



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 37 OF 2012

FLORENCE KABURU MUTHIKE.....PLAINTIFF

VERSUS

KIBURI MARIA.....1ST DEFENDANT

DOMINIC MUTHIKE KIBURI.....2ND DEFENDANT

JUDGMENT

The plaintiff herein **FLORENCE KABURU MUTHIKE** moved this Court by way of her plaint filed on 28th November 2012 seeking judgment against the defendants **KIBURI MARIA** (1st defendant) and **DOMINIC MUTHIKE KIBURI** (2nd defendant) in the following terms:

- (a) A declaration that the 1st defendant holds land parcel No. BARAGWE/RAIMU/3007 in trust for the plaintiff, the 2nd defendant and their children.***
- (b) A declaration that land parcel No. BARAGWE/RAIMU/3007 is matrimonial property and family land.***
- (c) An order for determination of the trust in land parcel No. BARAGWE/RAIMU/3007.***
- (d) Costs of the suit.***

The basis of the plaintiff's claim is that she is the wife to the 2nd defendant while the 1st defendant is her father in law. That following her marriage to the 2nd defendant on 2nd January 1993, they were blessed with two children namely:

- 1. ANNETE WANJIKU** – born on 6th April 1993 and
- 2. BRIAN WAWERU MUTHIKE** – born on 19th April 1997.

While the plaintiff is a radiographer at the Embu Provincial Hospital, the 2nd defendant is a lecturer at Kabete Technical Training Institute although the two established their matrimonial home on land parcel No. BARAGWE/RAIMU/3007 (the suit land) where they built a three (3) bedroom semi-permanent house in 1994 and also grow coffee, bananas and other crops. That though registered in the names of the 1st defendant, the suit land is family land held for the plaintiff, the 2nd defendant and their children.

The defendants, then acting in person, filed a joint statement of defence, later amended on 10th June 2013 denying the plaintiff's averments. The 1st defendant added that although he had intended to transfer the

suit land to the 2nd defendant, he had now transferred it to the 2nd defendant as a gift. They sought the dismissal of this suit.

On 27th October 2015, the suit was withdrawn as against the 1st defendant during the trial after it transpired that he had transferred the suit land to the 2nd defendant on 9th January 2013 notwithstanding orders of inhibition issued by this Court on 29th November 2012.

The plaintiff told the Court that she was married to the 2nd defendant in 1993 and produced their marriage certificate (Plaintiff's Exhibit 1) adding that they have two children **ANNETE** and **BRIAN** whose birth certificates she also availed (Plaintiff's Exhibit 2 and 3 respectively). That they established their matrimonial home on the suit land by putting up a permanent house thereon jointly on a portion given to them by the 1st defendant. They also planted coffee and bananas. However, since 2011, they no longer live together and she resides in a rental house in Kerugoya town. She no longer has access to the suit land which is now registered in the names of the 2nd defendant although it was previously in the names of the 1st defendant as per the certificate of search (Plaintiff's Exhibit 4). The 2nd defendant has refused to give her a share of the suit land and so she wrote to the National Irrigation Board to withhold any payment to the 2nd defendant (Plaintiff's Exhibit 5) and also placed a caution on the land. She also produced documents showing that the suit land is among those being acquired by the National Irrigation Board and for which compensation is being paid (Plaintiff's Exhibits 6 and 7).

The 2nd defendant testified and called his father (previously the 1st defendant) as a witness. He asked the Court to adopt his witness statement filed together with the amended defence. In that statement, he confirmed that the plaintiff was his wife although she ran away from the matrimonial home. He added that she has no locus to claim the suit land which was transferred to him as a gift by the 1st defendant. He sought the dismissal of this suit.

His father also asked this Court to adopt his statement as his evidence in which he confirmed that the plaintiff was married to this son but has since deserted the matrimonial home and therefore has no right to the suit land which he has since transferred to his son.

Submissions have been field both by the firm of **MAGEE WA MAGEE** Advocates for the plaintiff and **KELI & MWAURA** Advocates who came on record later for the defendants.

I have considered the parties oral and documentary evidence and the submissions by counsel.

The following are not really in dispute:

- 1. That the plaintiff and 2nd defendant were married on 2nd January 1993 under the African Christian Marriage and Divorce Act.***
- 2. That they were blessed with two children out of that marriage namely Annete Wanjiku born on 6th April 1993 and Brian Waweru Muthike born on 19th April 1997.***
- 3. That they established their matrimonial home on the suit land.***
- 4. That they now live apart since 2011.***

What this Court has to determine is:

(a) Whether the 1st defendant (against whom the suit was withdrawn) held the suit land in trust for the plaintiff, the 2nd defendant and their children. As the suit land is currently registered in the names of the 2nd defendant, this Court will have to determine whether he too holds it in trust for the plaintiff and their children.

(b) Whether the suit land is matrimonial property.

(c) *Costs.*

IS THE SUIT LAND MATRIMONIAL PROPERTY?

