



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 27 OF 2014

MARTHA WAMUGO NJERU.....PLAINTIFF

VERSUS

NJERU RUKUNGU.....1ST DEFENDANT

MOSES NJAGI NJERU.....2ND DEFENDANT

ANTHONY GITONGA JOSPHAT.....3RD DEFENDANT

PAULINE KARIMI IRERI.....4TH DEFENDANT

JUDGEMENT

1. By a plaint dated 27th July 2005 and filed on 28th July 2005 the Plaintiff sought the following reliefs against the Defendants;

a. A permanent injunction do issue against the 1st Defendant, whether by himself, servants, agents, representatives or assigns or howsoever from alienating, disposing, transferring and/or in any other way interfering with the Plaintiff's farming activities and occupation of Title No. Kagaari/Kanja/1112.

b. A declaration that the 1st Defendant holds original Title No. Kagaari/Kanja/1112 (now subdivided into parcel Nos. Kagaari/Kanja 5798 up to 5803) and original Title Kagaari/Kanja/1712 (now subdivided into parcel Nos. Kagaari/Kanja/5728 up to 5732) in trust for himself and the Plaintiff.

c. An order that the trust be determined and half share of both Title Nos. Kagaari/Kanja/1112 and Title No. Kagaari/Kanja 1712 be registered in the name of the Plaintiff.

2. It was pleaded in the plaint that the Plaintiff and the 1st Defendant herein were married in 1949 under Embu customary law and that in the course of their marriage they jointly purchased *Title No. Kagaari/Kanja/1712* (hereafter *parcel 1712*). It was contended that both parties had made cash contributions towards its purchase.

3. The Plaintiff further pleaded that sometime in 1962 the 1st Defendant acquired *Title No. Kagaari/Kanja/1112* (hereafter *parcel 1112*) from his clan which he was to hold in trust for himself, the Plaintiff and the rest of the family members under customary law.

4. The Plaintiff also pleaded that the 1st Defendant had unilaterally sub-divided the said two properties and disposed of some of the sub-divisions to the 2nd- 4th Defendants without reference to her interest therein.

5. By a defence dated 11th August 2005, the 1st Defendant denied the Plaintiff's claim in its entirety. It was denied that the Plaintiff had made any contribution towards the purchase of parcel 1712. It was also denied that the 1st Defendant was registered as proprietor of parcel 1112 to hold it in trust for the Plaintiff or any other family members.

6. The 1st Defendant pleaded that he had indeed sub-divided the suit properties in order to distribute them amongst his family members including the Plaintiff. He further stated that the Plaintiff and some of his children had refused to take up the portions of land offered to them whereas other members had taken up their respective portions. The 1st Defendant denied having inherited parcel No. 1112 from his clan.

7. The 1st Defendant also pleaded that the Plaintiff had previously filed *Meru HCCC No. 33 of 2002* against him seeking similar orders which was withdrawn later on. He contended that the Plaintiff's suit did not disclose any cause of action against him.

8. It would appear from the material on record that the 2nd – 4th Defendants were not parties to the original plaint dated 27th July 2005. It would appear that the 2nd-4th Defendants applied to be joined in the proceedings after the filing of the suit. The record shows that the 2nd and 3rd Defendants were purchasers for value of *Title No. Kagaari/Kanja/5801* (hereafter parcel 5801) and *Title No. Kagaari/Kanja/5802* (hereafter parcel 5802) which were sub divisions of parcel 1112.

9. By a statement of defence dated 5th March 2006 and filed on 9th March 2006, the 2nd and 3rd Defendants denied all material allegations contained in the plaint and pleaded that the 1st Defendant was the absolute proprietor of the two parcels they purchased from him hence the Plaintiff had no cause of action against them.

10. The 4th Defendant filed a defence dated 12th October 2006 on 21st November 2006 in which he denied the Plaintiff's claim in its entirety. He pleaded that he lawfully purchased *Title No. Kagaari/Kanja/5803* (hereafter *parcel 5803*) from the 1st Defendant on 11th December 2002. He further pleaded that at the time of purchase, the 1st Defendant was the sole registered proprietor of parcel 5803 and contended that the Plaintiff had no cause of action against him.

11. The material on record indicates that even though the suit was filed about 14 years ago, the Plaintiff has not been keen in prosecuting the suit. The record shows that despite directions given in 2017 and 2018 for the Plaintiff to comply with **Order 11 of the Civil Procedure Rules** the Plaintiff was reluctant to comply with such directions. The court had to grant the Plaintiff several extensions of time to comply therewith.

12. It is also evident from the record that even upon the suit being fixed for hearing, the Plaintiff sought several adjournments and the hearing of the suit only commenced on 13th July 2019 after the court declined to grant any further adjournment at the instance of the Plaintiff.

