



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 443 OF 2016

EKNPLAINTIFF

VERSUS

AS.....1ST DEFENDANT

JS.....2ND DEFENDANT

ECK.....3RD DEFENDANT

JUDGMENT

PART A: INTRODUCTION AND PLEADINGS.

(Suit by plaintiff seeking specific performance on a land sale agreement; the vendor being polygamous with three wives; 2nd wife giving consent for sale of the property; First wife sued as 1st defendant refusing to give consent; 3rd wife not interested in the sale; vendor sued as 2nd defendant explaining that he had distributed his property and what he sold was his share and that of the 2nd wife; First wife contending that she must give consent; evidence showing that vendor wished to settle some of his sons with the 2nd wife on the disputed land but their house destroyed by sons of the 1st wife; vendor explaining that he was forced to sell so that he may settle his sons on another land which he purchased with the proceeds of sale; on the evidence, court holding that 1st wife unreasonably withheld consent, court giving a go-ahead to the transaction).

1. JS, the 2nd defendant, is the husband to AS and ECK, who have been sued as the 1st and 3rd defendants respectively. AS is the first wife and E is the 2nd wife. It emerged in evidence that J has a third wife but who was not sued. Through a plaint filed on 17 October 2016 and amended on 31 July 2017, the plaintiff averred that on 2 April 2016, J and his 2nd wife, sold to him two parcels of land being Rongai/Rongai Block 4/*** and Rongai/Rongai Block 4/1** at a total consideration of Kshs. 3,500,000/=. This money is pleaded to have been paid to J who then proceeded to hand over the title deeds and all relevant documents to have the land transferred to the plaintiff including an application for consent of the Land Control Board. When the plaintiff went to the Land Registry to book a date for appearance before the Land Control Board, he was informed that AS, J's first wife, had lodged a restriction on both parcels of land on 5 April 2016, which was three days after the sale agreement. The hearing on the restriction was done and parties eventually referred to court. It is the position of the plaintiff that the defendants acted dishonestly in the whole transaction and believes that they have colluded to defraud him. He has asked for the following prayers :-

*(a) An order of specific performance to issue upon the 2nd defendant to ensure that the (land parcels) Rongai/Rongai Block 4/*** and Rongai/Rongai Block 4/***(sic) (must have meant Rongai/Rongai Block 4/1**) is transferred to the plaintiff by obtaining the Land Board consent.*

(b) That the 1st defendant be ordered to lift the restriction within 7 days of service of the order and failure to which the Nakuru County Land Registrar be ordered to lift the restriction lodged by the 1st defendant (Ann Simita) (sic).

*(c) An order of injunction restraining the defendants by themselves, their agents and their servants from interfering with the plaintiff's possession and occupation of land parcel number Rongai/Rongai Block 4/*** and Rongai/Rongai Block 4/***(sic) (must have meant Rongai/Rongai Block 4/1**).*

*(d) In the alternative to prayer (a) (b) and (c) above the court to issue an order against the 2nd defendant to reimburse the purchase price of Kshs. 3,500,000/= plus the penalty of 25% of the purchase price for breach of contract for the parcel of land known as Rongai/Rongai Block 4/*** and Rongai/Rongai Block 4/***(sic) (must have meant Rongai/Rongai Block 4/1**).*

(e) That the court to award damages for breach of contract as against the 2nd and 3rd defendant.

(f) The defendants be condemned to meet all the costs of this suit.

2. The 1st defendant entered appearance through the law firm of M/s Nancy W. Njoroge & Company Advocates. She pleaded in her statement of defence that the two suit properties were registered in trust for her and her children, long before the 3rd defendant joined the family. She averred that the sale agreement of 2 April 2016 is void in law for lack of her consent despite being in sole occupation of the parcels of land from the year 1975. She admitted placing the restriction but added that she first placed a caution in the year 2012 which was unprocedurally removed. She has pleaded that she was not aware that the plaintiff had purchased the properties and is a stranger to any exchange of money. She has pleaded that no surveyor has ever come to the land to subdivide their land parcel Rongai/Rongai Block 4/** measuring 10 acres and that she came to learn of the subdivisions (which comprise the suit properties) on 14 September 2016 during the hearing of the objection to remove the restriction before the Land Registrar. She has pleaded that the sale agreement in issue is null and void for want of Land Control Board consent. She has added that the subdivision of the land and transfer of the two suit properties to the plaintiff is tainted by fraud. The following particulars of fraud are pleaded against the plaintiff :-

*(a) Purporting to enter into a sale agreement for LR Rongai/Rongai Block 4/*** and 1** without the relevant Land Control Board consent as well as consent from the 1st defendant.*

*(b) Purporting to obtain the title deeds for LR Rongai/Rongai Block 4/*** and 1** irregularly without following the legal procedure.*

*(c) Irregularly and fraudulently causing the Land Registrar to obtain titles for LR Rongai/Rongai Block 4/*** and 1** in his name while he was well aware there was no conformity with the legal procedures.*

3. On the part of the 2nd defendant, the following particulars of fraud are pleaded against him :-

*(a) Illegally purporting to sell part of LR Rongai/Rongai Block 4/** where the 1st defendant lives without her consent.*

(b) Purporting to obtain money from the plaintiff while he knows very well the land he was purporting to sell was under use by the 1st defendant who has a beneficial interest in it.

