



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT
MILIMANI LAW COURTS
ELC.NO.332 OF 2012

G W N.....PLAINTIFF

-VERSUS-

ANDREW KINGORI..... DEFENDANT

JUDGEMENT

The Plaintiff herein **G W N** has brought this claim against the Defendant, **Andrew Kingori** vide a Plaint dated **12th June 2012**. The Plaintiff has sought for the following prayers:-

- a) *A permanent Injunction restraining the Defendant and/or his agents or servants from trespassing onto, dispossessing, harassing the Plaintiff or in any way interfering with the Plaintiff's quiet occupation and possession of Plots Nos.[particulars withheld], Njiru Githunguri Farm purchased from [particulars withheld] Women Group under Plot Certificates Nos.[particulars withheld] respectively.*
- b) *General Damages for trespass.*
- c) *Cost of this suit.*
- d) *Any other and/or further relief that this court may deem fit and just to grant in the circumstances.*

The Plaintiff's case is that she got **married** to **J K N**, around the year **2003 under Kikuyu Customary Law**. Further that on or around **11th May 2005**, the Plaintiff and the said **J K N** **formalized** their marriage under the **Marriage Act, Cap 150** Laws of Kenya, and was issued with a **Certificate of Marriage no. [particulars withheld]**. Out of the said marriage, the Plaintiff was **blessed** with **two children**, being **I S** born on **9th April 2004** and **L K** born on **13th August 2010**. It was her contention that during the course of the marriage, she, together with her husband **purchased** and **developed** their matrimonial home at **Plots Nos.[particulars withheld], Njiru Githunguri Farm** from **[particulars withheld] Women Group** and were issued with **Plot Certificates Nos.LR No.[particulars withheld]** respectively. Therefore the two stated plots were registered in the names of her husband **J K N** though they bought and developed the same jointly.

Further that towards the **end of May 2012**, her husband **left** the country to **Comoros Island** without her

knowledge and/or information. It was her allegations that on **31st May 2012**, and other subsequent dates, the Defendant trespassed and have threatened to continue trespassing onto the Plaintiff's matrimonial home without just cause. She also alleged that on **31st May 2012**, the Defendant broke into the Plaintiff's house and therein caused destruction of the Plaintiff's household items. The Defendant left and threatened the Plaintiff that he would again visit the Plaintiff's matrimonial home and evict her unlawfully.

Plaintiff further contended that she is apprehensive that the Defendant being aware that her husband is out of the country, he intends to dispossess her of her matrimonial home through harassment, intimidation and outright fraud. Therefore her claim against the Defendant is for an injunction restraining the Defendant from trespassing onto or in any way interfering with the Plaintiff's quiet possession of her properties. Further that due to the aforesaid breach, she has suffered loss and damages which she now claims from the Defendant. She asked the Court to allow her claim.

The Defendant herein **filed** his **Defence** and **Counter-claim** dated **8th November 2012**, and **denied** all the allegations contained in the Plaintiff. He contended that **J K N**, was the registered owner of the suit land before the Defendant purchased the same from him and he ceased being the registered owner once he legally sold and transferred the suit lands to the Defendant. He also contended that he purchased the suit land **LR. No.[particulars withheld] Plot No measuring 60x40 or thereabouts** and **LR.No.[particulars withheld] Plot No. measuring 60x40 or thereabouts** to be excised from the larger piece of land registered in the name of **[particulars withheld] Women Group** from **J K N**. It was his further contention that he entered into a **Written Sale Agreement** with **J K N** when purchasing the suit lands and he produced the said **Agreements** as exhibits in Court. It was therefore his averment that after legally purchasing the suit lands, the Defendant transferred all the pieces of land known as **LR. No.[particulars withheld] Plot No. measuring 60x40 or thereabouts** to **Peter N. Njuguna** and the other **LR.No.[particulars withheld] Plot No. measuring 60x40 or thereabouts** to **himself**. Therefore the Defendant denied all the allegations of trespass and did put the Plaintiff to strict proof thereof. The Defendant further averred that he could not trespass on his own legally acquired and registered land and it was in fact the Plaintiff who was trespassing on the Defendant's land. He also averred that he had not been charged in any court for any offence related to the alleged destruction of the Plaintiff's property as alleged by the Plaintiff and he did put the Plaintiff to strict proof thereof.

