



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 252 OF 2017

(FORMELY KISII ELC CASE NO. 70 OF 2017)

ALICE KEMUNTO BRUNO.....PLAINTIFF/APPLICANT

VERSUS

GEORGE MWAMBA ONTIERI...DEFENDANT/RESPONDENT

JUDGMENT

1. The plaintiff namely ALICE KEMUNTO BRUNO (Hereinafter referred to as PW1) filed this suit by way of a plaint dated 17th February, 2015. She prays for judgment to be entered against the defendant for the followings orders:-

- a. A declaration that the plaintiff is the rightful owner of the land Ref No. **WEST KASIPUL/KONYANGO KOKAL/1289**.
- b. An order for the cancellation of the title **No. WEST KASIPUL/KONYANGO KOKAL/1289** in the defendants name and registration of the suit property in the name of the Plaintiff
- c. An order of permanent injunction restraining the defendant whether by himself, his agents servants, relatives or anybody claiming under him or otherwise howsoever from taking possession, entering and/or interfering with the Plaintiff quite possession and enjoyment of **L.R. NO. WEST KASIPUL/KONYANGO KOKAL/1289**.
- d. Cost of the suit
- e. Any other relief deemed fit to be granted by this honourable court.

2. Achillah T.O and Co. Advocates are on record forPW1. The defendant was duly served on 25/2/2015 as shown on an affidavit of service sworn on 29/3/16 by Nornael Goganyo, a duly licensed process server of this court. The said defendant failed to enter appearance and or file defence within the prescribed period of time or at all hence hearing proceeded ex-parte.

3. Briefly PW1 claims that in 1986, the defendant and herself married under Gusii Customary law. They were blessed with one son, James Maina. They then separated.

4. PW1 further claims that in 1999, she approached Lawrence Siro Mariera (PW3) to identify a piece of land in Oyugis area to enable her purchase it. He advised her to purchase the suit land namely LR No.West Kasipul/Kanyango Kokal/ 1289 measuring 0.6 hectares belonging to one Charles Ondiek Owenga. The agreed purchase price for the suit land was Ksh. 115,000/= .PW1 paid Ksh.90,000/= while the defendant paid Ksh. 25,000/= thereof. In the year 2000, the defendant by fraud, transferred and registered the suit land in his name. PW1 has been staying on the suit land since the year 2008. The defendant has threatened to evict her and move into the suit land rendering the instant suit necessary.

5. On 13/11/2017, I heard the evidence of PW1 and her two witnesses namely JOHN LAWRENCE OLIECH OWIDI (PW2) and LAWRENCE SIRO MARIERA (PW3). Mr Oyugi Odira, a counsel instructed by T.O Achilla and Co.Advocates conducted the prosecution case for PW1. The testimony of PW1 was that she has had the land dispute with the defendant since the year 2014 and that the latter registered the suit land in his name. She did plead at para 6 of the plaint, particulars of fraud/misrepresentation. PW1 produced a land sale agreement (PEXh1) in evidence.

6. The counsel for PW1 filed submissions on 15/12/2017. He gave an introduction on background of the dispute, four(4) issues for determination and relied on several authorities as follows;

- a. **Yogendra Pusshotahn Patel –vs—pascale Mireilla Bakshi and 2 others (2006)eKLR** on resulting trusts by operation of equity.

b. Carreras Rothmans –vs—Freeman Mathews Treasure (1985) CH 207 about resulting trust.

c. Gissing—vs—Gissing (1971) AC 886 in regard to intended trust and that equity fastens on the conscience of the person who receives property from another.

d. Calverley –vs—Green 56 ALR 483 on holding property by the transferee upon trust for the person who provided the purchase price.

e. Oxley –vs—Hiscock (2005) 3WLR 715 concerning beneficial interest based on the parties' contribution to the purchase price and the whole course of dealing between them in relation to the property.

f. Section 98 of the Evidence Act (Cap 80 Laws of Kenya) with respect to admissibility evidence of oral agreement or statement.

g. Bilous –vs—Bilous (1957) EA 96 in respect of application of the presumption of resulting trust

h. Hussey –vs—Palmer (1972) 3 ALLER 744 on equitable principle of constructive trust for an aggrieved party to obtain restitution.

i. Arthi Highway Developers Ltd –vs—West End Butchery Ltd and 6 others Court of Appeal at Nairobi Civil Appeal No.246 of 2013 CA (2015) eKLR to the effect that a fraudulent title cannot be allowed to stand as the court can cancel title and order the land to revert to the original owner.

j. Monica Herta Elfriede Behrmann –vs—Mubia Holdings Ltd (2017) eKLR that Section 80 of the Land Registration Act, 2012 empowers the court to rectify the register by cancellation of registration due to fraud or mistake.

k. Esther Ndegi Njiru and Anor –vs – Leonard Gatei (2014) eKLR in relation to entry of judgment for cancellation of title issued in the name of the plaintiff against the defendant.

l. L.N –vs—S.M.M (2013) eKLR about grant of mandatory order directing the defendant to transfer the suit property to the plaintiff in default the Deputy Registrar of the court to sign the transfer forms in favour of the plaintiff.

7. In the case of **Great Lakes Transport Co. (U) Ltd –vs—Kenya Revenue Authority (2009) KLR 720**, it was held that it is trite law that issues for determination in a suit generally flow from the pleadings or such issues as the parties have framed for the determination by the court. The plaintiff's counsel has framed four (4) issues for the court's determination. The defendant never framed any issues for determination by the court as he never defended this suit. I am inclined to reframe the issues framed by the plaintiff counsel as follows:

a. Did PW1 and the defendant jointly contribute to the purchase of the suit land?

b. Did the defendant obtain the title of the suit land by way of fraud or misrepresentation?

c. Is PW1 entitled to the reliefs sought in the plaint?

