



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 116 OF 2013

SUSAN CHEPATET LOKWANG.....PLAINTIFF

VERSUS

POWON LOKWANG KOMOLMOI.....1ST DEFENDANT

JOEL KEDI TUKEI.....2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff commenced this suit vide a plaint dated **10th September, 2013** and filed in court on the same date. The said plaint seeks the following orders:

- (a) **A declaration that the parcel of land known as West Pokot Chepkono/401 is a matrimonial property.**
- (b) **A declaration that the 2nd defendant's act of obtaining title deed in his name on the parcel of land known as West Pokot/ Chepkono /401 is malicious unlawful and illegal;**
- (c) **And order for rectification of the register to the suit property by way of cancellation of title issued in the name of the 2nd defendant and a new title deed to issue in the name of the plaintiff on the parcel of land known as West Pokot /Chepkono/401;**
- (d) **An order of eviction to issue against the 2nd defendant by himself his servants and/or agents or any other person claiming through him in the land known as West Pokot/ Chepkono/401;**
- (e) **Costs of this suit**
- (f) **Any other relief the court may deem fit to grant.**

2. The 1st defendant filed his defence dated **28th October, 2013** on the same date and the 2nd defendant filed his defence and counterclaim dated **26th October 2013** on **28th October 2013**.

3. The plaintiff's replies to the 1st and 2nd defendant's defence and defence and counterclaim respectively were both filed on **21th January, 2014**.

The hearing of this suit proceeded on the **5/3/2015, 26/4/2016** and on **8/10/2018**.

The Plaintiff's Case

4. According to the plaint the plaintiff's case is that in the year 1987 she got married to the 1st defendant and they thereafter had 5 children; that in the year **2003** the 1st defendant deserted the plaintiff and the said children; that in the year **2001** the 1st defendant sold the suit land to the 2nd defendant; that the 1st defendant then left the matrimonial home and went to his second wife; that in the year **2011** the plaintiff learnt at the land registry that the suit land had been transferred to the 2nd defendant; that the transfer was without her consent; that the suit land was matrimonial property; that the defendants instigated two criminal cases against her when she questioned the transfer and that since the 2nd defendant took possession there is not enough space to enable the plaintiff graze her animals.

The 1st Defendant's Defence

5. In his defence the 1st defendant denies that he was ever married to the plaintiff but that they had two children who were born out of wedlock; that the rest of the children stated by the plaintiff are not his; that the issue of whether the children were his was dealt with in a Kapenguria magistrates' court case; that the suit land was not matrimonial property and therefore the consent of the plaintiff for the transfer was not needed.

The 2nd Defendant's Defence

6. In his defence the 2nd defendant states that he was a bona fide purchaser of the suit land and that the land was not matrimonial property. In his counterclaim he states that the dispute between the plaintiff and the 1st defendant does not involve him as he paid for the land fully and the plaintiff should be evicted therefrom.

The Plaintiff's Reply to 1st Defendant's Defence.

7. In response to the 1st defendant's defence the plaintiff disputes his denial of all the children except two and urges that no paternity test has been conducted and that the Kapenguria Court was biased to the extent that it ignored the protection of children under the *Children Act No. 8 of 2001*.

The Plaintiff's Reply to 2nd Defendant's Defence.

8. The plaintiff reiterates that the suit land is her matrimonial property and accuses the 2nd defendant of maliciously colluding with the 1st defendant to transfer the suit land to the 2nd defendant without her consent; that she has been in occupation of the land since **1987** when she married the 1st defendant under Pokot customary law and that the registration of the land in the 2nd defendant's name was obtained fraudulently.

EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

9. The plaintiff testified on **5/3/2016**; she stated that the 1st defendant married her under Pokot customary law and they had **5** children together; that the 1st defendant paid dowry; that when he came home to meet her parents he told them that he already had land for her; that after her marriage she started living on the land with the 1st defendant; that she came to know the 2nd defendant when he came onto the suit land; that she caused a caution to be registered against the land but it was later removed without her knowledge; that the 1st defendant obtained title in the year **1998**; that now he has a second wife; that the 2nd wife stays on **50** acres at Lelan; that the suit land is about **15** acres, that it is not true that the 1st defendant has only sired **2** children with her; that she does not know how the children's case at Kapenguria ended; that the criminal case she was charged with was withdrawn upon the filing of this suit; that she never gave her consent for the land to be sold and that they have had a strained relationship with the 1st defendant since the time they were married.

10. **PW 2, Joel Kitabukua** testified on **26/4/2016**. His evidence is that he is a village elder and he knows the plaintiff and the 1st defendant; that the 1st defendant bought the suit land in **1982** and later married the plaintiff in **1987**; that the plaintiff is the wife of the 1st defendant and the two have **5** children; that he is a neighbour to the two; that he has known the plaintiff since **1997**; that the plaintiff was married to the 1st defendant in **1987**; that the 1st defendant also has another wife; that the 1st defendant deserted the plaintiff for a long time; that the 1st defendant later came and carved out a large parcel of land and gave it to another person; that he is not aware of any attempts by the 1st defendant to evict the plaintiff from the land.