In his Counter-claim, the Defendant reiterated that he purchased the suit land **LR. No.[particulars withheld] Plot No. measuring 60x40 or thereabouts** and **LR.No.[particulars withheld] Plot No. measuring 60x40 or thereabouts** to be excised from the larger piece of land registered in the name of **[particulars withheld] Women Group** from **J K N**. Defendant therefore urged the Court to dismiss the Plaintiff's Claim against him and enter judgement in his favour against the Plaintiff in the following terms:-

- a) **An order of mandatory injunction compelling the Plaintiff, her agents and/or servants to vacate the suit land and give vacant possession of the suit land to the Defendant which lawfully belongs to the Defendant.**
- b) **Costs of this suit.**
- c) **Interest on (b) above at court rates.**

The matter proceeded for hearing on **20th June 2016**, wherein the Plaintiff **G W N** gave evidence for herself and called no witnesses. She adopted her witness statement fully as her evidence in Court. The said witness statement is a repetition of the Plaintiff's averments in the Plaintiff. Plaintiff also produced a **bundle of documents**, as **exhibit no.1**. The said bundle contained her Marriage Certificate, Birth Certificate for her children together with immunization form, and two Plots Certificates for **Plots Nos. [particulars withheld]** She asked the Court to allow her claim as stated in the Plaintiff since the Defendant has refused to give her the property.

The Defendant, **Andrew Kingori**, also gave his evidence on the same day and did not call any other

witness. He also adopted his witness statement fully and produced the list of documents as his **exhibit Nos.1(a) and (b)**. He reiterated that he bought the plots from one **J K N** and one of the plot is **registered in his name** and the other in the name of **Peter Njuguna**. He also denied that he ever broke into the Plaintiff's house. He alleged that when he bought the plot, it was not developed and he is the one who built the house on it. However, the Plaintiff entered into the said house illegally and by force. He urged the Court to dismiss the Plaintiff's claim and allow his

Counter-claim.

The parties thereafter filed their **written submissions** which this Court has carefully read and considered. The Court has also considered the **pleadings** in general and the **exhibits** produced therein.

That being the evidence before the court, it is now the duty of this Court to determine whether the Plaintiff has proved her case on a balance of probability and in the alternative, whether the Defendant has proved his claim in the Counter-claim on the usual standard of balance of probability.

It is trite that he who alleges must prove and therefore the onus of proof herein is on the person who has laid a claim. I will be guided by the provisions of Section 107(1) of the Evidence Act which states that:-

“whoever desires any court to give judgement as to any legal right on liability dependent on the existence of facts which he asserts must prove those facts”.

Bearing in mind the above provisions of law, the Court finds that in the instant suit the Plaintiff, **G W N** has asserted that the Defendant herein has trespassed and continues to trespass on her matrimonial home without consent. She therefore wants the Defendant to be barred from such trespass.

On the other hand, the Defendant in his Counter-claim has alleged that indeed the Plaintiff is the one who has trespassed on his suit property as he is the registered owner and the Plaintiff should be compelled to give him vacant possession of the same.

There is no doubt that the **Plaintiff** herein **solemnized her Customary Marriage** to **J K N** on **11th May 2005** as is evident from the **Certificate of Marriage no.[particulars withheld]** issued under **‘The Marriage Act Cap 150 Laws of Kenya**. There is also no doubt that the two are **blessed with two issues of marriage**, being **I S** born on **9th April 2004**, as evident from the **Certificate of Birth no.[particulars withheld]** issued on **29th November 2006**, and **LK** born on **13th August 2010**, as per the Immunizations Card produced in Court.

There is also no doubt that **J K N** owned **Plot No.[particulars withheld]** at **[particulars withheld] Women Group** as is evident from the two Certificates of ownership of plots produced as exhibits by the Plaintiff. The said **J K N** was issued with **Certificate** for **Plot No.[particulars withheld]** on **16th December 2004**, and with certificate for **Plot no.[particulars withheld]** on **11th November 2009**. There is also no doubt that the said **J K N**, as the registered owner of **Plot No.[particulars withheld]**, entered into a Sale Agreement for sale of the two plots to the Defendant, **Andrew Karimi Kingori** on **15th August 2011**, as is evident from the **Sale Agreement** attached to the Defendants bundle of documents which were produced as exhibits in court. There was no evidence that the said Sale Agreement was not authentic. Further it is evident that the Defendant was issued with the **ownership Certificates** on **5th September 2011**, for the two plots.

