



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 3 OF 2015**

**LUCY NJERI NDUATI .....PLAINTIFF**

**VERSUS**

**STEPHEN NGUGI KIHARA .....1<sup>ST</sup> DEFENDANT**

**JACKSON NJOROGE KARIUKI .....2<sup>ND</sup> DEFENDANT**

**RULING**

***(Application for injunction; principles to be applied; suit by wife seeking to cancel a sale made by her husband to the 2nd defendant; plaintiff stating that she never gave consent for the sale; husband arguing that there was a general consensus to sell; spousal consent necessary in dispositions; whether the consent can be general or specific to the transaction; prima facie case raised by plaintiff; application for injunction allowed).***

1. This suit was commenced through a plaint that was filed on 10 February 2015. In the plaint, it is pleaded that the plaintiff has been a wife of the 1st defendant under Kikuyu Customary Law since the year 1993 and that they have three issues. It is averred that in the year 1996, during the subsistence of their marriage, they purchased the land parcel Bahati/Kabatini Block 1/1587 and they put up their matrimonial home which it is averred is where she lives with the 1st defendant. She has pleaded that she also uses the land to cultivate and sell farm produce to enable her fend for her children. In the year 2014, some people came into the suit property and informed her that they have purchased it. She has averred that she has now received notice from the 2nd defendant to vacate the property. It is her view that the defendants have fraudulently dealt with the suit property inter alia by transacting over it without her knowledge. In the suit, she has asked for the following orders :-

*(a) That the property Bahati/Kabatini Block 1/1587 be declared a matrimonial home.*

*(b) The defendants be permanently restrained from selling, subdividing or in any other way interfering with the suit property.*

*(c) Costs of the case and any other relief the Court may deem fit to grant.*

2. Together with the suit, the plaintiff filed an application under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, seeking to restrain the defendants from interfering with the suit land. It is that application which is the subject of this ruling. In her supporting affidavit, the applicant has inter alia averred that her husband never informed her of any intentions to sell the suit land and that she has never

participated in any sale of the same. She has averred that this is where she lives with her family.

3. The plaint was amended on 12 February 2015 to plead that it is a Matrimonial Cause brought under the Matrimonial Property Act, 2013 and the Marriage Act, 2014.

4. The application is opposed by the 2nd defendant who filed a Replying Affidavit. He is represented by the law firm of M/s Githui & Company Advocates. In his replying affidavit, he has inter alia averred that on 30 May 2014, the 1st defendant offered the property for sale and he accepted the offer. Before purchasing the land, he did an official search which showed that the property is registered in the name of the 1st defendant. He has averred that the 1st defendant disclosed to him that he has two families but that his 1st wife is deceased. He informed the 2nd defendant that he has sat down with his family and they have agreed to sell the land so as to settle his families. The 2nd defendant annexed copies of these agreements said to be from the family. He also annexed the sale agreement. He averred that the property was thereafter transferred to him and he now has title. He has deposed that the plaintiff signed the agreement to have the land sold and was informed of the intended sale by her husband, and that the 1st defendant undertook to purchase alternative land to settle them. This, it is averred was all witnessed by the area Chief who wrote a letter to that effect. The letter is annexed to the replying affidavit. He has further averred that the remedy of the plaintiff is monetary and not proprietary. It is averred that this suit cannot be a matrimonial dispute since he (the 2nd defendant) has no marital union with the plaintiff.

5. The 1st defendant also filed a Replying Affidavit. He inter alia averred that he is married to two wives. His first wife died and the children are now grown up. He has stated that the plaintiff has been a headache to him and had in family meetings stated that she would take the entire land to the exclusion of the family of the first wife. To break the impasse, he called his entire family to a meeting which was held on 13 July 2013. It is said that in the meeting, all parties, including the plaintiff, agreed that the suit property should be sold and the proceeds used to settle the families separately. He annexed copies of the minutes. It is after this that the sale agreement was drawn. He then entered into a separate agreement to purchase other land to settle the plaintiff. There was a balance which he applied to construct a house for the plaintiff. He met the Chief of the area where he had purchased land and informed him that he is now in his area of jurisdiction. The Chief has written a letter to that effect which is annexed. In his view, the remedy of the plaintiff is to ask him to account for the proceeds of sale, or surrender the property that he purchased, which he is ready to do so.

6. The plaintiff filed a supplementary affidavit vide which she averred that she had an agreement with the 1st defendant that they have equal shares in the suit property. She has deposed that it is not true that she had threatened to keep the whole land to herself but had advised her husband to split it into two equal halves for the two families. She has deposed that in the meeting of 31 October 2013 before the Chief, it was agreed that she would also take part in the selling of the suit property and in the buying of other property where her family could relocate to, but despite this agreement, her husband never involved her in the selling of the land to the 2nd defendant. She has further averred that the 1st defendant has never disclosed to her information regarding the existence of the land that he alleges to have purchased and that this is an afterthought.

7. The plaintiff also filed a Preliminary Objection, objecting to the law firm of M/s Githui & Company Advocates acting for the defendants since it is the said firm which drew the sale agreement between the defendants.

A second amended plaint was filed on 17 April 2015 vide which the plaintiff added a prayer for cancellation of the title of the 2nd defendant.

