackson Kivuva vs. Angela Syokwaa Kiema, the orders sought herein are misplaced and unwarranted and as such, the Plaintiff should be condemned to pay the costs. The Counsel for the 3rd Defendant submitted that the Plaintiff did not adduce evidence to support her allegation of collusion against the 3rd Defendant and as such, she should be condemned to pay costs.

35. From the evidence on record, it is clear that the sale of the suit property No.389 Muthungiini Settlement Scheme took place in the year 2010 while the Land Registration Act No.3 and Matrimonial Property Act No.49 were enacted in the years 2012 and 2013 respectively. Guided by the authority of **P.N.N vs Z.W.N [2017] eKLR**, the applicable law in this dispute is the Registered Land Act Chapter 300 of the Laws of Kenya (now repealed). This Act did not provide for spousal consent. As such, I hold that there was no requirement for spousal consent when the 1st Defendant sold the land Parcel No.389 to the 2nd Defendant in the year 2010. As it were, the 3rd Defendant cannot be said to have ignored to enquire about the issue of spousal consent before transferring and registering the suit property from the 1st Defendant to the 2nd Defendant.

36. Secondly, the Plaintiff's evidence was that they developed the suit property No.389 Muthingini Settlement Scheme by cultivating and putting up permanent buildings on it. However, there is no evidence to show that what was demolished in or about October, 2010 by the 1st Defendant were permanent buildings. It is not lost on me that whereas the 1st Defendant says that he was the one who purchased the suitland in 1971, the Plaintiff is silent on the contribution that she made towards its purchase. She also appears not to have opposed when the 1st Defendant sold the suitland to his uncle, one David Ngila. Neither is there evidence to show that she contributed towards its re-purchase by the 1st Defendant from the said Ngila. It seems to me, therefore, that the suit property cannot be matrimonial home under the circumstances. There is evidence to show that the 1st Defendant was to move the Plaintiff to another parcel of land in Makindu after he sold land Parcel No.389 Muthungiini Settlement Scheme to the 2nd Defendant. In any case, the Plaintiff did not rebut the 1st Defendant's evidence that they had separated by the time he bought the suitland from his uncle in the year 1983.

37. The upshot of the foregoing is that the Plaintiff has not satisfied this court that she has a cause of action against the three defendants on a balance of probabilities. Her claim against the three defendants must therefore fail. In the circumstances, I hereby proceed to dismiss the Plaintiff's suit with costs to the Defendants.

Signed, dated and delivered at Makueni this 27th Day of June, 2019.

Mbogo C. G.,

Judge.

In the presence of:

Ms. Ongong'a for the Plaintiff

No appearance for the Defendants

Ms. C. Nzioka - Court Assistant

Mbogo C.G., Judge

27/6/2019.