(c) Causing the 3rd defendant who is the 2nd defendant's 2nd wife to give spousal consent to sell land that she has never lived in nor utilized in any way.

*(d) Colluding with the plaintiff to obtain titles for LR Rongai/Rongai Block 4/*** and 1** without following the right procedure of obtaining consent from the Land Control Board.*

4. She asked that the plaintiff's suit be dismissed with costs.

5. On their part, the 2nd and 3rd defendants filed a joint statement of defence through the law firm of M/s Gordon Ogola, Kipkoech & Company Advocates. They pleaded inter alia that in good faith and in honour of the terms of the agreement with the plaintiff, they undertook all the necessary steps to supply the plaintiff with the completion documents and obtain the necessary consent from the Land Control Board but for the misfortunes authored by the 1st defendant. It is pleaded that the 2nd defendant being the absolute proprietor of the land parcels Rongai/Rongai Block 4/***, ***, and 1**, procedurally and in good faith, subdivided these portions of land among his two wives and himself. To his first wife (1st defendant) he gave the land parcel Rongai/Rongai Block 4/***, 1; to the 3rd defendant (2nd wife), he gave the land parcel Rongai/Rongai Block 4/1** and to himself the land parcel Rongai/Rongai Block 4/***. It is contended that the 1st defendant therefore has no interest in the land parcels Rongai/Rongai Block 4/***, and 1** which are in issue in this suit. It is pleaded that the allegation by the 1st defendant that her consent was needed is not only procedurally flawed but also substantively misguided.

PART B : EVIDENCE OF THE PARTIES

6. The plaintiff is a businessman operating in Nairobi but having a home in Rongai- Nakuru, where the suit properties are located. In his evidence, the plaintiff inter alia testified that he has known A (the 1st defendant) and J (the 2nd defendant) as husband and wife. He did not know the 3rd defendant (E) there before until 2 April 2016 when J introduced her as his 2nd wife and informed him that they were selling some land in Rongai. He was informed that J has subdivided his land into three portions and he was selling two of these each measuring 3 acres. He went to the ground, saw the beacons, and they entered into an agreement to purchase the two plots for Kshs. 3.5 million which money he paid into the account of J. A spousal consent was given by E. J then gave him the original title deeds, a signed transfer form, copies of his ID and PIN and an application for consent of the Land Control Board all of which he produced as his exhibits. The properties could not however be transferred as Ann had placed a restriction on 5 April 2016. When he informed J about this, he told him that his two wives have a dispute over the land. He explained that when he purchased the land, he was told that the whole land was originally 10 acres, with 4 acres being for A, 3 acres for E and 3 acres for J. What was sold to him were the portions belonging to E and J, and J informed him that he was selling these two portions because of conflict between the children of the two wives. J wished to settle the two sons of E in Rongai, but A resisted, so J wanted to sell so that he can have money to buy other land to settle the sons of E. He informed him that he used the purchase price to buy a land parcel Nakuru/Temoyetta/214 and showed him a copy of the sale agreement dated 16 May 2016, vide which he bought this land, and the copy of title deed showing that he is now registered as proprietor. However, because of the conflict between the two wives, he (plaintiff) has not been able to get the land that he bought. He asked for his money back or the land that he purchased. He acknowledged that J has not refused to transfer the land to him but what stopped the transfer was the restriction. He did not see why A is resisting the sale since what was sold to him is not A's portion.

7. Cross-examined by counsel for the 1st defendant (A), he testified that his home is about 4 kilometres away from the suit properties and he and A go to the same church. He had been informed that J was selling his land and they talked and agreed to meet in Kericho. When they met, J was accompanied by his three brothers, his two sons and E (his 2nd wife). That is when he told him that he has subdivided his land into three portions to accommodate his two houses but all the title deeds were in his name. What was being sold to him was what belonged to J and E so he did not see the need of calling A. They did the sale agreement the following day, but three days later, A put a restriction. He informed the village elders who went to see A and he himself also tried to reach out to A accompanied by their pastor and elders, but all this was in vain and they got a hostile reception since A was not agreeable to the sale. According to him, A wanted the whole of the 10 acres as she did not recognize the 2nd house. He then asked J to refund him the money but J could not do so as he had already bought the other land in Molo. He stated that they attended a Land Control Board meeting but they were referred to court. He elaborated that A and E have conflicts and that there was a time the two sons of E wanted to settle in Rongai but the sons of A resisted and their house was demolished. He was aware of the fights between the children of the two houses but he never imagined the issues were that deep.