The Defendant in his evidence alleged that he took possession of the two plots in vacant possession. He built a temporary structure which the Plaintiff took over in the year **2012**. He denied that he is trespassing on the Plaintiff's suit land. It is evident that the two respective plots were sold to the Defendant by one **J K N** who was the registered owner.

The above facts being undisputed, the Court finds that the issues now for determination are:-

i. Who is the legal owner of the suit property.

ii. Are the two plots matrimonial property.

iii. Was spousal consent required before the Defendant could purchase the suit property?

iv. Is the Plaintiff entitled to the orders sought and/or in the alternative is the Defendant entitled to the orders sought in the Counter-claim.

v. Who is to bear the costs of the suit.

i) Who is the legal owner of the suit property?

The Court has considered the respective submissions by both parties herein. The Court has also considered the exhibits produced in Court. As the Court observed earlier, the two plots were initially owned by one *J K N*, who **later sold** the same to the Defendant as per the copy of the **Sale Agreement** dated **15th August 2011**. At the moment, **Plot No.[particulars withheld]** is registered in the name of the Defendant, **Andrew Karimi Kingori** and **Plot No.[particulars withheld]** is registered in the name of **Peter Ngure Njuguna**, as per the ownership certificates produced in Court. However, the said **Peter Ngure Njuguna** has not been enjoined as a Defendant herein. It is also evident that the two plots are to be excised from the larger portion owned by **[particulars withheld] Women Group**. Though the ownership certificates are not certificates of titles as envisaged by Section 26 of the Land Registration Act, the Court finds that if the said **[particulars withheld] Women Group** was to finalize the process of subdivision and issuance of certificates of titles, then the persons who would receive the certificates of titles in respect of **Plots No.[particulars withheld]** would be **Peter Ngure Njuguna** and **Andrew Karimi Kingori** respectively. On the face of it, the two named persons are the legal owners of the suit plots unless it would be shown that they acquired the plots and the certificates of ownership fraudulently or illegally.

However, there is evidence that the previous owner of the two plots sold them to **Andrew Karimi Kingori**, the Defendant herein as per the **Sale Agreement** dated **15th August 2011**. As it is the Plaintiff who has asserted, she ought to have proved that the said sale was fraudulently done or illegal. There was no evidence brought to that effect. Then assuming that the two certificates of ownership represent the certificate of titles, then the Defendant and **Peter Ngure Njuguna** are legal owners of the two plots in issue.

ii) Are the two plots No.[particulars withheld] matrimonial property?

As was submitted by the Defendant, matrimonial property is described by **Section 6** of the **Matrimonial Property Act**, to mean a matrimonial home or homes, household goods and effect in the matrimonial home or homes and immovable or movable property jointly owned or acquired during the subsistence of the marriage. The Plaintiff avers that the suit plots were her matrimonial home and that she lived on the suit land until end of **May 2012** when the Defendant trespassed on the same and attempted to evict her.

On his part, the Defendant stated that he bought the plots in vacant possession and he is the one who put up the temporary structures on the suit property. The question that seeks for answers is whether the suit property qualifies to be a matrimonial property. **Black Law Dictionary 9th Edition** describes Marital property as:

“property acquired during marriage and that is subject to distribution or division at the time of marital dissolution. It is the property generally acquired after the date of the marriage and before the spouse files for separation or divorce”.

In the instant case, it is evident that for **Plot No.[particulars withheld]**, the same was registered in the name of **J K N** on **16th December 2004**. That was before the Plaintiff and **J K N** formalized their marriage i.e on **11th May 2005**. Though Plaintiff alleged that she contributed in the purchase of the same,

no evidence was availed by her.

The second Plot was registered in the name of **J K N** on **11th November 2009**. The Plaintiff said that is where she had developed her matrimonial home. However, the Defendant alleged that he purchased the said property in vacant possession. The Plaintiff did not avail any evidence to prove that indeed she had developed her matrimonial home on the suit property and therefore the two plots are matrimonial property.

