



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 3 OF 2017

WANJIRU MUIRURI NDUATI - PLAINTIFF

VS

ERASTUS NDUNGU THUNGU - DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant on 7/8/2015. The plaint was amended with the leave of the Court vide an order issued on 12/7/2016.

2. By way of background the Defendant is the registered owner of the LOC 6/GIKARANGU /207 (now subdivided into parcel No.s Loc 6/GIKARANGU /4480, 4481 and 4482) having inherited the same from his father. The Plaintiff alleges that she is the legal wife of the Defendant. She averred that she, the Defendant and her children (14 in total) reside on the suit land. That the suit land is her matrimonial home. Her claim is that the Defendant is bent on disposing the land without her consent. In furtherance of his intention, that the Defendant has fraudulently subdivided the suit land into three parcels namely LOC 6/GIKARANGU /4480, 4481 and 4482. That as a spouse of the Defendant, she made indirect contributions towards the improvement and development of the suit land which entitle her to an interest in the said land. That she and her children depend on the suit land for their livelihoods and stands to be rendered destitute if the Defendant succeeds in disposing the land. That if the Defendant succeeds she and her children will be rendered destitute. She sought the following orders;

- a. That permanent injunction do issue restraining the Defendant by himself, his servants and employees from doing any of these acts, that is to say, from advertising for sale, selling whether by public auction or private treaty, leasing, letting, charging gifting or disposing in any manner all those parcels of land known as LOC 6/GIKARANGU /4480, 4481 and 4482 formerly LOC 6/GIKARANGU /207 or any part thereof without the Plaintiff's consent.
- b. Declaration that the Defendant holds all that parcel of land known as LOC 6/GIKARANGU /207 (subdivided into LOC 6/GIKARANGU /4480, 4481 and 4482) in trust for his dependants.
- c. Declaration that all that parcel of land known as LOC 6/GIKARANGU /4480, 4481 and 4482 formerly known as LOC 6/GIKARANGU /207 is the Plaintiffs matrimonial and ancestral land.
- d. That the Honourable Court be pleased to revoke the registration of the mutation registered on 18/9/2015 and the subsequent subdivision of all that parcel of land formerly known as LOC 6/GIKARANGU /207.
- e. A declaration that the Plaintiff is entitled to half share of the properties known as LOC 6/GIKARANGU /4480, 4481 and 4482 formerly known as LOC 6/GIKARANGU /207.
- f. An order directing the Land Registrar Murang'a to enter the name of the Plaintiff into the Register of titles as a joint and equal title holder to the properties known as LOC 6/GIKARANGU /4480, 4481 and 4482 formerly known as LOC 6/GIKARANGU /207.

3. In resisting the Plaintiff's claim the Defendant contended that the Plaintiff is not his wife and that she is a stranger and a busy body. He refuted the Plaintiffs claims that the suit land is neither ancestral nor matrimonial property and called for strict proof thereof. He admitted that he acquired the suit land through transmission. He denied the existence of any developments on the suit land as averted by the Plaintiff in para 6 of her plaint. He stated that the caution was lawfully removed and opined that he does not require the Plaintiff's consent to dispose his property.

4. At the hearing the Plaintiff testified that the Defendant is her husband whom she married in 1959 through Kikuyu customary law and were blessed with 9 children but one of them died leaving 8 alive. That her co-wife Julia Njeri died 4 years ago and left 6 children under her care. She stated that the suit land is registered in the name of the Defendant. She further adduced evidence that she lives on the suit land with the Defendant and her children. Further she informed the Court that they have 2 permanent houses and 2 semi -permanent houses on the suit land. That she contributed to the development of the suit land by planting subsistence crops as well as avocados and 2000 coffee trees and

depend economically on the land for her and her children's livelihood.

5. That the Defendant inherited the suit land from her father in law when they were already married. She testified that she made contributions towards meeting the finances used to fence the suit land as well as transferring the said land from the name of the defendant's father to the Defendant. She used the proceeds from the farm produce to do so. She did this with her deceased co-wife, Julia. That the land is family and ancestral land. In respect to her names, she stated that Wanjiru Muiruri Nduati and Milka Wanjiru Ndungu are her names. That the former refers to her maiden names as appears on the identity card while the latter refers to her baptismal & marital names. That she filed suit using Wanjiru Muiruri Nduati which are the names as they appear in her identity card. She denied that she had a co-wife named Hannah Wambui Ndungu.