8. With the above evidence, the plaintiff closed his case.

9. DW-1 was the 1st defendant. She testified that she got married to J in the year 1965 in [Particulars Withheld] in Kericho, and they lived on land owned by her father in law upto the year 1972. Her husband then sold this land and bought some land in a settlement scheme in an area called [Particulars Withheld] in Bomet, where they moved to. This land was 24 acres. They lived here for only one year after which her husband sold this land and they moved back to [Particulars Withheld] and settled in land that was owned by her father in law. This land is 14 acres. They terraced the land, planted tea and maize. They lived here upto the year 1979, when she fell ill and was brought to Nakuru for treatment. She was here for about 4 months. She stated that in the meantime, her father in law moved to Rongai on 10 acres of land that he had purchased. That land is the same land in dispute in this case. She stated that when she got well, her father in law advised her to stay in Rongai and take care of this land but her 2 children, DR and GR, could continue

living in Kericho to take care of the tea and cattle. In the year 1984, her husband married E as his 2nd wife and they lived together upto the year 2000 when he married a 3rd wife, C. E continued living in the land in [Particulars Withheld] but in the house built for her (A). She stated that C is an elderly lady and when J came to unveil her, she (C) said that she has her own children and property and she (A) did not therefore object to her being married to J. C lives in her own home in [Particulars Withheld]. She testified that in the year 2000, her husband requested her (A) to take the tea bonus for the land in [Particulars Withheld] for 3 years so that he can buy for E land but since then he has continued to collect the bonus. She testified that the land in Rongai was registered in the name of her husband but that E has never lived here. According to her, E uses the whole of the 14 acres in [Particulars Withheld]. She stated that two of her (A's) sons live in C and have planted some tea though she did not know how many acres.

10. She stated that the plaintiff is known to her as a neighbour in Rongai but he never came to her to inquire from her about the sale of the suit land. He came to see her after 30 April 2016 with some elders and it is then that she was told that her husband has sold the land. She did not agree to the sale as according to her this land is of her father in law. She attended the Land Control Board meeting and objected to the sale. She denied that the land has been subdivided between her, her husband and E in the ratio of 4, 3 and 3 acres respectively. She testified that she has never been involved in any subdivision of the land. She stated that her husband has not subdivided the land in [Particulars Withheld] and according to her, the 2nd and 3rd wives have only come to enjoy property that she and her husband created. She stated that her sons have no peace in Kericho and that their tea is now overgrown. She wants this tea given back to her.

11. Cross-examined, she asserted that both the land in [Particulars Withheld] Kericho and the land in Rongai belonged to her father in law and they constituted their inheritance. She acknowledged that she did not contribute to their purchase. She refuted that the land in Rongai was purchased by her husband. She has 4 children, 2 sons and 2 daughters. Her first born son David Rono lives in [Particulars Withheld] (Kericho) and her second son, GR lives with her in Rongai although he has planted some tea in Kericho. She did not know the acreages that they occupy in Kericho. One of her daughters is married and has her own land whereas her other daughter lives with her in Rongai. She testified that the tea in Kericho has always been supplied in the name of her husband and it is him who receives the tea bonus payments although she did admit that her two sons also supply tea in their own names and get paid separately from the same land in Kericho. She stated that when E got married, she had no objection as her husband mentioned that he will buy for her another piece of land. She was aware that E has 8 children although she did not know whether or not they have finished school since, in her own words, she is not much bothered about that family. She stated that her husband needed to involve her before demarcating his property amongst his wives and homes. She would not agree to be left with 4 acres in Rongai since according to her, the whole of the 10 acres of the land belongs to her. She was also of opinion that her children should stay in Kericho. About E's children, she did not think that they should live in the land in Kericho, since her husband promised to buy them a separate parcel of land, through the tea bonus.

12. She did not know how her husband utilizes the tea bonus payments. She stated that they planted this tea in the year 1975 and they started receiving tea bonus payments in the year 1976. All along, her husband had been the one receiving these payments. She was not aware that this money was used to cater for the family, pay school fees and buy food, although she did acknowledge that her husband would take care of them. She affirmed that her husband took her children to school and paid their school fees and would feed and clothe them. Of her children, the first, June, was born in the year 1965, D 1967, Susan 1970 and G, 1973. They were taken care of until they became adults who could fend for themselves. She refuted that the land in Kericho is 12 ½ acres (despite this being the acreage that she provided in her witness statements) and insisted that it was 14 acres. She stated that she lives in Rongai in a house built by her husband. She did not agree when it was put to her that if all the land owned by her husband was to be equitably shared, amongst his houses and children, the most her house would be entitled to is 6 ½ acres. She stated that her husband should not force her to accept what he wants to do with the land. She was not agreeable to the subdivision of the land in Rongai so that she gets 4 acres and it did not matter to her that what her husband sold was not the 4 acres he assigned to her. She insisted that she cannot allow the sale of this land in Rongai. Neither did she agree to her husband's proposal to allocate her house 4 acres in Kericho because according to her, all the other wives found her in these properties. She was bitter because her husband took the tea bonus from the year 2000 but did not buy land for E. She insisted that her husband has never called them to inform them of how he proposes to subdivide his land.

