



REPUBLIC OF KENYA

THE ENVIRONMENT & LAND COURT AT GARISSA

ELC CASE NO. 20 OF 2017

NM.....PLAINTIFF

VERSUS

DM.....DEFENDANT

JUDGEMENT

The plaintiff and the defendant are wife and husband who got married to each other under the Christian Marriage and Divorce Act on 7th December, 2002. The two were blessed with the following issues namely;

1. PKM
2. DMM
3. VKM
4. IKM and
5. SK

During the subsistence of their marriage, the plaintiff and defendant cohabited at [particulars withheld] area where they established their matrimonial house on land parcel No. Mwingi/Kanzanzu/[xxxx]. In her plaint dated 24th March, 2017 and amended on 1st November, 2017, the plaintiff averred that upon marriage, they jointly acquired properties being Mwingi/Kanzanzu/[XXXX], Mwingi Kanzanzu/[XXXX] and Land situated in Lundi area. The plaintiff further averred that without her consent or permission, the defendant has unilaterally subdivided parcel No. Mwingi/Kanzanzu/[XXXX] into parcels No. Mwingi/Kanzanzu/[XXXX].

The plaintiff also averred that sometime in 2014 or thereabouts, the defendant started disposing off part of the Matrimonial Property being Mwingi/Kanzanzu/[XXXX] without her consent and/or approval. The plaintiff further averred that on or about the 3rd August, 2015, they developed marital differences and that the defendant forced her to leave their matrimonial home at [particulars withheld] and moved to Nguni area where she also works for gain. The plaintiff further contends that she lodged caution with the Land Registrar Mwingi but in vain.

In a statement of defence and counterclaim dated 27th April, 2017 and filed the same date, the defendant denied the plaintiff's claim and puts her to strict proof thereof. By way of a rejoinder, the defendant averred that the marriage between him and the plaintiff is his second marriage after the demise of his first wife who died in the year 1995. The defendant further averred that it is the plaintiff who deserted their matrimonial home constructively and started cohabiting with another man at Nguni market and that the suit property referred to as LR NO. Mwingi/Kanzanzu/[XXXX] is a commercial land which he bought from his late father in the year 1982 before he married the plaintiff.

The defendant further contends that he subdivided the said parcel of land No. Mwingi/Kanzanzu/[XXXX] into portions which he has been selling to enable him educate his children. The defendant also averred that he has another parcel of land No. Mwingi/Kanzanzu/[XXXX] which is their matrimonial land and not Land No. Mwingi/Kanzanzu/[XXXX] as alleged by the plaintiff.

THE PLAINTIFF'S CASE

According to the plaintiff, she got married to the defendant in the year 1994 under Kamba Customary Law and later solemnized under the Christian Marriage and Divorce Act on 7th December, 2002. They cohabited as husband and wife until 2009 when the defendant started having issues and chased her away on 3rd August, 2015. Between 2014 and 2017 the defendant started selling portions of land Parcel No.

Mwingi/Kanzanzu/[XXXX] which is an ancestral land without her consent or approval.

DEFENDANT'S CASE

The defendant on the other hand contends that he married the plaintiff in 2002 after the death of his first wife in the year 1995. The two were blessed with the following four (4) issues namely;

1. DMM
2. VKM
3. IKM and
4. SM

Since they married, they have been living on parcel No. Mwingi/Kanzanzu/[XXXX] which he bought from his late father in 1989 before marrying the plaintiff. The defendant further averred that he has sub-divided the parcel into portions which he has been selling to cater for school fees for their children. The defendant also stated that he has acquired another property registration No. Mwingi/Kanzanzu/[XXXX] which is a matrimonial property and which he has sub-divided among his four sons each getting 3 acres. The defendant further contends that he has also allocated another piece of land to his 3 daughters measuring 55ft x 125 ft in parcel No. Mwingi/Kanzanzu/[XXXX].

ISSUES FOR DETERMINATION

Both the plaintiff and the defendant through their Advocates drew separate issues for determination. It is trite law that issues flow from the pleading. From the amended plaintiff and amended defence and counterclaim the following are possible issues for determination.

- 1. Whether the court is seized with jurisdiction to divide matrimonial properties relating to subsisting marriage between the plaintiff and the defendant?**
- 2. Whether the defendant holds the suit properties in trust for himself and the plaintiff?**
- 3. Whether the plaintiff has satisfied the principles for the grant of injunction orders?**
- 4. Whether land parcel Nos. Mwingi/Kanzanzu/[XXXX], Mwingi Kanzanzu/[XXXX], Mwingi/Kanzanzu/[XXXX] and Mwingi/Kanzanzu/[XXXX] are part of the matrimonial properties?**
- 5. Who will bear the costs of this suit?**

To answer the first issue, Section 7 of the Matrimonial Property Act No. 49 of 2013 provides as follows;

“ 7 Ownership of Matrimonial Property subject to Section 6 (3), ownership of matrimonial property vests 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.”

The marriage between the plaintiff and the defendant is still subsisting. Unless the two are divorced or their marriage dissolved, this court has no jurisdiction to divide their matrimonial properties. To divide matrimonial properties between couples who are still married is akin to distributing an estate of a living person.

Consequently, this court has no jurisdiction to divide matrimonial property(ies) of a couple whose marriage is still subsisting. The other issue for my determination is whether the defendant holds the suit properties in trust for himself and the plaintiff. The suit properties are registered under the Land Registration Act which provides that spousal rights over matrimonial property and customary rights are overriding interests which subsist in all registered land without being noted in the register. Section 28 states as follows;

“ 28 Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without being noted on the register:-

- a. Spousal rights over matrimonial property;**
- b. Trust including customary trusts;.....”**

The suit properties are all registered land which the statute has placed on an overriding interest from being disposed of by one spouse without the consent of the other. The same applies to trust including customary trust.

The Land Registration Act 2011 is self regulating such that no spouse can dispose of a property registered in his name without the consent or approval by the other spouse. It therefore follows that an injunction is not an alternative remedy where overriding interests are protected by statute.

In the upshot I find no merit in this suit and the same is hereby dismissed. In order to safeguard the family relations, I make no order as to costs.

Read, Delivered and Signed in the open court this 27th day of September, 2018.

E. C. Chero

ELC JUDGE

In the presence of:

1. Ms. Ndindi holding brief Nzili for Plaintiff.
2. Mr. Kibera holding brief Mbaluka for Defendant.