13. At the trial hereof, the Plaintiff did not testify personally but she had her son Matthew Kariuki Rukungu (PW1) testify on her behalf. The court was informed that she could not testify due to some health challenges. PW1 relied on the contents of the brief witness statement dated and filed on 13th May 2019 in support of the Plaintiff's case.

14. The 2nd Plaintiff's witness was Eliud Fundi (PW2) who was an elder in the 1st Defendant's clan. He stated that he was aware of the land dispute in the 1st Defendant's family and that clan elders had previously deliberated on the issue and resolved that the 1st Defendant should give each of his sons one acre of land.

15. The 1st Defendant testified on his own behalf at the trial as DW1. He did not call any other witnesses. He adopted his witness statement dated 10th January 2014 as his sworn testimony. He stated that he had sub-divided both parcel Nos. 1112 and 1712 and distributed it amongst his family members. He had also sold some of the sub-divisions. It was his case that he had two (2) wives and 15 children and that the Plaintiff was among the persons offered one acre. He contended that the Plaintiff and some of her children had declined to take the portions of land offered.

16. The 2nd – 4th Defendants did not attend court for trial despite having sought and obtained orders to be joined in the proceedings. The court notes from the record that the Plaintiff's advocate filed an affidavit of service indicating that the 2nd – 4th Defendants were served with a hearing notice personally even though they had advocates on record.

17. The court has noted from the evidence and affidavits on record that the Plaintiff contends that the 1st Defendant irregularly or fraudulently obtained consent of the Land Control Board (LCB) to transfer some of the sub-divisions of parcel 1112 and 1712 to third parties. The 1st Defendant has also supplied copies of minutes of the Land Control Board indicating that consent to transfer was not 'deferred' as contended by the Plaintiff. The court shall, therefore, consider the legality of the consent of the Land Control Board in the course of the judgement.

18. The court has noted that the parties herein did not file any agreed statement of issues for determination. In the premises, the court shall frame the issues in the matter as stipulated by law. Under **Order 15 Rule 2 of the Civil Procedure Rules**, the court may frame issues from any of the following:

- a. The allegations contained in the pleadings.
- b. The contents of documents produced by the parties.
- c. The statements made on oath by or on behalf of the parties.

19. The court has considered the pleadings, evidence and the documents tendered in evidence in this suit and is of the opinion that the following issues arise for determination:

- a. Whether parcel 1712 is matrimonial property which was acquired through the joint efforts of the Plaintiff and the 1st Defendant.
- b. Whether parcel 1112 was clan land and whether the 1st Defendant was registered as proprietor thereof in trust for the Plaintiff and her children.

- c. Whether the consent of the Land Control Board granted to the 1st Defendant was irregular or fraudulent.
- d. Whether the titles held by the 2nd – 4th Defendants over parcel Nos. 5801, 5802 and 5803 are impeachable.
- e. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
- f. Who shall bear the costs of the suit.

20. The court has considered the evidence on record and the submissions of the parties on the first issue. As indicated before, the Plaintiff did not testify at the trial hereof. It was her son, Mathew Rukungu (PW1) who testified on her behalf. It was his evidence that the Plaintiff and the 1st Defendant applied their income and savings towards the purchase of parcel 1712. He did not however, indicate, how and when the said parcel was acquired and how much was contributed by each of his parents.

21. During cross-examination by the 1st Defendant's advocate, PW1 stated that he was 50 years of age meaning that he was born about 1969. A copy of the land register for parcel 1712 indicated that it was registered in the 1st Defendant's name in the 1960s when PW1 was still a minor. It was not demonstrated how PW1 came to know that the Plaintiff contributed some income or savings towards its acquisition. The mere fact that parcel 1712 was acquired during the subsistence of the marriage does not automatically entitle the Plaintiff to one half of the property. There must be credible evidence of some contribution towards its acquisition, whether direct or indirect.

22. In the case of **P.N.N. V Z.W.N. NBI Civil Appeal No. 128 of 2014 [2017] eKLR** it was held that although Article 45 (3) provided for equality of rights of spouses before, during and after the dissolution of marriage, that did not mean that there would be an automatic 50:50 sharing of assets upon dissolution of marriage. With the enactment of the **Matrimonial Property Act, 2013** it was clarified that both monetary and non-monetary contributions would be taken into account in the distribution of such property.

23. Section 7 of the **Matrimonial Property Act, 2013** stipulates that:

“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.”

24. Under Section 9 of the Act, the contribution may either be monetary or non-monetary. Non-monetary contribution is defined to include domestic work, child care, companionship, farm work and management of family business or property. The Plaintiff's case all along was that she made a direct monetary contribution from her savings and income. No evidence of such contribution was given by PW1 who testified on behalf of the Plaintiff. There was also no evidence of non-monetary contribution tendered by PW1 at the trial hereof.

