



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 3 OF 2017

VMB.....PLAINTIFF

VERSUS

JBW.....DEFENDANT

JUDGMENT

By a plaint dated 22nd December and amended on 17th June 2017 the plaintiff herein sued the defendant seeking the following orders;

- a) A declaration that UASIN/GISHU/KIMUMU/[xxxx] belongs to the plaintiff.
- b) Cancellation/ removal of the defendant's name from the title deed to L.R No. UASIN/GISHU/KIMUMU/[xxxx]
- c) A permanent injunction against the defendants from dealing in the suit land.
- d) Costs of the suit.

PLAINTIFF'S CASE

The plaintiff adopted her statement filed in court on 19th June 2017. She stated that the parties were husband and wife before their union was dissolved. The suit parcel was acquired during the subsistence of their marriage. Her husband never contributed towards the acquisition of the property and she included his name as co-owner as a gesture of transparency and love. She stated that wishes to have his name removed from the registration documents as the defendant currently resides on the suit parcel with his current wife.

She produced a letter of employment as proof of financial ability and testified that she purchased the property solely. She produced a marriage certificate, a P3 form, letter from the hospital to support her testimony that the marriage was dissolved as a result of the defendant's violence, a copy of a green card, a certificate of search to the suit parcel as proof that the property was jointly owned, and a sale agreement.

She testified that she sourced finances for the development from Moi University Sacco and produced a letter of offer and bank statements from National Bank of Kenya. She also produced a copy of the chief's letter that enabled her lodge a restriction on the suit land after being chased away by the defendant.

The plaintiff testified that the defendant prevented her from re-entering the suit land and produced photographs to corroborate her prayers. She also testified that she first purchased $\frac{1}{4}$ of an acre and then added another piece measuring $\frac{1}{8}$ bringing the total acreage to $\frac{3}{8}$ of an acre.

It was her evidence that they had acquired other suit properties during the subsistence of the marriage but the suit land does not constitute matrimonial property as it was purchased and developed by her.

PW2, the vendor, confirmed that he sold a total of three points of an acre to the plaintiff and received consideration of kshs. 60,000/- per point from her. He acknowledged the sale agreement dated 18th June 1998 and denied knowledge of the second agreement dated 16th September 1998.

He stated that no other agreement was ever made over the suit land. It was his testimony that all his sons had to be present whenever he sold his land and that the agreement dated 16th September 1998 indicated that there was only one son present which did not meet his

requirements. He denied the authenticity of the agreement. He further testified that he gave his consent to transfer the suit land on the basis of the agreement dated 18th June 1998 and not the alleged agreement dated 16th September 1998.

The plaintiff finally stated that she purchased the suit property for valuable consideration and the purchase price was paid in full and as such is the absolute and indefeasible owner and her title can only be challenged on the ground of fraud or misrepresentation as per section 26 of the Land Act. Her evidence and exhibits have not been challenged and the defendants' allegations have not been corroborated. She urged the court to grant her the orders as prayed in the plaint.

DEFENDANT'S CASE

It was the defendant's evidence that he raised all the monies that were used in the purchase of the suit land and building the family home. Further, that although he purchased the suit land and built a home thereon, the same is matrimonial property and is not available for either spouse to lay a claim on it.

He testified that there was no way the plaintiff could have purchased 0.3 acres of the suit land by drawing an agreement for ¼ of an acre and a verbal agreement for the 1/8 of an acre in one event. That it was neither logical nor lawful.

He stated that he sent the plaintiff Kshs. 120,000/- which was enough to purchase ¼ of an acre and that the plaintiff has not demonstrated how she raised 180,000/- by herself. He further stated that he sent his wife Kshs. 120,000/- to purchase the initial ¼ of an acre and 3 months later he travelled to Eldoret where he entered into a purchase agreement on 16th September 1998 where PW2 sold him an additional 0.375 acres of land at a cost of Kshs. 180,000/-.

Defence Counsel relied on section 38(1)(a) of the Land Act which provides that no disposition in land shall be valid unless the same is put down in writing. That the court finds that the purchase of the 1/8 of an acre was unlawful. The defendant further stated that it was not in dispute that the property was purchased during the subsistence of the marriage or that it was registered jointly. He stated that the same was matrimonial property as per the definition by the matrimonial property Act.

