



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 509 OF 2017**

**RAHAB MUTHONI MBATIA.....PLAINTIFF**

**VERSUS**

**JOB KARANJA NGUGI .....1<sup>ST</sup> DEFENDANT**

**GEOFFREY KARANJA MWAURA.....2<sup>ND</sup> DEFENDANT**

**COUNTY LAND REGISTRAR, KIAMBU.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff sued the Defendants seeking for the following remedies:

*a) Permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from evicting the Plaintiff from the land parcel number Githunguri/Nyaga/T.243;*

*b) Cancellation of the title issued to the 2<sup>nd</sup> Defendant by the 3<sup>rd</sup> Defendant;*

*c) The title relating to land parcel number Githunguri/Nyaga/T.243 (the suit land) to be registered jointly and in equal share among the Plaintiff, the 1<sup>st</sup> Defendant and their children.*

*d) Costs of the suit.*

2. The Plaintiff averred that she is the wife of the 1<sup>st</sup> Defendant and that they have two (2) issues with him; that she got married to the 1<sup>st</sup> Defendant in 1984 and was cohabiting with him on the suit land and that they constructed their matrimonial home on the suit land in the year 2011. According to the Plaintiff, when the 1<sup>st</sup> Defendant expressed his desire to sell the suit land, she registered a caution on the suit land which was removed without her consent. The Plaintiff averred that the 1<sup>st</sup> Defendant sold the suit land to the 2<sup>nd</sup> Defendant without her consent, and that the 2<sup>nd</sup> Defendant has threatened to evict her from the suit land.

3. In their Defence, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied that the Plaintiff was ever married to the 1<sup>st</sup> Defendant; that there was no issue (*children*) between the 1<sup>st</sup> Defendant and the Plaintiff; that the 1<sup>st</sup> Defendant was the registered proprietor of the suit land and that the 2<sup>nd</sup> Defendant has been the registered proprietor of the suit land since 2013. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants pleaded that the 2<sup>nd</sup> Defendant acquired the suit land from the 1<sup>st</sup> Defendant who was a lawful beneficiary of the Estate of the deceased, Ngugi Karigo Kamau, vide a Sale Agreement and that the 1<sup>st</sup> Defendant had the property transferred in his name vide a Grant issued in Kiambu Succession Cause 284 of 1999 on 9<sup>th</sup> February 2011.

4. The Defendants pleaded that the Plaintiff has never filed an affidavit of protest in the Succession Cause and denied that there is a matrimonial home on the suit land. According to the Defendants, the Plaintiff was married to John Mbatia; that her matrimonial home is in Nyeri where she resided with John Mbatia with whom they had 5 children with and that there was no filial relationship between the Plaintiff and the 1<sup>st</sup> Defendant.

5. By way of a Counter-claim, the 2<sup>nd</sup> Defendant pleaded that he was the lawful proprietor of the suit land; that he acquired the suit land from the 1<sup>st</sup> Defendant and that the Plaintiff was not a beneficiary of the Estate of Ngugi Karigo Kamau in Kiambu Chief Magistrate's Succession Cause 284 of 1999.

6. The 2<sup>nd</sup> Defendant pleaded that he followed the lawful process in the acquisition of the suit land and was lawfully issued with the

Certificate of Title. The 2<sup>nd</sup> Defendant averred in the Counter-claim that the Plaintiff had no entitlement to the suit land; that she has not demonstrated the basis of her claim and that the documentation over the suit land had official stamps that were attributable to the Kiambu County Land Registry by officially identifiable officers of the Ministry of Lands at the said registry.

7. The 2<sup>nd</sup> Defendant prayed that a declaration do issue that the suit land was lawfully acquired by him. He also prayed that a permanent injunction do issue as against the Plaintiff as well as an eviction order. The 3<sup>rd</sup> Defendant neither entered appearance nor filed a Defence.

8. The Plaintiff testified as PW1 and sought to rely on her witness statement dated 4<sup>th</sup> July, 2013. PW1 informed the court that she had been on the suit land since 1990; that she got married to the 1<sup>st</sup> Defendant in 1984; that the two (2) children she had were Mbatia's and that when she divorced the said Mbatia, she came with the said children to live with the 1<sup>st</sup> Defendant.

9. PW1 informed the court that the 1<sup>st</sup> Defendant paid dowry to her parents and that the suit land is ancestral land. According to PW1, there is no decision yet in respect of the protest that she filed in Kiambu Succession number 384 of 1999. It was her testimony that the transaction on the suit land by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was done fraudulently.

10. According to PW1, when she married the 1<sup>st</sup> Defendant, he did not have a job or money; that she is the one who gave him Kshs. 700,000 to start a business in Tanzania and that the suit land was given to the 1<sup>st</sup> Defendant by his father.

11. The 1<sup>st</sup> Defendant, DW1, informed the court that the Plaintiff is not his wife. According to DW1, she met the Plaintiff in 1996 and that they were just informal friends.

