



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CIVIL CASE NO. 67 OF 2013**

**FATIAH WAMUYU ABDALLA ALIAS ESTHER WAMUYU THINWA....PLAINTIFF**

**VERSUS**

**CONSOLATA NJAGI NJIRU.....DEFENDANT**

**JUDGMENT**

The plaintiff **FATIAH WAMUYU ABDALLA** Alias **ESTHER WAMUYU THINWA** acting in person filed this suit via Originating Summons dated 25th February 2009 and premised under **Section 17 of the Married Women's Property Act (1882)** and sought the following orders against the defendant **CONSOLATA NJAGI NJIRU**:-

- 1. That a declaration do issue that piece of land NGIRIambu/NGARIAMA/1472 registered in the names of the defendant is jointly owned by the plaintiff and the defendant and that the plaintiff is entitled to a half share thereof.***
- 2. That a declaration do issue that the defendant holds half share piece of land NGIRIambu/NGARIAMA/1472 in trust for the plaintiff.***
- 3. Spent.***
- 4. Spent.***
- 5. That the defendant do pay the plaintiff the costs of this suit.***

The claim was based on pleadings that, inter alia, the parties got married in 2000 under Kikuyu Customary Law and have jointly developed the land parcel No. NGIRIambu/NGARIAMA/1472 (the suit land) which the defendant inherited from his deceased father. That the parties also acquired livestock together which the defendant has sold but did not share the proceeds with her. That the defendant has no interest with respect to half share in the suit land and has been a bad and cruel husband to her and also refused and neglected to maintain her. That she has information that the defendant has married a second wife despite being legally married to her.

The defendant filed a replying affidavit in which he denied having married the plaintiff under Kikuyu Customary Laws in 2000 and challenged her to prove where it took place and who the witnesses were. He added that he inherited the suit land way before 2000 and all the developments thereon have been done by him and his estranged wife. He further pleaded that the plaintiff identifies the developments she made on the suit land or the livestock acquired together adding that the two have only been friends and have never acquired any property together and that the suit land is registered in his names and he has no interest in sharing it.

On 19th June 2009, the firm of **KENNETH J.N. GITHINJI Advocate** filed a notice of appointment to act on behalf of the plaintiff.

The parties having complied with pre-trial directions, the matter came up for hearing on several occasions but could not proceed for various reasons including lack of preparedness on the part of the plaintiff (2nd December 2013 and on 25th September 2014) and illness on the part of the plaintiff's advocate (13th November 2014). When the case came up for hearing on 21st April 2016, the plaintiff appears to have lost faith in her advocate **MR. GITHINJI** because, on that day, **MS THUNGU** advocate held his brief and requested that the file be kept aside upto 10.30 a.m. as **MR. GITHINJI** was on his way. The plaintiff was however adamant that the hearing must proceed adding that **MR. GITHINJI** would not turn up in Court. However, since the defendant had in fact not been served with the hearing notice and was therefore not present, the Court adjourned the trial but advised the plaintiff that it was in her interest to let her advocate lead her or engage another advocate. The case was therefore adjourned to 3rd October 2016 and the plaintiff still maintained that she would prosecute her own case. Recognizing her right under **Article 50 (1) of the Constitution** and in view of the fact that this case was filed way back in 2009 in Embu, the Court allowed the plaintiff to prosecute her case in which apart from her own testimony, the Court also heard the evidence of her witnesses **FAITH MICERE (PW2)** and **JOSEPH MBUTHIA KANAKE (PW3)**.

In her brief testimony, the plaintiff told the Court that she met the defendant in 1996 and the two lived together upto 2000. She asked that he gives her land where she can build and live adding that she had given him Ksh. 15,000 to sub-divide the suit land.

**FAITH MICERE (PW2)** told the Court that she knew the parties as man and wife when they were living in Dandora in 1996. Then in 2000, the parties moved to live in the defendant's home in Mbiri.

**JOSEPH MBUTHIA (PW3)** testified that in 1996 the defendant introduced the plaintiff to him as his new wife. He added that the parties thereafter lived in Nairobi before moving to live on land belonging to the defendant's father. Then in 2008, the defendant went back to his former wife and the plaintiff filed this suit and asked him to be his witness.