11. **PW3 Clementina Chebet Julius** testified on **26/4/16**. She stated that the plaintiff is her neighbour and a friend; that she is a midwife; that the 1st defendant is the plaintiff's husband; that the 1st defendant bought the suit land; that according to Pokot tradition a man who marries a second wife has to buy land for the second wife away from the land of the first wife; that at one time the plaintiff and the 1st defendant had a dispute and the 1st defendant came to **PW3's** home and asked her to persuade the plaintiff to allow the 1st defendant to sell one acre of land; that to her knowledge the plaintiff's children are all sired by the 1st defendant and the two have not divorced.

The Defendants' Evidence.

12. **DW1 Samuel Okodoi** testified on **8/10/18**. He stated that he is the Executive Officer, Kapenguria law courts and produced the original file record for **Civil Case Number 147 of 2010- Kapenguria**.

13. **DW2 Powon Lokwang** the 1st defendant testified on **8/10/18**. He adopted his statement dated **28/10/2013** and filed in court on the same date. He admitted selling the suit land to the 2nd defendant in the year **2006**; he averred that the suit land belonged solely to him; that it was not matrimonial property; that he never married the plaintiff; that only two out of the plaintiff's **5** children are sired by him; that he had defended himself in *Kapenguria Magistrates Court Case Number 147 Of 2010* where the plaintiff had sued him alleging him to be the father of all of her five children; that the court file was closed and the plaintiff condemned to pay costs; that the plaintiff has no right to the suit property and the 2nd defendant is already in occupation.

14. DW3, Joel Kedi Tukei the 2nd defendant testified on 8/10/18. He averred that on 4/2/2007 the 1st defendant sold him the land consisting of 14 acres at the price of Kshs. 625,000/=. At the time of the sale the plaintiff was with his wife, by the name Mary Chepkogei and her children; that they are named in the agreement; that he came to know the plaintiff as he was fencing the suit land; that she cut his wire and a criminal case against her at the Kapenguria court ensued; that consent of the Land Control Board was obtained; that he fully paid for the land but the plaintiff has not vacated the suit land and that the plaintiff stays on the land with her husband.

Submissions

15. The defendant filed his submissions on the 1/11/2018. I have perused through the court record and found no submissions filed on behalf of the plaintiff.

DETERMINATION

Issues for Determination

16. The main issue for determination is whether the suit land is matrimonial property or not.

17. Section 2 of the **Matrimonial Property Act Number 49 Of 2013** defines a “matrimonial home” as

“...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;”

18. Section 2 of the **Land Act** No 6 of 2012 defines “matrimonial home” as

“...any property that is owned or leased by one or both spouses and occupied by the spouses as their family home;

19. “Matrimonial property” is defined in **Section 6** of the **Matrimonial Property Act Number 49 of 2013** as follows:

(1) 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.

(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.

20. I have noted that the criminal cases preferred against the plaintiff were commenced in the year 2011 and 2012 respectively.

21. Before these cases a dispute involving the plaintiff and the 1st defendant was entertained by the District Officer, an officer of the Government of Kenya in the year 2005 which dispute is cited in the entry of a restriction over the land title registered on 19/7/2005 which was subsequently removed vide the District Officer’s letter of 16/5/2006. It is quite striking that the land was transferred to the 2nd defendant one day after that restriction was removed.

22. Six years before the plaintiff was arraigned in court on the said criminal cases there was therefore a record of her interest in the land as seen in the restriction. Quite surprisingly none of the parties produced any record of proceedings before the District Officer which would give this court insight into the nature of their dispute then.

23. The case at Kapenguria that is **Kapenguria Magistrates Court Case Number 147 of 2010** did not end in the 1st defendant’s favour on the merits. Indeed the 1st defendant can not proudly show off any decree in that matter to prove that it was determined therein that any of the plaintiff’s children were not sired by him. The entire file was produced but a perusal of that file does not aid the 1st defendant’s case but makes it worse in double measure for the reasons given herein after.

24. In the Court of Appeal decision in **Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR:-**

“Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has

crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.”

25. I have examined the evidence of the parties in this suit. It is clear that the plaintiff and her children lived on the suit land for a long time. Without reference to Kapenguria *PMCC Children’s Case No. 147 of 2010*, the evidence on the record is persuasive that the 1st defendant and the plaintiff were married in 1987 under customary law. Owing to the customary nature of their marriage there may not be any certificate of marriage in proof of the fact. The 1st defendant’s denial of marriage between him and the plaintiff must be viewed in the light of that trite fact concerning customary marriages.

26. The 1st defendant bore children with the plaintiff during their stay. That period was long enough for them to be recognized by any reasonable person as husband and wife by their neighbours. As I have stated before, were it not that the proceedings in *Kapenguria PMCC Children’s Case No. 147 of 2010* were brought to the attention of the court, there exist all ingredients needed to presume a marriage in this case. However there is no need to presume a marriage the proceedings in *Kapenguria PMCC Children’s Case Number 147 of 2010* proved that there was a marriage between the plaintiff and the 1st defendant.