13. DW-2 was the 2nd defendant. He conceded having sold land to the plaintiff and that he was paid in full. When he sold the land, his 2nd wife consented to the sale, but A placed a restriction. He explained that he has two parcels of land, that in Kericho which measures 12 ½ acres and the one in dispute in Rongai, which in total is 10 acres. He has planted tea in Kericho, having started the crop in the year 1978. There is 4 acres under tea. It was his name which was registered and it was him who was getting the tea bonus payments. He later divided the tea and allocated one acre to his 1st wife and another one acre to his 2nd wife, and he remained with 2 acres under his name. The sons to A later registered their names in place of their mother for their mother's one acre portion. He testified that he uses his tea bonus payments to pay school fees. For tea under his wives, they use the money therefrom exclusively

for themselves. All his children with his first wife are now adults, have families, and take care of themselves although he sometimes helps to pay school fees for his grandchildren. He has 8 children with E and 3 are under 18 years and in Secondary School. Two are in University and two are in Technical Colleges. He mentioned that it is him who pays school fees for all of them and that he derives income from the tea in his farm and other farming activities. His third house has 2 children who are all adults and have completed school.

14. He testified that he has subdivided his two pieces of land among the whole family. He has subdivided the land in Kericho into three portions; the first of 3 ½ acres, he has allocated to himself; the other two portions, he has allocated equally to his first and second wives, each getting 4 ½ acres. The title deed is still in his name and he has not formally had the subdivisions surveyed and registered separately due to lack of money as he is pressed for school fees. For the land in Rongai, he formally subdivided it into 3 portions, through a subdivision plan which was drawn on 19 September 2012. The subdivision produced the titles Rongai/Rongai Block 4/**1, ** and 1**. He allocated the parcel No. 1** to his first wife (A) and the parcel No. 1** to his second wife (E). He allocated the parcel No. ** to himself. He has not assigned any land to his third wife (C) as she was given land by her own family. According to his calculations, of all the land that he owns, he has in total allocated to A 8 ½ acres, to E 7 ½ acres, and to himself 6 ½ acres. He stated that he called his family in the year 2000 and distributed this land as he has mentioned and there was no objection.

15. When he sold land to the plaintiff, he talked to E and her children. A was also aware of the sale and raised no objection. They later called for meetings in Kericho, to resolve the issue, but A did not attend any of them. They resolved to move the meetings to Rongai, which A attended and agreed that he could proceed with the sale, but when he went to do a transfer, he found a restriction.

16. He did not think that A has any good reason to object to the sale in issue. According to him she is only motivated by jealousy and wants to deny land to the other houses. He mentioned that when he settled A's children in the land in Kericho, A had no problem, but when he wished to settle 2 of E's sons in Rongai, A refused. That is why he opted to sell the land so that he can move them to another land instead of them fighting each other in Rongai. He mentioned that with the proceeds of the sale, he bought land in Molo. He wished that the court could allow him complete the sale to the plaintiff. He testified that the land in Kericho and Rongai were owned by his father. Their father had secretly apportioned his sons land, and he sold his share, which money was used to buy the Rongai land and the Kericho land. He testified that A did not contribute to their purchase. He stated that if he has to refund the plaintiff his money, it means that he will have to sell the land in Molo, and bring back the sons of E to Rongai, and this can lead to friction.

17. Cross-examined by counsel for the 1st defendant, he stated that their ancestral home was in Cheborgei (in Kericho). They lived here with A upto the year 1971. This land was sold and with the proceeds, he bought the land in [Particulars Withheld]. It was his father who sold the land and gave him the money and he then proceeded to buy the [Particulars Withheld] land. He thereafter took a loan with KTDA and planted tea. He was at the time employed as a tractor driver in a private farm. He mentioned that at this time, A was indisposed; he brought her to Nakuru for treatment and she did not go back to Kericho. He had workers who were taking care of the tea and he used the proceeds to pay off his loan. He refuted the claim that he had an agreement with A for him to receive tea bonus for 3 years after the year 2000 so that he could buy land for E. He testified that he married E in the year 1981. On the Rongai land, he stated that he purchased it as shares in the year 1971 and Ann came to live in it in the year 1979. He himself used to farm maize in Rongai and keep cattle and he has used the proceeds to pay school fees. He stated that he subdivided this land in Rongai, on the ground, in the year 1998, but brought a surveyor to formally subdivide it in the year 2012. He stated that A was present when the surveyor demarcated the land and he was not aware of any caution placed by A at this time. All the titles to the subdivided parcels are in his name although he has assigned portions to his wives. He stated that he called E to give consent to the sale because what he was selling was her portion and not the portion that he had assigned to A. He explained that if he wished to sell A's portion, he would not call E for consent. He refuted that A exclusively used the land in Rongai and he stated that he himself uses it just the same way he uses the land in Kericho. He has cattle which he sometimes sells to raise money for school fees and the milk is taken to the dairy for which A receives the money. He has maize on this farm which he sells some and some is used for consumption. He denied that he has chased away any of the sons of A from Kericho, but conceded that at some point he had a difference with Geoffrey, for he had quarrelled his workers and wanted to chase them away.