In his defence, the defendant told the Court that he met the plaintiff in 1995 when she went to attend his sister's burial. Thereafter the same year the plaintiff and her child spent their August Holidays at his house. In 1996, the plaintiff visited him at his place of work in Embu where he was employed by the Kenya Postal Corporation and told him that she had heard that he had quarreled with his wife. She therefore advised him to get land elsewhere otherwise his wife would kill him. On that day, the two spent a night together in a lodging and he gave her Ksh. 500. They then went for the week-end at the plaintiff's house in Makutano. They remained friends and she encouraged him to get land where they could settle. While at the plaintiff's house, he saw a photo-album and asked her if she was married but she denied saying that the man had no land and so she left him. The defendant told her he could not have a relationship with a married woman and so he left her and returned to his wife although they again parted in 2001. When the plaintiff heard that the defendant and his wife had parted ways, she visited him and asked him to get her a job. She took him to her Dandora house and in 2005, she joined him at his house. Then one day, some two men, one who looked like a Policeman, visited him and asked him if he was living with the plaintiff. He told them that he had previously lived with her but she had left. When the men left, he went to the plaintiff's house and told her not to visit him again.

He told the Court that the plaintiff was married to one Munyi and he even saw the marriage certificate although he could not remember the number. He denied having married the plaintiff adding that she was aware that he was married and they were only friends and when he learnt that she was married, he left her and they never had any children together.

I have considered the oral evidence by both parties and the documentary exhibits produced.

This suit was filed on 25th February 2009 when the law governing disputes involving matrimonial property was the now **repealed Married Women's Property Act of 1882**. That Act ceased to exist

following the enactment of the **Matrimonial Property Act No. 49 of 2013** which came into effect on 16th January 2014 and which is now the applicable law in such disputes.

The plaintiff's claim to a share of the suit land is premised on the pleading that she was married to the defendant in 2000 under Kikuyu Customary Law. Under **Section 107 (1) and (2) of the Evidence Act**, it was therefore her duty to prove that allegation. That provision reads as follows:-

1. ***“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”***
2. ***“When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person”***

The defendant having denied any marriage took place between him and the plaintiff, the burden of proof lay on the plaintiff to prove that indeed she and the defendant were man and wife and since she pleaded and testified that the two were married under Kikuyu Customary Law, she was required to prove that such a marriage was indeed solemnized. However, neither she nor her two witnesses gave evidence in proof of that allegation. In her brief testimony, she simply said she wants a share of the suit land where she can put up a home stating that she met the defendant in 1996 and they lived together upto 2000. Her two witnesses simply said they knew the parties as man and wife in 1996. There was no evidence from either the plaintiff or her witnesses as to when and where the Kikuyu customary marriage was solemnized, if at all. Indeed, all I can say is that the evidence in that regard was very scanty. The essentials of a valid Kikuyu customary marriage are now well settled. In **RESTATEMENT OF AFRICAN LAW: KENYA VOLUME 1, THE LAW ON MARRIAGE AND DIVORCE, DR EUGENE COTRAN** states that there can be no valid marriage under Kikuyu customary law unless a part of ‘*nguracio*’ has been paid and more categorically that ***“No marriage is valid under Kikuyu law unless the Nguracio ram is slaughtered”***. The importance of Nguracio to a valid marriage under Kikuyu customary law has been confirmed in many Judicial decisions including **ELIUD MAINA MWANGI VS MARGARET WANJIRU GACHANGI C.A CIVIL APPEAL No. 281A of 2003** and recently in **JOSEPH GITAU GITHONGO VS VICTORIA MWIHAKI MUNYA C.A CIVIL APPEAL No. 227 of 2005 (2014) e K.L.R.** None of the witnesses alluded to any wedding or marriage ceremony between the parties and infact there is no mention of any Nguracio being performed. Indeed during cross-examination by the defendant, **FAITH MICERE (PW2)** said:

***“All I know is that you do not have any children with the plaintiff. I did not attend any wedding between you and the plaintiff. All I know is that I saw you together. I did not see you paying any dowry”***