25. The court is aware that in **Milimani Petition No. 164B of 2016 Federation of Women Lawyers Kenya (FIDA) Vs the Attorney General & Another [2018] eKLR**, the Petitioner challenged the constitutionality of **Section 7 of the Matrimonial Property Act 2013**. It was contended that in so far as the Act pegged distribution of matrimonial property on the respective contributions of the parties it was in contravention of **Article 45 (3)** of the Constitution of Kenya which provided for equality of rights of spouses. In its judgement, the High Court rejected the Petitioner's plea and upheld the constitutionality of the Act.

26. The Petitioner in that case had also submitted that the parliamentary Hansard showed that the original version of the bill had provided for equal sharing of matrimonial property regardless of the respective contributions of the spouses and that the final version as passed by parliament was discriminatory and unconstitutional. In rejecting the Petitioner's plea, the High Court held as follows:

“59. Article 45(3) of the Constitution treats parties to a marriage as equal partners. That equality is reflected in the provisions of the Act which recognize that the contribution of parties to a marriage whether monetary or non-monetary will be treated equally. The same equality is maintained by Section 7 of the Act which provides that upon dissolution of a marriage, parties are entitled to a share of the property equal to their contribution whether monetary or non-monetary. The Petitioner's fear as I understand it is that it is difficult to prove non-monetary contribution. I do not think so. Section 2 of the Act defines contribution in very clear terms. All that a party is required to do is to provide evidence or details of his or her non-monetary contribution in the marriage and leave it to the court hearing the dispute to determine. I have no doubt that the court will rise to the occasion and in the circumstances of the individual case, apply the evidence, the law and appropriate legal skills and arrive at a fair determination of the valuation of the non-monetary contribution in the circumstances of the case under consideration, and determine the respective rights of the parties in the case. That, our courts are capable of doing.”

27. The court is thus not satisfied that the Plaintiff has demonstrated that she contributed towards the acquisition of parcel 1712 hence entitled to a share thereof. There was no evidence of non-monetary contribution forthcoming from PW2 who was a son of the Plaintiff. The court does not find evidence of PW1 persuasive since he was merely a clan elder and it was not demonstrated how closely he knew the parties and how far or closely he resided in relation to the couple's residence.

28. The 2nd issue is whether parcel 1112 was clan land and whether the 1st Defendant was registered as proprietor thereof in trust for the Plaintiff and her children. The court has considered the evidence and submissions on record on this issue. The court is satisfied from the evidence on record that parcel 1112 was allocated to the 1st Defendant by his Gitiri clan in the 1960s. The court accepts and believes the evidence of PW2 who was a clan elder that the 1st Defendant was given the said land by his clan. The 1st Defendant did not contend or demonstrate at the trial that he bought parcel 1112 on his own.

29. The only question for determination is whether having been allocated clan land the 1st Defendant held it in trust for the Plaintiff and her children or solely in trust for the Plaintiff and her children under the relevant African Customary Law. There is no doubt that the 1st Defendant belongs to Aembu community hence the Embu Customary law may be applicable to him.

30. The court has noted that the Plaintiff did not adduce any evidence to demonstrate what the relevant African law on the subject provides on the holding of such clan land, the extent to which such land may be alienated, and the persons who might be legally entitled to a share of such land during the lifetime of the registered owner. Unlike statutory and other written law, African customary law is largely unwritten hence it must be proved as a matter of fact by those who wish to rely upon it. See **Kimani V Gikanga [1965] EA 753**.

31. Although the Plaintiff wanted half a share of parcel 1112 on the basis that it was clan land, it was not demonstrated that under the Aembu customary law she was entitled to half share. It was not demonstrated that the 1st Defendant was holding it exclusively in trust for the Plaintiff and her children. As it emerged at the trial the 1st Defendant has a second wife who has several children as well. If the Plaintiff contends that the clan land was held in trust for her (as a wife) and her children, there is no logical explanation as to why the 1st Defendant could not hold it in trust for his two wives and all their children.

32. The evidence of PW2 did not address the question of the applicable customary law on the land dispute. His evidence was simply that parcel 1112 was given to the 1st Defendant to enable him “raise” his family there and not for the purpose of selling it. He testified that the decision of the elders which deliberated on the land dispute was that each of the ten (10) sons of the 1st Defendant should be allocated one acre each and that the 1st Defendant should retain 4 acres. Although it was not clear from a copy the written decision on what basis it was reached, it is evident that the elders did not resolve that the Plaintiff should get one half of the property in dispute. Since that decision is not legally binding, the court shall say no more on it.