8. PW1 stated at paragraphs 4 and 5 of the plaint that she approached PW3 to identify a suitable parcel of land to purchase in Oyugis area. PW3 confirmed so in his evidence and that he advised her to purchase the suit land. PW1 further stated that the cost of the suit land was Ksh.115,000/= and she paid Ksh. 90,000/= thereof while the defendant paid the balance of Ksh.25,000/= for it's purchase.

9. The statement of PW1 was reiterated in her own testimony and she did mention about PW3 and Ksh 90,000/= which she paid to the defendant for the purchase of the suit land. Her testimony was corroborated by PW2 who testified that:

“ PW1 and the defendant were together. I saw PW1 pay Ksh.90,000/= in cash to the seller. The balance of Ksh.25000/= was to be settled by the defendant. The land parcel number was West Kasipul/ Konyango Kokal/1289. PW1 stayed on the land alone since 2008.” (*Emphasis added*)

10. The evidence of PW1 was further fortified by PW3, who stated, inter alia:

“On 6/2/2000, PW1 paid Ksh.90,000/= to the seller Charles Ondiek Owenga. The purchase price was Ksh. 115,000/=. The balance of Ksh.25,000/= was to be settled by her husband, the defendant herein”(Emphasis supplied)

11. By the testimonies of PW1, PW2, PW3 together with PExh1 and the submissions by the counsel forPW1, it is abundantly clear that the parties to this suit pulled resources together and bought the suit land. PW1 contributed 78.26% of the purchase while the defendant contributed 21.74% of it's purchase price.

12. At paragraph 6 of the plaint and in the testimony, of PW1, it is pretty clear that the defendant transferred and registered the suit land in his name in lieu of joint names of PW1 and himself. He didn't consult PW1 hence an element of fraud or corrupt scheme or misrepresentation. PW1 told the court in part :

“ The defendant requested me to have the land registered in his names. I agreed He ran away with the title to the land upon registration. He registered it in his name by misrepresentation.”

13. Furthermore, PW1 pleaded the particulars of fraud /misrepresentation at paragraph 6 (a) to (d) of the plaint. She specifically pleaded fraud/misrepresentation and particulars thereof stated on the face of the pleadings/plaint; see Abiero—vs—Thabiti Finance Co.Ltd and Anor(2001)KLR 496.

14. Counsel for PW1 relied on various cases, among them, Bilous and Hussey cases (supra), on equitable trust principle in his submissions. In Mwangi and Anor –vs—Mwangi (1986) KLR 328, it was held that trust over agricultural land is not subject to section 6 (1) (a) of the Land Control Act (Cap 302 LOK) where consent of the area land control board may be required and section 7 of the Limitation of Actions Act (Cap 22) on adverse possession. I am guided by, among other authorities, Mbuthu and others—vs—Waitimu and 11 others (1986) KLR 171 at 189 quoted in Yogendra case (supra) on resulting trust in joint transactions, Gissing case (supra) that joint efforts by a couple are an inference that the property belongs to them both equally and L.N case (supra) that the plaintiff was used by the defendant to buy the suit property and that the plaintiff claim for the recovery of the suit property is properly before this court.

15. It then follows that the suit land belongs to both PW1 and the defendant equally. It is their matrimonial property. **Article 27 of the Constitution of Kenya, 2010** provides for right to equality and the right to property is enshrined under **Article 40 of the Constitution of Kenya, 2010.**

16. The Matrimonial Property Act, No. 49 of 2013 (The MPA, 2013) makes provision for equality of status of spouses over property. **Section 4** of the Act reads:

“Despite any other law, a married woman has the same rights as a married man-

a. To acquire, administer, hold control use and dispose of property whether movable or immovable;

b. To enter into a contract ; and

c. To sue and be sued in her own name. (Emphasis added)

17. The term matrimonial property is defined under **Section 6** of the **MPA, 2013**, to include;

“any other immovable property jointly owned and acquired during the subsistence of the marriage;”

18. PW1 has demonstrated in her plaint and evidence that she contributed kshs. 90,000/=in the acquisition of the suit land. The defendant has acquired it's title by fraud or misrepresentation or through a corrupt scheme thus the exceptions to absoluteness and indefeasibility of title under **Section 24 of the Land Registration Act, 2012** are applicable in the circumstances. The authorities relied upon by counsel for PW1 in support of her claim are all very relevant to the instant suit, PW1 is entitled to the ownership of the suit land. Moreover, **Section 7** of the **MPA, 2013** , provides as follows;

“Subject to section 6(3) ownership of matrimonial property vest 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. (Emphasis supplied).

19. In the result, I find the claim by the PW1 quite clear, cogent and unchallenged. She has proved her claim against the defendant on a balance of probability.

20. I accordingly enter judgment for the plaintiff against the defendant and make orders in the following terms:

a. A declaration that the plaintiff PW1 is a rightful proprietor of 0.48 Ha of the land Ref. West Kasipul/Konyango Kokal/1289 .

b. Cancellation of title No. West Kasipul/Konyango Kokal/1289 in the defendant's name and registration of the suit land in the name of PW1 and defendant with 0.48 Ha and 0.12 Ha respectively.

c. A permanent injunction restraining the defendant whether by himself, his agents, servants, relatives or anybody claiming under him or otherwise howsoever from taking possession and enjoyment of 0.48 Ha of L.R No. West Kasipul/Konyango/1289.

d. Costs of the suit shall be borne by the defendant

Delivered, Signed and Dated at Migori this 18th day of January, 2018

G M A ONGONDO

JUDGE

In the presence of:

Mr. Odira Counsel for the Plaintiff

Tom Maurice –Court Assistant

G M A ONGONDO

JUDGE