On his part, **JOSEPH MBUTHIA KANAKE (PW3)** also said the following during cross-examination by the defendant:

***“I did not attend any wedding between the two of you but you introduced her to me and said she was your wife”***

On her part, when the plaintiff was re-called for further cross-examination, all she said was:

***“You married me traditionally”.***

The burden is upon a party who wishes to rely on a customary law to prove the same - **JOSEPH GITHONGO VS VICTORIA MUNYA (2014) e K.L.R.** Clearly, there is no evidence upon which this Court can conclude, as pleaded in paragraph two (2) of the plaintiff's supporting affidavit;

***“That I got married to the respondent under Kikuyu Customary Law in the year 2000”.***

In the circumstances, the plaintiff has not been able to prove that she and the defendant were married under Kikuyu Customary Law or indeed any other law for that matter. Her claim to a share of the suit

land on the basis of such marriage must therefore be dismissed.

I have however decided to go further and interrogate if there is any evidence upon which a presumption of marriage can be made in the circumstances of this case and I have reached the conclusion that there is none. In ***HOTENSIA WANJIKU YAWE VS PUBLIC TRUSTEE C.A CIVIL APPEAL No. 13 of 1976***, the former Court of Appeal for East Africa held that long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it and only cogent evidence can rebut that presumption. However, the defendant in this case asserted that the plaintiff was only his friend and from the circumstances in this case, that is the position. It is obvious in this case that the defendant was having problems in his own marriage and may even have contemplated marriage. However, apart from the short spells when the two spent time together either at the plaintiff's or defendant's home, there was really no long cohabitation that crystallized into a marriage and indeed from the defendant's own evidence, when he saw the album in the plaintiff's house suggesting she was married and also when strangers visited his home and asked him if he was married to the plaintiff, he developed cold feet and told the plaintiff to stay away. Their relationship was really that of a mere concubine and therefore even if I had been asked to determine this suit on the basis of the concept of a presumption of marriage, there was no evidence adduced to prove that there was such long cohabitation on which to base that presumption as known in law.

The plaintiff also pleaded that she is entitled to a share of the suit land on the basis of a trust. In paragraph two (2) of her Originating Summons, the plaintiff pleaded as follows:-

***(2) "That a declaration do issue that the respondent holds half share piece of land NGIRIAMBUN/GARIAMA/1472 in trust for the applicant"*** It was therefore the plaintiff's duty to lead evidence to prove the existence of a trust as far as the suit land is concerned. In ***MWANGI MBOOTHU & OTHERS VS GACHIRA WAITIMU & OTHERS 1986 K.L.R 171***, the Court of Appeal held thus:-

***"The law never implies, the Court never presumes a trust but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied"***.

It is clear from the copy of the title deed to the suit land that the same was registered in the names of the defendant on 17th June 1992 long before he met the plaintiff. The plaintiff testified that she gave the defendant Ksh. 15,000 to enable him sub-divide the suit land. That is not evidence upon which this Court can conclude that the defendant owns the suit land on behalf of the plaintiff and is therefore obliged to give her a share thereof. That claim must therefore be dismissed.

It is clear that whereas the plaintiff's claim against the defendant is premised on an alleged marriage between the parties under Kikuyu Customary Law in the year 2000, there is no evidence to prove that the parties were married under that law or indeed any other law. Having failed to prove that marriage, the plaintiff's claim for a share of the suit land under the ***Married Women's Property Act (now repealed)*** or even the ***Matrimonial Property Act 2013*** cannot be sustained. Trust is similarly an issue of both law and fact which needs to be proved by cogent evidence. The plaintiff has also been unable to surmount that hurdle.

Ultimately therefore and upon considering the evidence by both parties, I find the plaintiff's suit is devoid of any merit. It is accordingly dismissed with costs to the defendant.

It is so ordered.

**B.N. OLAO**

**JUDGE**

**20<sup>TH</sup> DECEMBER, 2016**

**Judgment delivered, dated and signed in open Court this 20<sup>th</sup> day of December, 2016**

Plaintiff present in person

Defendant present in person.

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**20<sup>TH</sup> DECEMBER, 2016**