8. I invited counsels to file submissions and both did file fairly elaborate submissions which I have taken into account in arriving at my decision. The gist of Mr. Gekonga's submissions, counsel for the applicant, is that the 1st defendant breached the agreement that the two had, to sell the property together, which agreement was reached in the meeting before the Chief on 31 October 2013. He submitted that the 1st defendant breached this by selling the property without the knowledge of the plaintiff. He pointed me to various sections of the Matrimonial Property Act, 2013. He further submitted on the preliminary

objection and was of the view that Mr. Githui should be disqualified from acting in this matter. On his part, Mr. Githui's main point, I believe, was that the issue of his disqualification cannot be addressed in a preliminary objection but will require submission of facts through an affidavit. He submitted further that the applicant cannot deny that there were consultations before the sale. Both counsels directed me to various authorities which I have considered.

9. There are two issues here. The first is that raised in the preliminary objection, on whether or not Mr. Githui can act in this matter, and the second is on the injunction itself. On the first issue, I am of the view that the question of whether or not an advocate should be disqualified from acting, is a matter that can only be determined through a substantive application and not through a preliminary objection. I indeed faced a similar scenario in the case of ***Murigu Wanyoike vs Dyno Holdings, Eldoret E&L Case No. 279 of 2013*** (ruling of 7 November 2013) where I rejected a preliminary objection aimed at having counsel disqualified from acting for one of the litigants. It is important that before an advocate is disqualified, good reasons backed up with evidence, which can only be done through an affidavit, be tendered, so that the advocate and/or his client can address those issues. I will not therefore delve into the issue of disqualification of Mr. Githui in this ruling. The plaintiff, if she still intends to pursue that question, will need to file a formal application for consideration.

10. On the merits of the application, my task has been made a little simpler by the uncontested fact that the plaintiff and 1st defendant are married. It is also not contested that the suit property constituted property that was owned previously by the 1st defendant and that this is where the parties have lived as man and wife. The sale to the 2nd defendant was made on 30 May 2014. It is an agreement that was entered into after the coming into force of the Constitution of Kenya, 2010, and the new land statutes comprised of the Land Act, 2012 and Land Registration Act, 2012. The provisions of these laws therefore apply.

Section 93 of the Land Registration Act, is material and it provides as follows :-

*93. (1) Subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or, all the spouses—*

*(a) there shall be a presumption that the spouses shall hold the land as joint tenants unless —*

*(i) a provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in, his or her own name only, or that the spouses are taking the land as joint tenants; or*

*(ii) the presumption is rebutted in the manner stated in this subsection; and*

*[b) the Registrar shall register the spouses as joint tenants.*

*(2) If land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered .*

*(3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house—*

*(a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or*

*(b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.*

*(4) If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3)(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.*

11. For our purposes, I think Section 93 (3) above applies, for the sale herein was one over property that was held in the name of the 1st defendant who is husband to the plaintiff. It will be discerned that the transferee, has a duty to inquire whether the spouse of the transferor has consented to the assignment. I have yet to see an authority which has an in-depth analysis of Section 93 and how it is to be applied, and none was provided to me, but my preliminary view at this stage of the proceedings, of course subject to being convinced otherwise after a full hearing, is that the other spouse, must give consent to the particular transaction. I am not too sure that a general consent to sell is good enough. In our case, there is no evidence that the 1st defendant sought consent for the *specific* transaction with the 2nd defendant. There may have been a general consensus to sell, but the complaint by the plaintiff is that she was not aware of the *particular* disposition to the 2nd defendant and therefore did not consent to it. I am not at this stage of the proceedings called to make any final determinations, and without settling the issue, I nevertheless think that there is substance in the argument that one spouse needs to give consent that is specific to the particular transaction which is what the applicant has raised in our case. I am therefore of the view that the plaintiff has demonstrated to me what qualifies to be a prima facie case with a probability of success.

12. In the event that I had some doubts, I think the balance of convenience would still tilt in favour of the plaintiff. The plaintiff is in possession together with her family. She has been in possession for a considerable duration of time and it is this land that she knows as home. If the 2nd defendant evicts them, the plaintiff and her children stand to suffer great loss.

13. I am satisfied that the plaintiff has met the test to enable her obtain the injunction. I therefore allow her application and make the following orders which shall subsist pending hearing and determination of this suit :-

*(i) There is hereby issued an order of inhibition, inhibiting the registration of any disposition in the register of the land parcel Bahati/Kabatini Block 1/1587 pending the hearing and determination of this suit.*

*(ii) The defendants jointly and/or severally are hereby barred from entering into any further sale, any lease, charge or other encumbrance over the land parcel Bahati/Kabatini Block 1/1587.*

*(iii) The defendants jointly and/or severally are hereby barred from issuing the plaintiff with any notice to vacate, or evicting the plaintiff and her family from the land parcel Bahati/Kabatini Block 1/1587.*

*(iv) The 2nd defendant and/or his employees, or assigns or agents, or any person acting under his behest, is hereby specifically barred from taking possession of the land parcel Bahati/Kabatini Block 1/1587.*

14. The costs of this application shall be costs in the cause.

15. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> day of July, 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of: -**

Mr.Osur holding brief for Mr.Gekong'a for plaintiff/applicant

Mr. Githui present for defendants/respondents.

Court Assistant: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**