18. With the above evidence, the 2nd and 3rd defendants closed their case.

PART C : SUBMISSIONS OF COUNSEL

19. I invited counsel to file written submissions which they did. In brief, Mrs. Muthoni Gathecha, learned counsel for the plaintiff,

inter alia submitted that the subject property was not a matrimonial property for the reason that it was a gift from the father of the 2nd defendant and that the 1st defendant did not contribute to its acquisition. She was of opinion that an inheritance is not generally considered matrimonial property. She averred that as the man of the house, the 2nd defendant acted to sell the land and buy another land in Molo so as to save his family, since the two houses are not in good terms. She submitted that in a polygamous marriage, either of the wives can give consent for a sale.

20. Mr. Gordon Ogola, learned counsel for the 2nd and 3rd defendants held the view that sanctity of title needs to be upheld and that a registered owner can deal with his land as he pleased and such owner cannot be curtailed from selling land that he owns. It was pointed out that the land in question belongs to the 2nd defendant and that he has every right to sell the property as he was trying to avoid a conflict between two of his houses. He thought that the 1st defendant is driven by greed and jealousy, and despite being the 1st wife, she has no right to more property than the other house. Counsel submitted that spousal consent is no longer mandatory on account of Section 31 of the Land Laws (Amendment) Act, 2016. He submitted that the 1st defendant has unreasonably withheld consent to sell and referred me to Section 103 of the Registered Land Act (repealed). He submitted that there were legitimate issues that the 2nd defendant had to address as head of the family and he had to ensure that the two houses live in peace. He submitted that the 1st defendant cannot claim to hold the whole land in Rongai to the exclusion of the entire family of the 2nd house and that she made no contribution towards its purchase.

21. Ms. Nancy Njoroge, learned counsel for the 1st defendant, on her part, submitted that the 1st defendant has been living in the Rongai land since the year 1979 and that her whole life revolves around this land. She pointed me to the evidence of her client that the 2nd defendant was to use tea bonus to buy land for the 3rd defendant. She submitted that though the land is registered in the name of the 2nd defendant, the 1st defendant has made contribution through her labour and referred me to Section 93 (2) and (3) of the Land Registration Act. She submitted that this land fits the description of a matrimonial home of the 1st and 2nd defendant and their children. She wondered how the plaintiff could have bought part of the matrimonial home without her consent. She was of the view that the 2nd defendant settled her client in Rongai, and settled the 3rd defendant in Kericho, and it was in bad faith for him to obtain consent from the 3rd defendant who does not live in Rongai. She submitted that the plaintiff is guilty of fraud for buying land from a neighbour he knew, without seeking her consent. She submitted that her client was not aware of the subdivision of the land and that her consent was not sought. She asked the court not to allow the removal of the restriction.

PART D- ANALYSIS AND DETERMINATION

22. Just to put everything into context, it is common ground that the 2nd defendant has three wives, the 1st defendant being his first wife, the 3rd defendant his second wife, and the third wife is not a party to these proceedings. The 2nd defendant held two parcels of land registered in his name, one in [Particulars Withheld], Kericho, and the other in Rongai, Nakuru. The land in Kericho is 4.94 Ha (close to 12 ½ acres) whereas the land in Rongai was initially one whole measuring 10 acres, but the 2nd defendant later subdivided it into 3 portions, two portions measuring 3 acres, and the last portion measuring 4 acres. The two portions of land which measure 3 acres each are those registered as Rongai/Rongai Block 4/** and 1**, and it is these two parcels of land that were sold to the plaintiff through a sale agreement that was executed on 2 April 2016. The 2nd defendant as vendor, has every intention of transferring the property to the plaintiff, and it is apparent that his 2nd and 3rd wives have no problem with the sale, with the 2nd wife having explicitly given consent, but complications have arisen because his first wife does not wish to have the plots sold, and she has placed a restriction on the properties. What the plaintiff wants in this case is either for the sale to be completed or to be refunded his money with interest. The position taken by the 2nd and 3rd defendants is that they have no problem with this court sanctioning the sale. The 1st defendant however, does not wish to have the sale completed.

23. It has been submitted by counsel for the 1st defendant that the suit property is matrimonial property and therefore the 2nd defendant could not sell it without the consent of the 1st defendant and I think that the first thing that I need to make a decision on, is whether the properties in issue comprise of matrimonial property. Under Section 93 of the Land Registration Act, Act No. 3 of 2012, where property is obtained during the subsistence of a marriage, it is to be dealt with under the Matrimonial Property Act, Act No. 49 of 2013.

24. The Matrimonial Property Act, defines what a “matrimonial home” is and also what “matrimonial property” is. A “matrimonial home” is defined in Section 2 as follows :-

“matrimonial home” means 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;

whereas “matrimonial property” is defined in Section 6 of the Act as follows :-

Meaning of matrimonial property :-

(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.

25. From the facts adduced in this case, it is apparent to me, firstly, that the property in issue was acquired by the parties after they had been married. The 1st and 2nd defendants got married in the year 1967. The 1st defendant herself stated that this property was owned by her father in law, and he gave it to them as a gift. The 2nd defendant’s evidence was that this property was bought from proceeds of the sale of his share of the ancestral land. I would take the position of the 2nd defendant to be the correct version as I assume that he is better placed to state how the land was acquired. Whichever way, the property would be matrimonial property because it is a “matrimonial home”, as defined by Section 2, as this is where the 1st defendant has been living since the year 1978 or thereabouts, and this is where her family house is located. A matrimonial home is part of what is to be considered “matrimonial property” as defined by Section 6 (1) (a) of the Matrimonial Property Act set out above.