In his submissions, counsel for the defendants did not deny that the suit property is matrimonial property. His focus was that such property cannot be distributed during coverture and several High Court decisions were cited including the decision of the Court of Appeal in **MURIUKI MARIGI VS RICHARD MARIGI MURIUKI and OTHERS C.A CIVIL APPEAL No. 189 of 1996 (1997 e K.L.R)** where it was held that a party cannot be compelled to share out his property during his life-time. The **MARIGI** case (supra) has of course now been distinguished and only applies where the land is private land and not ancestral land – see **MBUI MUKANGU VS GERALD MUTWIRI MBUI C.A CIVIL APPEAL No. 281 of 2000**. The answer as to whether the suit land is or is not matrimonial property can be found in the parties own evidence. In the course of the trial, the 2nd defendant asked this Court to adopt the statement filed herein as his evidence. I have therefore looked at the said statement and at paragraph five (5) thereof, he says:

“That the plaintiff deserted our matrimonial home since December 2011 and our marriage with her does not exist practically”

On his part, the 1st defendant who later testified as a defence witness and who also asked that his statement be treated as his evidence said in paragraph five (5) that:

“The plaintiff run (sic) away from her matrimonial home in December 2010 without any just reasonable cause at all”.

In her evidence in chief, the plaintiff testified how she and the 2nd defendant developed the land given to them by the 1st defendant. She said:

“I and the 2nd defendant jointly put up a house on the portion given to us. He is employed at Kabete Technical Institute. We put up the house after our marriage and opened it in 1995. It is a three bedroom house. We also planted 400 coffee stems and bananas”

Matrimonial property is defined under **Section 6(1) of the Matrimonial Property Act, 2013** to mean:

“(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”

It is therefore clear from the plaintiff’s cogent and un-controverted evidence which is infact confirmed by the statements of the 2nd defendant and his father, that the plaintiff and 2nd defendant did set up their matrimonial home on the suit land which therefore became matrimonial property in terms of the provisions of **Section 6(1) of the Matrimonial Property Act 2012**. The answer therefore as to whether the suit land is matrimonial property is ***“Yes it is”***. Counsel for the defendants submitted at length that the said property cannot be distributed before the parties divorce. It is clear from the pleadings that this is not strictly a case for distribution of matrimonial property under either the ***Married Women’s Property Act*** or the ***Matrimonial Property Act of 2013***. The main remedy is really to declare a trust and determine it.

DOES THE 2ND DEFENDANT HOLD THE SUIT LAND IN TRUST FOR THE PLAINTIFF AND THEIR CHILDREN?

In the course of the trial, the plaintiff who is in gainful employment testified how she and the 2nd defendant jointly put up the matrimonial house to replace the semi-permanent structure that the 2nd defendant had been living in before their marriage. She lived therein with their children until 2011 when

she moved out because her husband was beating her. It is also instructive to note that the suit land was not obtained by the 2nd defendant as his own private property which was the position in the MARIGI case (supra) cited by the defendants counsel. The suit land herein was given to the 2nd defendant by his father who in turn had received it from his clan. In cross-examination, the 1st defendant who testified as the 2nd defendant's witness following the withdrawal of the case against him said as follows:

“It is true that the land had been given to me by the clan. The clan was giving me land for myself and my family. So the 2nd defendant holds the land for himself and his family”

There is therefore direct evidence from the 2nd defendant's own father that the suit land is held by the 2nd defendant in trust for himself and his family who are the plaintiff and their children. There is also evidence, which was not rebutted, that the plaintiff who is in gainful employment contributed towards the development of the suit land jointly with the 2nd defendant. It is also common knowledge that for eighteen (18) years from the time of their marriage in 1993 to the time of their separation in 2011, the plaintiff and 2nd defendant lived on the suit land. Under such circumstances, a constructive trust also arises in the plaintiff's favour. In HALSBURY LAWS OF ENGLAND 4TH EDITION VOLUME 48 at paragraph 69, it is provided as follows:

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so doing, he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that other party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate”.

Clearly, there is evidence upon which the Court can make a finding, which I hereby do, that the 2nd defendant holds the suit land under a constructive trust, for the benefit of himself, the plaintiff and their two children.

Finally, the parties are Kikuyu and the element of trust is not alien in Kikuyu Customary Law. The 2nd defendant's own father confirmed that the suit land was given to him by his clan no doubt to hold the same in trust for his family and future generations. It was not his private property to do as he wishes. The 2nd defendant therefore also holds the suit land in trust for his family and future generations and the registration of the suit land in his names, which was done notwithstanding that there was an order of inhibition, did not relieve him of his responsibility as a trustee. That is clear from Section 25 of the Land Registration Act. In addition, Section 28 (b) of the same Act recognizes customary trusts as some of the overriding interests which need not be noted on the register. In view of all the above, I have no hesitation in making a finding that the 2nd defendant holds the suit land in trust for himself, the plaintiff and their two children. The plaintiff therefore has a beneficial interest in the suit land.

Ultimately therefore and upon considering all the evidence herein, I am satisfied that the plaintiff has proved her case against the 2nd defendant. Judgment is accordingly entered for her in the following terms:

- 1. A declaration that land parcel No. BARAGWE/RAIMU/3007 is matrimonial property and family land.***
- 2. A declaration that the 2nd defendant holds land parcel No. BARAGWE/RAIMU/3007 in trust for himself, the plaintiff and their children.***
- 3. The said trust is determined so that each owns half a share in the land parcel No. BARAGWE/RAIMU/3007.***
- 4. Each party shall meet their own costs.***

B.N. OLAO

JUDGE

21ST APRIL, 2017

Judgment delivered, dated and signed in open Court this 21st day of April 2017

Ms Kiragu for Mr. Magee for Plaintiff present

Ms Muthike for Mr. Mwaura for the Defendants present

Right of appeal explained.

B.N. OLAO

JUDGE

21ST APRIL, 2017