The two Plots were registered in the name of **J K N** who sold the same to the Defendant. The Plaintiff has not enjoined him as a Defendant in this case. The Defendant herein is not in a position to respond to the allegation whether the suit property was a matrimonial property or not since the person who sold the suit property is not enjoined as a Defendant. How could this Court know whether this suit as filed by the Plaintiff is a collusion between the Plaintiff and her husband who sold the land to the Defendant herein? The Court finds that the suit property was registered in the name of **J K N** who sold the same to the Defendant and there is no evidence that the same was a matrimonial property. The Court finds and holds that it cannot hold with certainty that the two plots were matrimonial property and therefore the Court declines to hold so.

iii) Was spousal consent required before the Defendant could purchase the suit property?

It is evident that the two plots were sold to the Defendant vide a **Sale Agreement** dated **15th August, 2011**. The Spousal Consent is a requirement provided by the provisions of the Land Registration Act and the Land Act. The suit property was sold on **15th August 2011**, and Spousal Consent was not a requirement then. See the case of **Stella Mokeira Matara & Another..Vs..Thaddues Mose Nanganya & Ano. Civil Appeal No.63 of 2014 (2016)eKLR** where the Court held that”-

“Even if the Appellant had shown that matrimonial home was situated in the suit properties, the Appellant still had to proof that a consent to charge the property was by law required and was not obtained considering that the charge in issue was drawn and executed before the Land Act 2012 and Land Registration Act 2012 were enacted”.

Equally in this matter when **J K N** sold the two plots to the Defendant, the two Acts which provide for Spousal Consent had not been enacted and therefore the Spousal Consent was not a requirement as by law. The two suit plots were in the name of **J K N** and he disposed them as a proprietor of the same.

iv) Is the Plaintiff entitled to the orders sought in her Complaint and in the alternative, is the Defendant entitled to his claim in the Counter-claim?

As the Court has found in the above issues, the Defendant herein purchased the suit plots from **J K N** who is a husband to the Plaintiff herein. The Plaintiff has not enjoined him as a Defendant and the Court therefore finds that the Plaintiff had a duty to assert and which duty she did not discharge to the required standard. She never brought sufficient evidence to prove that the suit plots were matrimonial plots. There is documentary evidence that her husband sold the suit plots to the Defendant. There was no evidence of fraud or misdeed on the part of the Defendant. The Defendant alleged that he bought the two plots in vacant possession and took possession of the same. He even built a temporary structure which has now been invaded by the Plaintiff. There was no evidence called by the Plaintiff to controvert that allegation. The Defendant has been able to show that he purchased the suit plots from **J K N** on **15th August 2011**. **Plot No.[particulars withheld]** is in the name of **Peter Ngure Njuguna** whom the Plaintiff has not enjoined as a Defendant. The Court cannot issue orders against a party who is not enjoined in a suit. That would be against the rule of natural justice. Therefore the Court finds that the Plaintiff herein has not discharged her onerous task of asserting and proving her allegations.

This court will therefore find and hold that the Plaintiff is not entitled to the prayers or orders sought in her statement of claim. However, the Defendant in his part proved his claim on the required standard of balance of probabilities. The Defendant is therefore entitled to his prayers as contained in the Counter-claim.

The Plaintiff to give the Defendant **vacant possession** of the suit property within a period of **45 days** from the date of this Judgement. Failure to do so, the **Defendant** to **apply** for **eviction order**.

v) Who is to bear costs of the suit?

It is evident that costs do follow the event. As provided by Section 27 of the Civil Procedure Act, costs are awarded at the discretion of the Court. The Court finds that the Defendant herein is the successful litigant and he is therefore entitled to costs of the suit and the Counter-claim.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has not proved her case on a balance of probabilities. Consequently, the **Plaintiff's suit** is **dismissed** entirely with **costs** to the **Defendant**.

However, the Defendant has proved his Counter-claim on the required standard of balance of probabilities. Consequently, the Court enters Judgement for the Defendant against the Plaintiff herein **G W N** as prayed in his Counter-claim in terms of **prayers no.(a) (b) and (c)**. Further the **Plaintiff** to give the Defendant **vacant possession** of the **two suit plots** within a period of **45 days** from the date of this Judgement, in default, Defendant to apply for eviction order.

It is so ordered.

Dated, signed and delivered at THIKA this 27th day of July 2017.

L. GACHERU

JUDGE

27/7/2017

In the presence of

No appearance for Plaintiff though date taken in court

No appearance for Defendant though dated taken in court.

Rachael – Court Clerk,

L. GACHERU

JUDGE

27/7/2017