6. Sometime in 2014 she informed the Court that she learnt that the Defendant was intent on selling the land. To prevent the sale, she caused a caution to be registered on the suit land. She annexed a copy of a caution registered on the 17/11/2014 as well as a certificate of official search to support her averments. On the 16/5/2015 she carried out a search on the land and discovered that the caution had been removed. She annexed a certificate of official search dated 16/7/2015 this time showing a caution registered in favour of one Kenedy Murigi Muiruri claiming purchasers' interest. She stated that she was not notified of the removal of the caution as required by the provisions of the law. She sought an explanation from the District Land Registrar, Murang'a through her lawyers on record Messrs CK Nyoro & Company Advocates on the circumstances that led to the removal of her caution without the requisite notice. No response was forthcoming from the District Land Registrar, Murang'a. She produced a letter dated 20/7/2015 in support thereof.

7. Alarmed by the turn of events and having failed to get help from the Land Registrar's office she resorted to file suit on the 7/8/2015. On 19/10/2015 through an official search discovered that the suit land had been subdivided into 3 portions and new numbers allocated as LOC 6/GIKARANGU /4480, 4481 & 4482. She annexed the mutation form registered on 18/9/2015, undated application for the land control board consent to subdivide and consent to subdivide dated 8/9/2015. This led to the amendment of the plaint to reflect the new numbers of the suit lands. It is her case that the Defendant did not seek spousal consent for both the attempted sale and subdivision of the suit land.

8. The Defendant testified that he had 3 wives namely Milka Wanjiru Ndungu, Hannah Wambui Ndungu (deceased) and Julia Njoki Ndungu (deceased). He stated that Milka Wanjiru Ndungu is his estranged wife who deserted the matrimonial home in 1970. He asserted that the Plaintiff is a stranger. He admitted that the suit land was an inheritance from his deceased father. He stated that he sought the removal of the caution lodged on the title on 17/11/2014. He said that the Land Registrar sent the notice of removal to the Plaintiff but the Plaintiff did not raise any objection leading to the removal of the caution by the Land Registrar after 30 days. He also blamed the Plaintiff for not paying the requisite fees for the hearing of the case in respect to the removal of the said caution.

9. On cross examination by the Plaintiff's Counsel on record, the Defendant stated that he knows Milka Wanjiru Ndungu. That she is his wife. He confirmed that he and Milka Wanjiru Ndungu reside on the suit land together with their children. He pointed her out in Court as the Plaintiff in the case. He confirmed that he sired 8 children with her. That he separated with her in 1970 but she came back and he lives with her on the suit land. He however denied knowledge of Wanjiru Muiruri Nduati. He stated that there are six homesteads on the suit land. He reiterated that the said Milka Wanjiru Ndungu cultivates avocados, maize, beans and prior coffee on the suit land. He stated that he had been approached by East African Power & Lighting to sell 1 acre of the suit land. That his late wife, Julia Njoki had agreed to give consent to the sale when she was alive. However, Milka Wanjiru Ndungu declined to give her consent and instead lodged a caution. He affirmed that Milka Wanjiru Ndungu did not receive the letter from the District Land Registrar.

10. At the close of the case, both parties through their counsels on record elected to file written submissions which I have read and considered.

11. Having considered the written submissions, the evidence adduced at the hearing and the legal authorities submitted, the issues for determination are; whether the Plaintiff is a spouse and if in the affirmative, whether she has any beneficial interest in the suit land; whether the suit land is Matrimonial Property; Whether the suit land is family/ancestral property being held under trust by the Defendant; Is the Plaintiff entitled to the orders sought; Who meets the costs of the suit?

12. As to whether the Plaintiff is a spouse to the Defendant, the Plaintiff led evidence that she is the wife of the Defendant having married him through Kikuyu customary law in 1959 and together sired 9 children, 8 of whom are alive. In addition, that she takes care of 6 other children of the Defendant by his deceased wife Julia Njoki. The Plaintiff stated she is known by both Wanjiru Muiruri Nduati and Milka Wanjiru Ndungu, the former being her maiden names (in her Identity Card) while the latter being her baptismal names. The Defendant refuted the marriage on the ground that the Plaintiff did not lead evidence to corroborate the same. That she failed to produce certificates of the children to demonstrate that they belong to the Defendant. She was also faulted for not including any of the children as her co-Plaintiffs in the case if indeed it was true that they sired children together.

13. Section 2 of the Matrimonial Property Act, 2013 defines spouse as follows;

“**spouse**” means a husband or a wife”.

14. At the hearing the Defendant pointed out the Plaintiff in Court and stated that he knows her as Milka Wanjiru Ndungu. This is consistent with his testimony that he is married to 3 wives one of whom is Milka Wanjiru Ndungu. He categorically stated that he does not know Wanjiru Muiruri Nduati. He asserted that Milka Wanjiru Ndungu is his wife and that he lives with her and his sons on the suit land. His testimony is that she grows avocados, subsistence crops and earlier grew coffee on the land. This piece of evidence leads the Court to the irresistible conclusion that Wanjiru Muiruri Nduati and Milka Wanjiru Ndungu are one and the same person; the Plaintiff who, as affirmed by the Defendant, is his wife.