26. The difficult question in this matter is whether one spouse can proceed to sell matrimonial property, or part of matrimonial property, without the consent of the other spouse. The issue in this case is in fact a little bit more complicated than the above question, because the registered owner of the property is polygamous, and a new and more pronounced question now arises as to whether in such union, all spouses have to give consent to sale of matrimonial property, or whether consent from any spouse will be sufficient, or indeed, whether a case of no consent at all will still allow the proprietor to dispose of the property.

27. Section 12 of the Matrimonial Property Act, attempts to address this situation, albeit partly, for it provides as follows :-

Special provisions relating to matrimonial property

(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.

(2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man’s wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

(3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.

(4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except—

(a) on the sale of any estate or interest in the matrimonial home in execution of a decree;

(b) by a trustee in bankruptcy; or

(c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.

(5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.

28. I have set out the whole of Section 12, to put it into context, but it will be seen that only Section 12 (1) is relevant, in determining the question whether a spouse must give consent for the sale of matrimonial property. However, the same only makes provision for a monogamous union, and in such instance, there needs to be consent of both spouses for matrimonial property to be alienated including an alienation by way of sale. I have not seen any explicit provision in the Matrimonial Property Act that relates to the sale of matrimonial property in a polygamous union. Probably this is a lacuna that Parliament needs to address so that the issue is clear and not left in doubt.

29. If we were dealing with a case of a monogamous union, then I would not have hesitated to hold as a starting point, that consent of the spouse was needed before the sale could be completed. But I am dealing with a case of a polygamous marriage and the provisions of Section 12 (1) cannot apply. We therefore need to ask ourselves the difficult question whether consent of any spouse is sufficient, or whether consent of all spouses is required, or whether no consent at all is required.

30. The easy and safe view to take, being an analogy from the provision of Section 12 (1) , is to state that if it is the case that where there is one spouse, consent from such spouse is required, then in a polygamous union, consent of all spouses will be required. I say easy, because the dynamics of a polygamous union can be a bit complex. As demonstrated in this case, in some polygamous unions, one house may have absolutely no interest in some property that is in possession of the other house. For example in this case, it has emerged that the 3rd wife lives in her own land and the 1st and 2nd wives have absolutely no interest in that land. Now, if her (3rd wife) or their common husband, wishes to sell part of it, will consent from the 1st and 2nd wife be needed" It has also emerged that the 3rd wife has no interest in the Kericho and Rongai land in dispute, but is her consent needed if either 1st or 2nd wife wish to dispose of such properties"

31. It will of course be well and good if all spouses consent to any sale, but what if one of the spouses does not consent to the sale yet the other/s have no problem; or one spouse who on the face of it does not appear to have any interest in such property, refuses to give consent to the other spouse to sell"

32. I am alive to these difficult questions. My own interpretation of the law is that if it is the position that consent is required of the other spouse in a monogamous union, then by analogy, consent would be required of all spouses in a polygamous union, unless there is clear demonstration that the property does not constitute matrimonial property, or that through custom, because customary law is applicable under Section 11 of the Matrimonial Property Act, or other legal provision, the other spouses cannot have any recognizable interest in such property and their consent is thus not necessary.

33. Having said that, I think that a spouse is entitled to relief, and entitled to approach court for an order to proceed with the disposition in issue, if he or she feels that the other spouse or spouses, are either not in a position to give consent, or are unreasonably withholding consent. Starting with the former, let me give an example. Let us assume that a man is in a monogamous marriage and his spouse is critically ill and in a coma. Let us assume that they have some matrimonial property and the man now wants to sell this property, or part of it, so that he can get some money to treat his wife. His wife is of course not in a position to give consent to sell. Will we now insist that there must be consent to sell irrespective of the fact that his wife is in a coma and in hospital and the sale for all intents and purposes appears to be for good cause" I think not. That is why I am saying that there may be liberty for one to approach court to dispense with consent of the spouse, and if the court is persuaded that the sale of the property is in the best interests of the union, allow the disposition to proceed without the consent of the spouse, depending on the surrounding circumstances of the case.

34. On the other point, let us assume that a woman in a monogamous union needs to sell some land so that she can raise school fees for one of her children and this is the only reasonable source of finance. The husband declines to have the property sold, not that he has any other option for raising funds, and the land that is sought to be sold is probably excess to the requirements of the family.

Would the woman be bound by the husband's refusal to sell" Does it mean that her children do not now proceed to be educated" Would the woman be bound by that refusal by her husband to give consent or can she seek a remedy to waive the consent" I think she can, because it is apparent in such respect that the consent is being unreasonably withheld.

