



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 72 OF 2016

MARY KEMUNTO JOSEPH.....PLAINTIFF

VERSUS

JOSEPH ONDIEKI.....1ST DEFENDANT

JANE NYAGECHANGA ONDIEKI.....2ND DEFENDANT

R U L I N G

1. The plaintiff is the 1st wife of the 1st defendant while the 2nd defendant is the 2nd wife of the 1st defendant. The suit is thus between a wife, the husband and the co-wife. In the suit the plaintiff claims that land parcel **Majoge/Bokimonge/329** was originally owned by Kurendi Nyakagita, her deceased father in law but has now been subdivided into land parcels **Majoge/Bokimonge/3114** and **3115** which are presently registered in the 1st defendant's and the 2nd defendant's name respectively. The plaintiff claims she has been in occupation of land parcel **Majoge/Bokimonge/329** where she has her home and has carried out extensive developments. She avers following the subdivision of the land parcel **Majoge/Bokimonge/3115** now registered in the 2nd defendant's name includes part of the portion occupied by her (plaintiff) where there is part of her homestead, tea bushes and trees belonging to her.

2. The plaintiff prays for judgment for an order that she is entitled to a portion of the suit property and for an order that she is entitled to a portion of the land where she has been in occupation on the ground.

3. The 1st defendant in the replying affidavit sworn in response to the plaintiff's application for injunction filed simultaneously with the plaint admitted that he was the registered owner of land parcel **Majoge/Bokimonge/329** since 1984. He averred that he settled both of his wives on the land and built each of them a house on their respective portions. The 1st defendant stated he agreed to subdivide the land between his two wives and the plaintiff was to get land parcel **Majoge/Bokimonge/3114** and the 2nd defendant **3115**. The plaintiff failed to avail her identity card and passport photographs to facilitate registration of parcel **3114** in her name. The 1st defendant stated that he registered the land parcel **3114** in his name and now holds the title in trust for the plaintiff. The 1st defendant further stated that he is the one who planted the tea bushes and both his wives have access to the same. He averred that as the owner of the suit property he had a right to allocate his wives land as he deemed appropriate.

4. On 13th April 2016 when the matter came up for the interpartes hearing of the plaintiff's application, the court in view of the close family relationship directed the parties to attempt to reconcile. As the parties did not agree, the court further on 21st June 2016 when the matter was listed for mention, directed that the parties submit to mediation of the dispute before the Assistant County Commissioner, Liokindo Division. The Assistant County Commissioner filed a report dated 6th September 2016 and among the findings he made was that the 1st defendant who was the husband of the plaintiff and the 2nd defendant had subdivided his land parcel **Majoge/Bokimonge/329** into parcels **3114** and **3115** and had transferred parcel **3115** to the 2nd defendant while parcel **3114** was intended to be transferred to the plaintiff but had not because she had not provided the supporting documents. He also found the plaintiff's homestead was on parcel **3114** while 700 tea bushes that the plaintiff claimed to be hers were on parcel **3115** transferred to the 2nd defendant. The Assistant County Commissioner made two proposals to the parties:-

1. That the plaintiff takes parcel number Majoge/Bokimonge/3114 as given to her on condition that she continues utilizing the 700 tea bushes on parcel Majoge/Bokimonge/3115 for a period of five years within which the 2nd defendant shall have planted equal number of tea bushes (700) in an area on parcel number, 3114 as directed by the plaintiff.

2. That the parties agree on a swap of the proprietorship on condition that the plaintiff moves her homestead from parcel number 3114 to parcel number 3115 and plant equal number of tea bushes on parcel number 3114 on an area as directed by the 2nd defendant.

5. The Assistant County Commissioner however stated the parties did not agree to either of the proposals and suggested the court could

determine to pick either of the proposals as its ruling. While the proposals put forth by the Assistant County Commissioner are realistic and well founded it was up to the parties to agree as the Assistant County Commissioner was merely acting as a mediator in an effort to reconcile the parties. The Assistant County Commissioner was not acting as an arbitrator so that his decision would bind the parties. Even then to the extent that he offered two proposals, his decision would have been incapable of being enforced for want of decisiveness. In a mediation process the parties have to reach an agreement and in the absence of an agreement the dispute remains unresolved. That is the situation herein.

6. The plaintiff has vide the Notice of Motion dated 27th February 2018 requested the court to order for a rehearing of the dispute before the same Assistant County Commissioner and/or for the matter to be heard by the court. The 1st defendant has filed a replying affidavit opposing the application sworn on 18th April 2018. For the reasons adverted to earlier it is my position that the mediation efforts have failed and no useful purpose would be served by referring the matter back to the same mediator who has heard the dispute and determined that the parties have failed to agree.

7. In the premises, the court vacates the order of reference of the matter to mediation and directs that the parties comply with Order 11 of the Civil Procedure Rules to facilitate the hearing of the matter on merits.

8. This matter being one that the Magistrates Court would have jurisdiction to handle having regard to the value of the suit property which would at any rate not exceed the Magistrates pecuniary jurisdiction of kshs. 20,000,000/=, I hereby direct and order that this file be transferred to the Chief Magistrates Court, Kisii for hearing and determination.

9. The costs of the plaintiff's application shall be in the cause.

RULING DATED, SIGNED and DELIVERED at KISII this 20TH DAY of JULY 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

M/s Nyagacha for the 1st and 2nd defendants

Ruth Court assistant

J. M. MUTUNGI

JUDGE