27. In *Kapenguria PMCC Children’s Case Number 147 of 2010*, the plaintiff claimed in her plaint that there was cohabitation that led to the birth between them of 5 children. In the defendant’s defence it was admitted that in the year 1987 he married the plaintiff under Pokot customary law and that they stayed and cohabited as husband and wife until 2003 when the 1st defendant deserted the family. He described himself as a polygamist and stated that if the plaintiff is ignoring his parental responsibility as a polygamist, then she should “vacate the defendant’s land and his animals.” He also admitted that his two daughters are living with the plaintiff on his land. He further pleaded in that defence that he has provided the plaintiff with land to cultivate and cows and goats for food, milk, and school fees. There is no need therefore to base this judgment on presumption of marriage because as stated above, the defendant has admitted in *Kapenguria PMCC Children’s Case Number 147 of 2010*, that he is the plaintiff’s husband.

28. It has also been proved by the evidence of witnesses including the defendants that the plaintiff is still in occupation of a portion of the land. The plaintiff’s evidence is that she has by virtue of the sale to the 2nd defendant been squeezed into some 2.5 acres of the parcel of land known as **West Pokot/ Chepkono/401**.

29. In this court’s view the only way in which the plaintiff could have accessed the land for the purpose of occupation was through marriage to the 1st defendant and no other, otherwise a record of criminal cases over trespass dating back to the year 2005 should have been provided by the defendants. The only reason why such criminal cases do not exist is that she was a spouse and was so recognized by the 1st defendant until the 1st defendant decided to dispose of the suit land unilaterally.

30. It is clear that the 2nd defendant was in a polygamous marriage and that the plaintiff was the second wife. The first wife is said to live on a separate piece of land elsewhere. The evidence of the plaintiff’s witnesses is that in Pokot Culture it is a requirement for a man who wishes to marry another to acquire land before he marries her.

31. In the instant suit it can be safely concluded that even if the land was purchased before the marriage, the 1st defendant acquired the suit land for the purpose of having a second wife, and the second wife was the plaintiff, whom he subsequently accommodated on the suit land and had children with.

32. It is the pleading and evidence of the plaintiff that the 1st defendant left the matrimonial home on the suit property and went to live with the other wife. The 1st defendant objects that he did not sire some of the plaintiff’s children. That has not been proved to be true.

33. In any event even if it were true, it has no bearing on the validity of their marriage. It does not change the fact that she was his second wife and that she had been put into possession as such. In the case of *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR*, the Court of Appeal found in favour of a presumption of marriage even where the 1st respondent (a lady) in that appeal had cohabited with the deceased during his life, had one child with him, lived in the same matrimonial home since 1986, and even brought her two children whom she had given birth to with another man to the matrimonial home. The Court of Appeal upheld as proper the High Court’s order for provision to be made for the 1st respondent from the deceased’s estate on the basis that the deceased had two wives.

34. Matrimonial property is found where there is a marriage. I have found that it is possible to arrive at a presumption of marriage and that there is an express admission of marriage between the plaintiff and the 1st defendant in this case. As a result of that possibility of a presumption and the express admission it is a logical conclusion that the home that was established upon the suit land is a matrimonial home and the suit land it is attached to is matrimonial property.

CONCLUSION

What orders should issue?

35. Following the express admissions of the 1st defendant and the evidence of the witnesses as set out herein above, I therefore find that the suit land is matrimonial property and thereon was established the plaintiff’s matrimonial home all within the definitions set out in the *Matrimonial Property Act* and the *Land Act*. The disposal of the land by the 1st defendant to the 2nd defendant without any reference to the plaintiff was therefore irregular and illegal.

36. The plaintiff has proved her claim against the defendants on a balance of probabilities and I enter judgment against the defendants jointly and severally and issue the following orders:

(a) A declaration that the parcel of land known as West Pokot Chepkono/401 is matrimonial property.

(b) A declaration that the 2nd defendant's act of obtaining title deed in his name in respect of the parcel of land known as West Pokot/ Chepkono /401 is irregular and unlawful;

(c) And order for rectification of the register to the suit property by way of cancellation of title issued in the name of the 2nd defendant and a new title deed to issue in the name of the plaintiff in respect of the parcel of land known as West Pokot /Chepkono/401;

(d) An order that the 2nd defendant his servants and/or agents or any other person claiming through him shall remove themselves from all that land known as West Pokot/ Chepkono/401 failure to which they shall be forcefully evicted therefrom.

(e) The defendants shall bear the costs of this suit

It is so ordered.

Dated, signed and delivered at Kitale on this 20th day of 2018.

MWANGI NJOROGE

JUDGE

20/11/2018

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Analo holding brief for Chebet for plaintiff

N/A for the defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

20/11/2018