12. According to DW1, the 2<sup>nd</sup> Defendant lawfully acquired the suit land for valuable consideration from the Estate of his deceased father, Ngugi Karigo Kamau and that the Plaintiff did not file an Affidavit of Protest in Kiambu Succession Cause No. 284 of 1999.

13. The 2<sup>nd</sup> Defendant, DW2, informed the court that he met the 1<sup>st</sup> Defendant in September, 2011; that the 1<sup>st</sup> Defendant offered to sell to him the suit land and that after conducting due diligence, he established that the Plaintiff had no basis being on the suit land; that he entered into a Sale Agreement with the 1<sup>st</sup> Defendant on 17<sup>th</sup> October, 2011 and that the 1<sup>st</sup> Defendant's brothers and sisters participated in the transaction. It was the evidence of DW2 that after paying the purchase price, the Administrator of the Estate of the late Ngugi Karigo Kamau transferred to the 1<sup>st</sup> Defendant the suit property who then transferred it to him on 21<sup>st</sup> March, 2013. The 2<sup>nd</sup> Defendant prayed that the Plaintiff should be evicted from the suit land.

14. Although the Plaintiff had registered a caution against the title, DW2 informed the court that the Registrar of Lands removed it after summoning the Plaintiff. It was the evidence of DW1 that the Plaintiff was given the land to occupy it temporary and that the 1<sup>st</sup> Defendant has a wife who is not the Plaintiff.

15. In his submissions, counsel for the Plaintiff raised three (3) issues, firstly, whether there was any marriage between the Plaintiff and the 1<sup>st</sup> Defendant; secondly, whether there was spousal interest vesting over the suit property and finally, whether the suit property was a matrimonial home. On the first issue, counsel submitted that the 1<sup>st</sup> Defendant in his testimony admitted allocating the suit property to the Plaintiff and her children. According to counsel, the Plaintiff lives on and tills the suit property because she is the 1<sup>st</sup> Defendant's wife.

16. The Plaintiff's counsel submitted that the suit property is matrimonial property within the purview of Section 6 of the Matrimonial Property Act. Counsel placed reliance on the case of *Eunice Njeri Kariuki vs. James Mwangi Mwirika & Another (2017) eKLR* where it was held that spousal consent is necessary in respect of any alienation of matrimonial property.

17. In response, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted on the issue of jurisdiction and argued that the Plaintiff did not lodge this claim under the provisions of the Matrimonial Property Act or under Order 38 of the Civil Procedure Rules where trust and constructive trusts can be claimed. The Defendants' counsel submitted that the official search in respect of the suit property is indicative that the same was registered in the name of the 2<sup>nd</sup> Defendant.

18. On the second issue, counsel submitted that the Plaintiff was an invitee on the suit land, and that the invitation had been extinguished by the notice to the Plaintiff to vacate. Counsel submitted that the Plaintiff was a trespasser and had no equitable or proprietary interest in the suit land.

19. On the third issue, the Defendants' counsel submitted that there was no evidence to prove marriage between the Plaintiff and the 1<sup>st</sup> Defendant and relied on the case of *Justus Makeke Muumbi vs. Dorcas Nduku Kimeu (2018) eKLR*. Counsel submitted that the 2<sup>nd</sup> Defendant acquired the suit property for valuable consideration as evidenced by the sale agreement and concluded that the Plaintiff is not competent to sustain the claim.

#### **Analysis and findings:**

20. The Plaintiff's claim in this matter is that she got married to the 1<sup>st</sup> Defendant in the year 1984; that the 1<sup>st</sup> Defendant inherited parcel of land known as Githunguri/Nyaga/T.243 from his late father vide Kiambu Succession Cause No. 284 of 1999 (*the suit property*) and that their matrimonial home is on the suit property.

21. According to the Plaintiff, in the year 2011, the 1<sup>st</sup> Defendant attempted to sell the suit property without her consent at which particular

point she lodged a caution against the title. However, it was her testimony that the Registrar of Lands, in connivance with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, had the said caution lifted; that the 1<sup>st</sup> Defendant went ahead to sell the land to the 2<sup>nd</sup> Defendant in the year 2013 without her consent and that the actions by the 1<sup>st</sup> Defendant will render her homeless.

22. The Defendants have denied that the Plaintiff was ever married to the 1<sup>st</sup> Defendant, and that the 1<sup>st</sup> Defendant was entitled to sell the suit land to the 2<sup>nd</sup> Defendant. Arising from the pleadings and the evidence, the issues for determination are as follows:

**a. Whether there was a marriage between the Plaintiff and the 1<sup>st</sup> Defendant.**

**b. Whether there was spousal interest vesting over land known as Githunguri/Nyaga/T.243 and**

**c. Whether the sale of the suit land to the 2<sup>nd</sup> Defendant was lawful.**

23. It is not in dispute that on 9<sup>th</sup> February, 2011, the Estate of the late Ngugi Karigo Kamau, the 1<sup>st</sup> Defendant's father, was distributed vide a Certificate of Confirmation of a Grant by the court in Kiambu Chief Magistrate's Court Succession Cause No. 284 of 1999. After the said distribution, the Administrator of the Estate of Ngugi Karigo Kamau sought to have the Certificate of Confirmation for Grant amended so as to include other beneficiaries for the suit land, a move that the Plaintiff and the 1<sup>st</sup> Defendant objected to vide Affidavits of Protest filed in Court on 12<sup>th</sup> October, 2011.