15. Section 2 of the Matrimonial Property Act, 2013 defines ‘**matrimonial home**’ to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property (emphasis is mine).

16. Section 6 of the Matrimonial Property Act, 2013 defines ‘**matrimonial property**’ as follows;

For the purposes of this Act, matrimonial property means—

- a. the matrimonial home or homes;
- b. household goods and effects in the matrimonial home or homes; or
- c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property. (emphasis is mine).

(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights

(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.”

17. Both parties have led evidence that the suit property is an inheritance by the Defendant from his father. According to Section 6 (2) above the said property is therefore held under a customary trust having been passed down from the father to the Defendant. It therefore does not form part of a matrimonial property.

18. The said Act under section 9 further provides as follows;

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.

19. Contribution in this case under section 2 of the Act means monetary and non-monetary contribution and includes domestic work and management of the matrimonial home; childcare; companionship; management of family business or property; and farm work. The Plaintiff led evidence which was admitted by the Defendant that she has developed the suit land through farming activities, taking care of the children including those of her deceased co-wife as well as the Defendant. She also stated that she and her co-wife Julia Njoki contributed in the acquisition of the suit land using the proceeds of the farm produce and paid for the transfer expenses of the title into the name of the Defendant. She also alluded in her evidence in chief that she assisted to fence the property. No contrary evidence was adduced by the Defendant to rebuttal. From the evidence adduced and read together with the provisions of section 9 aforesaid the Plaintiff has proved that she is entitled to an interest in the suit land. She is entitled to a beneficial interest in the land. Her beneficial interest coupled with occupation and her control of the land (through farming and general husbandry) affords her an overriding interest on the suit land that is protected by the law.

20. It is not in dispute that the suit land is registered in the name of the Defendant. Credible evidence was led and corroborated by both parties that they both occupy the suit land. Evidence was led off the number of houses on the land and the Defendant agreed with the Plaintiff that she utilizes the land by growing maize beans, avocados and grew coffee before. The evidence given is consistent with the definition of a matrimonial home and property as provided for in the Act.

21. Is the property family and/or ancestral land? This is not in dispute. Both the Plaintiff and the Defendant agree that the suit land belonged to the Defendant’s father, which he inherited in 1990 after his father’s death. It goes without saying that this is ancestral and/or family land. The Defendant is therefore holding it in trust for himself as well as members of his family.

22. It is on record that the subdivision of the land was done without the consent having been sought and obtained from the plaintiff. It therefore follows that the said intended sale of the suit land would be invalid for want of the Plaintiff’s spousal consent. The Defendant admitted that he had been approached by the East African power Company to sell one acre and on approaching the Plaintiff for consent she declined. According to the certificate of search produced in Court one Kennedy Murigi lodged a caution on the title on 8/1/2015 claiming a purchaser’s interest. This evidence shows that the Plaintiff’s fears that the Defendant intended to sell the suit land without her consent was well founded. In the circumstances the Court finds that the cancellation of the mutation registered on 18/9/2015 and the subsequent subdivisions is justified in the circumstances as they are null and void for want of consent of the Plaintiff. The land shall be reverted to its original title LOC 6/GIKARANGU/207.

23. The upshot is that the Plaintiff’s claim succeeds and I make the following orders;

a. The registration of the mutation forms registered on the 18/9/2015 and their subsequent subdivisions for Loc 6/GIKARANGU/4480,4481 and 4482 be and are hereby cancelled and the suit land reverted to LOC 6/GIKARANGU /207.

b. It is declared that the Plaintiff holds a beneficial interest in the suit land. The Defendant holds the land in trust for himself and persons who are children, spouse or dependants.

c. It is hereby ordered that LOC 6/GIKARANGU /207 be registered in the name of the Plaintiff and the Defendant in trust for

themselves and all their children.

d. In default of c above the Deputy Registrar of this Court is hereby authorized to execute all the documents to effect the said registration as contemplated under order c above.

e. A permanent injunction do issue restraining the Defendant by himself his servants, employees and/or agents or any person claiming under him from advertising, selling, charging, gifting or disposing LOC 6/GIKARANGU /207 without the Plaintiff's consent.

f. The parties being husband and wife, I make no orders as to costs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH OF OCTOBER 2018.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff – Present in person.

Advocate Absent.

Defendant – Present in person

Advocate Absent.

Irene and Njeri, Court Assistants