Counsel for the defendant submitted that the plaintiff never filed a complaint on the claim that the agreement dated 16th September was fraudulent despite having knowledge of its existence since 2017. The document was produced by consent and the plaintiff never demanded that the maker be availed in court for purposes of producing the said document. The claim that it was fraudulent is an afterthought and the court ought to find that it was valid.

Counsel for the defendant therefore prayed that the court finds that the suit land is matrimonial property and the plaintiff ought to have moved to the High Court under Matrimonial Property Act because the honourable court lacks jurisdiction to entertain such claims.

Counsel also submitted that matrimonial property is property available to both parties if it is registered in the joint names of the couple regardless of whether one was given a share on the basis of love and affection.

ANALYSIS AND DETERMINATION

The issues for determination are as follows:

- a) Whether the suit land is matrimonial property
- b) Whether the court has jurisdiction to entertain this matter
- c) Whether the defendant's name should be removed from the title deed.

WHETHER THE SUIT LAND IS MATRIMONIAL PROPERTY

Matrimonial property is defined by section 7 of the Matrimonial Property Act as: -

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.

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to

determine their property rights.

(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

At the time of acquisition of the suit land, both parties were in a marriage and the property was registered jointly. Therefore, for purposes of this suit the land is considered matrimonial property.

Whether the names of either spouse was added as a show of affection is not grounds for the property not to be considered as matrimonial property.

WHETHER THE COURT HAS JURISDICTION TO ENTERTAIN THIS MATTER

Section 17 of the Matrimonial Property Act of 2013 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.”

In **Jane Wambui Ngeru v Timothy Mwangi Ngeru [2015] eKLR** the court, with regards to section 17 held;

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) ...

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.

The defendant did not prove to the court that it does not have jurisdiction to handle this matter. As per the authorities cited it is evident that the court has jurisdiction.

WHETHER THE DEFENDANT’S NAME SHOULD BE REMOVED FROM THE TITLE DEED

The plaintiff sought for the cancellation of the title deed of the suit land for the purposes of removing the defendant’s name from the title.

Section 26 of the Land Registration Act provides;

26. (1) 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

The plaintiff has not proven that there was any fraud or misrepresentation with regards to the acquisition of the suit land. She admitted in her witness statement that the registration was done as a gesture of transparency’ love and affection. Therefore, on what grounds would the court cancel the title? She has presented none.

In the absence of orders cancelling the title the orders for injunction cannot be granted. Neither can the prayers for an order of declaration that the property belongs to the plaintiff be granted.

The plaintiff claimed that she was solely responsible for the purchase and development of the suit land. In support of this she produced a sale agreement as p-Exh. 7 and a letter of offer and statements from National Bank of Kenya as P-Exh 8(a) and (b). The defendant on his part has

not produced any evidence that he provided the sums for purchase of the suit land. Section 14 of the Matrimonial Property Act states as follows: -

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

(b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

The question that arises therefrom is whether the plaintiff has rebutted the presumption that their beneficial interests are equal. She has not proven that the loan applied to the suit land. Further, the loan was obtained in June 2013, yet the suit was purchased in 1998. The defendant has also failed to prove that he is the one who sent her the money she purchased the suit land and executed the sale agreement with. In my opinion the presumption that they have equal beneficial interests in the suit land has not been rebutted.

On the prayers sought by the Plaintiff, the claim fails. She has not proven that the property was registered jointly through fraud and misrepresentation and therefore there are no grounds for the cancellation of the title or granting of the permanent injunction. The plaintiff can pursue the issue of division of matrimonial property in another forum. The plaintiff's suit is therefore dismissed and each party to bear their own costs.

Dated and delivered at Eldoret on this 31st day of July, 2019.

M.A. ODENY

JUDGE

JUDGMENT READ IN OPEN COURT in the presence of Miss.Awinja holding brief for Isiaho for Plaintiff and Mr.Kiboi for Kipnyekwei for defendant.

Mr.Mwelem – Court Assistant