35. I have given these examples in relation to monogamous unions, but the same scenario can play itself out in a polygamous union. In the first example, let us take it that the man is polygamous. He wants to sell one of his properties, and he chooses the one that will least inconvenience the family, so that he can proceed to treat his wife who is indisposed. If the other spouses, or one of them, categorically refuse to give him consent to sell, does the man now sit and wait for his ill wife to die" I think it would be unjust to insist that all wives must give him consent in such instance. To the second example, let us take it that the man is polygamous with three wives and they all live in different parcels of land. Because the first wife needs to raise school fees for her children, she has reasoned that she must sell part of the land she lives in so as to raise the required money. Her husband has no problem with this part of the land being sold but his other two spouses refuse to give consent to sell it. Will we now say, that since the other two wives (or any one of them) have refused to give consent, she is now bound by that and her children cannot go to school" Again, I think this would be unjust.

36. I do not think for one moment that the intention of the law was to curtail all dispositions irrespective of the circumstances, for the sole reason that the other spouse (or spouses) has refused to give consent. The intention of making it mandatory for one to seek consent of the other spouse was so that one spouse does not make unilateral decisions on matters affecting both or all spouses. This requirement is also aimed at preventing one spouse being rendered homeless, or without property, because of the single unilateral act of the other spouse. The aim is to enhance consultation within marriage in issues related to disposal of matrimonial property and also to protect the vulnerable spouse. It is an implementation of Article 45 (3) of the Constitution, which basically provides that parties to a marriage are entitled to equal rights. But equal rights is not the same as unreasonable rights. As I have said, I think a spouse ought to be entitled to proceed with the disposition if he/she demonstrates that the other spouse is unreasonably withholding consent.

37. The concept of "unreasonably withholding of consent" is not an alien principle in property law. Section 91 (6) of the Land Registration Act, specifically recognises this right in tenancies in common. The said provision is drawn as follows:-

(6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.

38. There is no similar provision in the Matrimonial Property Act, but as I have already pointed out, the said Act does not address a situation where one spouse refuses to give consent in circumstances that would be considered unreasonable. My own view is that spousal consent ought not to be unreasonably withheld and the court will need to look into the surrounding circumstances of each case to see if spousal consent can be dispensed because it is being unreasonably withheld.

39. Another important matter not addressed by the Land Act, Land Registration Act, and Matrimonial Property Act, is how a family ought to live and plan its affairs. The decisions of where a family is to reside, which land to farm, which land the children should utilize, what exact locations the children should settle at, what and where to set aside for special uses, and such like things, are not answers that you will find when you look at these statutes. Families are dynamic and what works for one family may not work for another. For example, in many of our communities, traditionally and pursuant to custom, the father of the house makes decisions such as where to farm, where the children are to build their houses, etcetera. A question that can easily arise in our modern society is whether all spouses have to be in agreement with such family arrangements. The fact of the matter is that in most homes the man is considered to be the head of the house (and I am saying this carefully, lest my statement is taken out of context, for I am not belittling the input or status of a woman in a home) and he thus takes the lead (and taking lead here does not mean a veto power or that he does not need to consult) in making a lot of the decisions regarding how his family will live and generally gives direction on such internal family matters. Taking an example of a polygamous union, if a man plans his houses so that spouse A will live in land X and spouse B in land Y, is consent of all the spouses needed for this to take effect" If for purposes of settling his children, a man proposes the first born resides in land A and the second born in the other house should settle in land B, should consent of all the spouses be needed" The element of consultation is obviously important but it may not be the case that all spouses agree with the proposed arrangements and the question that arises is whether courts should intervene where there is such conflict. My own view, is that the courts should be slow in entering into the sphere of making plans for families on how they should live. Those are dynamics that should be left to families to sort out although of course if the families cannot sort them out, then there being no option, the court may need to step in and resolve the dispute one way or another. But this really has to be a last recourse for it is best that families try and resolve their disagreements internally for home grown solutions.

40. Turning back to the matter at hand, I have already held that strictly speaking, the 1st defendant needed to have given consent to the sale in issue, but when I look at all surrounding circumstances, I am prepared to hold the view that the 1st defendant is unreasonably withholding consent and her consent can thus be waived. I have already said that it is not really the business of the courts to give direction on how families ought to live for that should be left to be sorted out within the dynamics of the particular family. In this case, the 2nd defendant acting as head of the house in the traditional set up that the family appears to live in, has already settled his wives in different parcels of land and I have no evidence that any of them has any problem with this. The 1st wife lives in Rongai, and the 2nd and 3rd wives in different parcels of land in Kericho. The 2nd defendant has also now proceeded to plan how his family is going to live and which resources are to be allocated to which house or person, for the duration that he will be alive. He has explained that he has carved out his property into three. One portion to his 1st wife, another portion to his 2nd wife and one portion to himself. He has given reasons as to why he has made these arrangements. He wants his wives to have something for themselves for their own upkeep and maintenance, but he also needs to have some property for himself, so that he can have money to pay school fees, provide food for his family, and generally take good care of his family. He has also made decisions on where his grown up sons should live. Therefore he has apportioned to his 1st wife and her children 4 acres in Rongai, and an additional 4 ½ acres in Kericho. To his 2nd wife and her children, he had allocated to them 3 acres in Rongai and 4 ½ acres in Kericho. He kept to himself 3 acres in Rongai and 3 ½ acres in Kericho. To his 3rd wife he seems to have a different arrangement with her which does not interfere with his first two houses. If this is the way in which this family has been arranged, who am I to interfere? The 1st defendant seems to me to be to be fair to every one of his families, and so far he appears to me to have done a pretty good job of taking care of his rather large family.

