



**REPUBLIC OF KENYA**

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

**ELC CAUSE NO. 760 OF 2016**

**JOYCE NYABOKE MOGOKI.....PLAINTIFF**

**-VERSUS-**

**WILFRED MONGARE.....DEFENDANT**

**JUDGEMENT**

The Plaintiff brought the suit herein by way of a plaint dated 7<sup>th</sup> March, 2012. In the plaint she sought three main orders namely that a declaration do issue that she is entitled to an equal portion of LR. No. West Kitutu/ Ikuruma/691, a permanent injunction to restrain the Defendant from ejecting, evicting and forcefully removing her and her family from the suit land, her occupation and enjoyment of quite possession of the land and an order compelling to the Defendant and in default the Deputy Registrar to transfer half share of the suit property to her.

According to the Plaintiff the facts are that she was married in 1978 to one Yusafia Moraa Seremani, a lady, who is deceased through the Abagusii customary law and rites that recognize woman to woman marriage. The Plaintiff averred that the deceased was the registered proprietor of the suit land and that at all material time she was occupying half of the suit land and she enjoyed peaceful and quite enjoyment of the land and on which she cultivated subsistence and cash crops.

The Plaintiff claims that the Defendant in a view to defeat the Plaintiff's interest in the land the Defendant caused himself to be registered as the sole proprietor and has since the aforesaid registration subjected the plaintiff to harassment with a view to forcefully evict her and children from the suit land.

The Plaintiff avers that being the wife of Moraa she is entitled to half a share of the property.

The Plaintiff's claims against the Defendant is therefore a declaration that the Defendant is entitled to an equal portion of LR. West Kitutu/Ikuruma/691, an order compelling the Defendant and in default the Deputy Registrar to transfer and do all incidentals in favour of the Plaintiff an equal share of land Reference No. West Kitutu/Ikuruma/691 and costs of the suit.

The Defendant has filed a defence to the Plaintiff's claim and he denies the said claim in its entirety and he contends that the suit property was transferred to him voluntarily by his deceased father and he has put the Plaintiff to strict proof of her averments.

When the suit herein came up for hearing the same proceeded in the absence of the Defendant who despite being served with a notice to cease acting filed by his advocates did not appear in court for the hearing of the application and the substantive suit.

The Plaintiff in her evidence in chief stated that she is in occupation of the suit land where she grows

crops namely tea and coffee and that she has further built three houses on the land and that she has been on the parcel of land for over a period of 30years having been married to her when his wife failed to bore him children.

I have heard the testimony of the plaintiff which remains unconverted and unchallenged. The plaintiff has tendered receipts as exhibits to show that she sales her tea at Itongo tea factory. In her evidence the Plaintiff has produced a certificate of official search which showed that the suit land is registered in the name of Seremani Sino and she has proved on a balance of probability that she was married under Kisii customary law to the first wife of Seremani Sino to whom she bore children.

From the evidence before me it is my finding that the Plaintiff has proved her case on a balance of probabilities and having been married as a wife by the first wife of Seremani Sino in whose name the suit land is registered. She is entitled to an equal share of the land.

In view of the above I therefore enter judgement for the Plaintiff against the defendant in the following terms:-

- 1. A permanent injunction do issue restraining the defendant, his agent, relatives or servants from ejecting, chasing, evicting and/or in any way interfering with the plaintiff's occupation and possession and/or using the Clearly demarcated portion she currently occupies in the suit land.**
- 2. A declaration do issue that the plaintiff is entitled to a portion that she occupies on land Reference No. West Kitutu/Ikuruma/691.**
- 3. An order do issue that the Defendant do transfer the portion named in (2) above to the plaintiff within 60 days in default the Deputy Registrar do all such transfer and incidentals in favour of the plaintiff.**
- 4. The costs of the suit is to the plaintiff.**

**DATED, SIGNED and DELIVERED in open court at KISII on this 23<sup>rd</sup> day of February, 2018**

**Mohammed Noor Kullow**

**Judge**

In the presence of:-