33. The court has considered the 1st Defendant’s evidence on how he intended to share his land. He stated that sometime in 2000 he decided to sub-divide both parcels Nos. 1112 and 1712 so that he could distribute the same amongst his family members. He contended that he gave out a portion of land to each of his wives and male children some of whom accepted the gifted land whereas others rejected the same. It was his case that the Plaintiff and 3 of her children declined to take their portions whilst the rest accepted.

34. Indeed, the 1st Defendant produced several copies of applications for consent of the Land Control Board for the purpose of transferring various portions of land to his family members. PW1, who is one of the sons of the 1st Defendant confirmed during cross-examination that indeed he was given a portion of land by his father but he moved out due to what he considered hostility from his step-brothers. PW1 also confirmed that the Plaintiff has a matrimonial house on her portion of land and that it had not been interfered with. The Plaintiff also had some cash crops such as coffee stems and tea bushes on the portion of land which was reserved for her.

35. The court is satisfied on the basis of the oral and documentary evidence on record that even though it was not demonstrated that the 1st Defendant was holding either parcel 1112 or 1712 in trust for the Plaintiff, the 1st Defendant did his best as a steward to provide for his family members including his two wives. The court is satisfied that some of his family members took up the portions of land offered whilst the Plaintiff declined to take her share. The 1st Defendant informed the court that the one acre of land offered to the Plaintiff was still available and was fully developed with a house and some cash crops. The 1st Defendant further informed the court that he was still ready and willing to transfer that portion to her at any time.

36. The 3rd issue is whether the consent of the Land Control Board was irregularly granted for the transfer of certain parcels of land to the 2nd – 4th Defendants. Although the Plaintiff contended that the consent of the Land Control Board was deferred when the 1st Defendant applied for the same, the documentary evidence on record does not support that view. The evidence on record indicates that vide minute No. 54 and minute No. 55 of the meeting of 10th September 2004 the Land Control Board granted consent for the transfer of parcel Nos. 5801 and 5802 to the 2nd and 3rd Defendants. The Plaintiff did not tender any copy of records indicating that the Land Control Board deferred any consent to transfer any of the parcels in dispute. The court finds no evidence of fraud or irregularity in the acquisition of the consent of the Land Control Board.

37. The 4th issue is whether the titles held by the 2nd – 4th Defendants over parcel Nos. 5801, 5802 and 5803 are impeachable. Although these Defendants did not testify at the trial, the Plaintiff’s burden of proof against them would have to be discharged if their titles are to be affected.

38. Under **section 26 of the Land Registration Act, 2012**, a title may be impeached on grounds set out in two broad categories. First, it may be challenged on the ground of fraud or misrepresentation to which the proprietor was privy. Second, it may be challenged where title was obtained illegally, unprocedurally or through a corrupt scheme.

39. The court has considered the pleadings and the evidence tendered at the trial. It is noteworthy that there were no allegations of fraud or misrepresentation on the part of the 2nd – 4th Defendants in their acquisition of the suit properties. There was no allegation that they obtained their parcels illegally, unprocedurally or through a corrupt scheme. The court also finds that no evidence of any impropriety against the 2nd – 4th Defendants was tendered at the trial hereof. Accordingly, the court finds no legal basis for impeaching their respective titles.

40. The 5th issue is whether the Plaintiff is entitled to the reliefs sought in the plaint. The court has already found that the Plaintiff has failed to demonstrate that parcel 1712 was matrimonial property acquired through her monetary or non-monetary contribution. The court has also found that the Plaintiff has failed to demonstrate that the 1st Defendant held parcel 1112 in trust for her under customary law. The court has also found that the Plaintiff has failed to demonstrate that the consent of the Land Control Board was irregularly or fraudulently obtained and that the titles held by the 2nd – 4th Defendants are impeachable. In those circumstances, it would follow that the Plaintiff is not entitled to the reliefs sought in the plaint.

41. The 6th and final issue is on costs of the suit. Although the general rule is that costs shall follow the event, the court has residual discretion to direct otherwise. The court is aware that the Plaintiff and the 1st Defendant are spouses. The court has also noted that although the 2nd – 4th Defendants filed defences in the suit, they did not attend court at the trial hereof. In those circumstances the order on costs which commends itself to the court is that each party shall bear his own costs.

42. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove her case on a balance of probabilities as required by law. Consequently, the Plaintiff's suit is hereby dismissed. Each party shall bear his own costs.

43. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **26TH DAY** of **SEPTEMBER, 2019**

In the presence of Ms. Kiai holding brief for Miss Ngige for the Plaintiff; Ms. Nzekele holding brief for Mr. Okwaro for 1st Defendant and in the absence of the rest of the parties.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

26.09.19