24. I have read the proceedings in Kiambu Succession Cause No. 284 of 1999. In the said proceedings, the Administration of the Estate of the 1<sup>st</sup> Defendant's father informed the court as follows:

***“When we started the process of the sale of the property, Job was being threatened by the wife (the Plaintiff herein) against teaming with us.”***

25. In the same proceedings, the 1<sup>st</sup> Defendant did file an Affidavit of Protest sworn on 12<sup>th</sup> April, 2012 in which he deponed as follows:

***“5. That I concur and support the contents of protest sworn by my wife Rahab Muthoni objecting to the said amendment.***

***6. That I swear this Affidavit in support of my protest to the prayers for amendments sought therein and ask the court to dismiss it as it smirks of unfairness on the part of the administrator and my other siblings.”***

26. After hearing the protests by the Plaintiff herein and the 1<sup>st</sup> Defendant herein, the learned Magistrate dismissed the Application by the Administration of the Estate of the 1<sup>st</sup> Defendant's father.

27. The proceedings before the learned Magistrate in Kiambu Succession Cause No. 284 of 1999 shows that the 1<sup>st</sup> Defendant admitted that the Plaintiff was his wife. Indeed, the 1<sup>st</sup> Defendant's brother, who was the Administrator of the Estate of the late Ngugi Karigo, also admitted that the Plaintiff was the wife of the 1<sup>st</sup> Defendant. That being the case, the 1<sup>st</sup> Defendant cannot deny in these proceedings that the Plaintiff is not his wife.

28. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have admitted that even as at the time of the sale of the suit land, the Plaintiff was living on the suit land with her children. Indeed, upto now, the Plaintiff's house is situated on the suit land. If the Plaintiff is not the 1<sup>st</sup> Defendant's wife, then, on which basis is she living on the suit land? She could only be on the land by virtue of having been married to the 1<sup>st</sup> Defendant in 1984. The argument by the 1<sup>st</sup> Defendant that he settled the Plaintiff with her children on the suit land because she was homeless cannot stand. The Plaintiff was the 1<sup>st</sup> Defendant's wife for all intents and purposes. The 1<sup>st</sup> Defendant admitted as much in Kiambu Succession Cause No. 284 of 1999.

29. That being the case, the Plaintiff, being a spouse of the 1<sup>st</sup> Defendant, and having put up a matrimonial home on the suit property, has an overriding interest on the land. Section 93 of the Land Registration Act provides as follows:

***“Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.”***

30. Matrimonial property has been defined under Section 6 of the Matrimonial Property Act as follows:

***“6(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.”***

31. Section 12(1) of the Matrimonial Property Act provides as follows:

***(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.***

32. Although the Defendants' advocate submitted that the suit herein was not filed pursuant to the provisions of the Matrimonial Property Act, the provisions of the Act have to be read alongside the provisions of Section 93 of the Land Registration Act. The said Section grants a spouse an interest over matrimonial property.

33. Considering that the provisions of Section 93 of the Land Registration Act and Section 12 of the Matrimonial Property Act requires a spouse to give his or her consent before a matrimonial property can be sold, it follows that the sale of the suit land to the 2<sup>nd</sup> Defendant without the consent of the Plaintiff was unlawful.

34. Although the suit property was registered in favour of the 2<sup>nd</sup> Defendant on 21<sup>st</sup> March, 2013, the said registration was unlawful. In the circumstances, the Plaintiff's Plaint dated 4<sup>th</sup> July, 2013 is allowed as follows:

***a. A permanent injunction be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from evicting the Plaintiff from land parcel Number Githunguri/Nyaga/T.243.***

***b. The title issued to the 2<sup>nd</sup> Defendant by the 3<sup>rd</sup> Defendant in respect of parcel of land known as Githunguri/Nyaga/T.243 be cancelled.***

***c. The 3<sup>rd</sup> Defendant is hereby directed to rectify the register in respect of land known as Githunguri/Nyaga/T.243 by deleting the name of the 2<sup>nd</sup> Defendant.***

***d. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants to pay the costs of the suit.***

***e. The Counter-claim by the 2<sup>nd</sup> Defendant is dismissed with costs.***

**DATED AND SIGNED AT MACHAKOS THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**O.A. ANGOTE**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT THIKA THIS 18<sup>TH</sup> DAY OF OCTOBER, 2019.**

**L. GACHERU**

**JUDGE**