41. He has explained the reasons why he sold the suit properties to the plaintiff. To begin with, what he sold is what he had assigned to himself and his 2nd wife. He did not sell what he had apportioned to the 1st defendant. He mentioned that he was actually forced to sell because he realized that his wish to have the children of his 2nd wife settle in Rongai could not come through for the reason that they were facing threats from the children of his 1st wife. He had tried to settle them here before but their house was destroyed. So that they could have a place, free from interference from the children of his first wife, he opted to sell what he considered to be their share in Rongai, and his own share, so that he can have funds to buy them an alternative property in Molo; that is precisely what he did. He did not mean to sell so as to squander the proceeds. This was a sale aimed at safeguarding and protecting his family from conflict. I see no bad faith or any ill motive in his decision to sell part of the land in Rongai.

42. If this sale is not to proceed, it means that he has to find a sum of Kshs. 3,500,000/= which he does not have, to refund the plaintiff. His property, will be at risk of being sold, so as to raise this money. He may in fact be forced to sell what he bought in Molo and this would mean that he brings his children back to Rongai to yet again face conflict from the children of his 1st wife.

43. The 1st defendant tried to make heavy weather of an alleged promise that the 2nd defendant would buy separate land for E with proceeds from tea bonus. The 2nd defendant explained what he has been doing with his tea bonus which is to pay school fees, and take care of his family. I am not persuaded by this claim by the 1st defendant that there was any promise to use tea bonus proceeds to buy E any separate land. In any event, as I have explained earlier, the 2nd defendant has already assigned 4 ½ acres to the 1st defendant and her children so that they can have something for themselves. No law obligates him to do this, for it emerged that his children with the 1st wife are now all adults who ought to fend for themselves without looking up to their father for upkeep. But so that his family is able to have some resources, he has chosen to do this. In essence, he has done what he feels is best for his family given his circumstances.

44. The 1st defendant approached this case on the premise that everything that is owned by her husband belongs exclusively to her and her children, and that E and C, the 2nd and 3rd wives and their children, ought not derive any benefit from these properties. I think this is a misconception by the 1st defendant. Her rights and entitlements in all respects as a wife to the 2nd defendant also fully apply to E and C as they too are, in equal measure his wives.

45. E and C were married in the years 1981 and 2000 which is now close to 40 and 20 years respectively. They have been in this family all this time. It is from these properties that they and their children have been taken care of. It cannot surely be claimed that they have suddenly crawled out of the woodwork to unfairly enjoy the fruits of the hard labour of the 1st defendant. They cannot just be told that they and their children can have nothing. There must be equity in families and there will be no equity if the family of E and C are discarded. In any case, God forbid, if the 2nd defendant dies, his property will be distributed almost equally to all his three houses following the law of succession. It wouldn't make much sense to say that because he is alive the other families cannot benefit but when he is dead, then they can benefit.

46. For the above reasons, I have no reason not to uphold the sale of the suit properties to the plaintiff. I see no good reason why the

1st defendant placed a restriction in the suit properties and I see no good reason why the restriction should not be removed. I am persuaded that she placed the restriction for no other reason but because she is jealous of the other wives, and greedy too, for she wants everything for herself. I believe that justice will be served if the transaction proceeds as the plaintiff wanted.

47. I believe that I have dealt with all issues save for costs. I would have ordered the 1st defendant to pay costs, but given the relationship of the parties, and wishing that there may be no further friction, I make no orders as to costs.

48. I now make the following final orders :-

(a) That the plaintiff and the 2nd defendant are at liberty to proceed to conclude the sale transaction that they entered into on 2nd April 2016 and are free to proceed to seek all requisite consents and execute all requisite documents to transfer to the plaintiff the land parcels Rongai/Rongai Block 4/* and Rongai/Rongai Block 4/1**.**

(b) That it is hereby declared that the 1st defendant has unreasonably declined to give consent to the 2nd defendant to proceed with the sale agreement of 2 April 2016 and her consent to the transaction is hereby dispensed with.

(c) That the restriction placed by the 1st defendant in the register of the land parcels Rongai/RongaiBlock4/* and Rongai/Rongai Block 4/1** be lifted forthwith and the 1st defendant is hereby barred from registering any restriction or in any way attempting to stop the completion of the sale transaction between the plaintiff and the 2nd defendant.**

(d) That there is hereby issued an order of permanent injunction restraining the 1st defendant, her servants, or assignees from entering, being upon, cultivating, utilizing, or in any other way interfering with the plaintiff's occupation of the land parcels Rongai/Rongai Block 4/* and Rongai/Rongai Block 4/1**.**

(e) That there shall be no orders as to costs.

49. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 28th day of March 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mrs. Muthoni Gathecha for the plaintiff.

Ms. Nancy Njoroge for the 1st defendant.

Mr. R.K Langat for the 2nd and 3rd defendants.

Court Assistant : Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU



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