



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 7 OF 2016

MBAIKA THITU.....PLAINTIFF

VERSUS

SAMUEL ROGONCHO.....1ST DEFENDANT

JOYCE KANISA ONDIEKI.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. By a plaint dated 14th January, 2016, the Plaintiff filed suit against the Defendants seeking an order of specific performance requiring the 1st Defendant to transfer a portion of land parcel no. **NYARIBARI/CHACHE/NYANTURAGO/664** measuring 2 acres to the plaintiff and the 2nd Defendant to give vacant possession thereof. It is the plaintiff's case that she is entitled to the said parcel of land by virtue of the fact that she was married to the 1st Defendant's son one **George Okemwa Rogoncho** (deceased).

2. The Defendants filed their Defence dated 2nd March, 2016 in which they denied the plaintiff's claim. In particular, they deny that the plaintiff was married to the late **George Okemwa Rogoncho** as no dowry was paid to the plaintiff's parents.

3. The suit was set down for hearing on 23rd September, 2019 and despite being served with a Hearing Notice, neither the Defendants nor their Advocate attended court. The case therefore proceeded ex-parte at Rogoncho.

4. The plaintiff who was the sole witness in support of the Plaintiff's case relied on her witness statement filed in court on 14th January, 2016. She testified that she was married to **George Okemwa Rogoncho**. She stated that she was claiming a portion of the suit property measuring 2 acres which is registered in the name of the 1st Defendant by virtue of the fact that she was married to the 1st Defendant's son. She stated that the 2nd Defendant was brought as wife to the deceased after his death.

5. She produced a limited grant in respect of the estate of the deceased dated 18th September, 2008, a copy of the deceased's death certificate, a copy of the funeral announcement, copies of Birth certificates and some photographs taken during the burial of the deceased after which she closed her case. Counsel for the plaintiff did not file any submissions.

ISSUES FOR DETERMINATION

6. Having considered the pleadings and the plaintiff's evidence the following issues fall for determination.

- i. Whether the plaintiff was married to the late **George Okemwa Rogoncho** (Deceased).
- ii. If the answer to (i) is in the affirmative, whether by virtue of the said marriage, she is entitled to a portion of land parcel **No. NYARIBARI/CHACHE/NYANTURAGO/664** measuring 2 acres registered in the name of the 1st Defendant.
- iii. Whether the plaintiff is entitled to an order of specific performance.
- iv. Who should bear the costs of this suit?

7. With regard to the first issue, the plaintiff testified that she was married to the late **George Okemwa Rogoncho**. Even though her evidence was not challenged, she did not state when and how the said marriage was solemnized. I would however give her the benefit of doubt.

8. Regarding her claim to the suit property, I have difficulties in determining the basis of her claim on various fronts. Firstly, she did not produce any certificate of official search to show that the suit property is registered in the name of the 1st Defendant. Secondly, even if there is no dispute as to the ownership of the suit property, the registered owner thereof is still alive and he had not yet bequeathed any portion of the suit property to the deceased. Thirdly, the plaintiff is not in occupation of the suit property. The plaintiff's claim is therefore premature and unsustainable.

9. In arriving at this finding I rely on the case of **MURIUKI MARIGI V RICHARD MARIGI MURIUKI & 2 OTHERS** (Unreported) where the Court of Appeal concluded that since the owner of the land was still alive his property was not available for distribution. The Court stated as follows:-

“We earlier set out the provisions of Sections 27 and 28 of the Registered Land Act which in effect state that the rights of a registered proprietor of Land Registered under the Act are absolute and indefeasible and are only subject to rights and encumbrances noted on the register or overriding interests which are set out in section 30 of the act. The evidence on record is silent on whether or not the Respondents' Kikuyu customary law rights over the suit property are noted in the land register respecting the land. In absence of such evidence we may not properly infer or imply that they are. The only other aspect outstanding for consideration is whether the customary law rights, if they exist at all, are overriding rights or interests recognizable under that section. The issue was considered in the following two reported cases of OBIERO -VS- OPIYO & OTHERS [1972] EA 227 AND ESIROYO -VS- ESIROYO& ANOTHER [1973] EA 388, and in both cases it was held that they are not. The Court in both cases was bound to come to that conclusion because of the clear language of Section 30, above. Moreover, considering the provisions of Section 3(2) of the Judicature Act which we partly reproduced above, customary law rights being subject to rights under a written law, the Respondents' rights are clearly excluded by the clear language of Sections 27 and 28 of the Registered Land Act.”

And concluded: -

“The appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decides to subdivide and distribute it among them. He may not be urged, directed or ordered to do it against his own will.” Emphasis supplied.

10. Similarly, in the instant case the plaintiff is not in occupation of the suit land even though I sympathize with her, I am unable to grant her the prayers sought as the 1st Defendant is still alive and within his rights to use and distribute his land as his wishes.

12. Accordingly, the plaintiff has failed to prove her case on a balance of probabilities and I dismiss it.

I make no order as to costs.

Dated, signed and delivered at KISII this 18th day of December, 2019.

J.M. ONYANGO

JUDGE