



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 20 OF 2019

SARAH JEPWAMBOK.....PLAINTIFF

-VERSUS-

KIBIWOTT CHEPKUTO.....RESPONDENT

RULING

[1] This ruling is in respect of the plaintiff's interlocutory application dated **10 May 2019**. The said application was filed pursuant to **Section 1A, 1B, 3A and 63(c)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 50 Rule 1** of the **Civil Procedure Rules, 2010** for orders that the Court be pleased to grant conservatory orders preserving all that property known as **PLATEAU/CHEPKONGONY BLOCK 6 (ROTUGA)25** pending the hearing and determination of this suit. The plaintiff also prayed that the costs of the application be provided for.

[2] The application was predicated on the grounds that the plaintiff is the 1st wife of the defendant; that both parties contributed towards the acquisition of the suit property; and that it is in the interest of justice that the orders sought be granted. In support of the application, the plaintiff exhibited a copy of the Certificate of Search in respect of the suit property as well as letters from the Land Registrar and the village elder of Rotuga Village, as **Annexures SJK1, SJK2 and SJK3** to demonstrate the efforts made with a view of asserting her rights to the suit property.

[3] The defendant opposed the application vide his Replying Affidavit sworn on **24 June 2019**. He denied any knowledge of the plaintiff and thus denied that they are husband and wife. He also denied having sold any portion of the suit property as alleged by the plaintiff and averred that the plaintiff has no right in law to claim any portion of the suit property. He accordingly prayed that the application be dismissed with costs.

[4] With the leave of the Court, the plaintiff filed a Further Affidavit on **2 July 2019** for the purpose of refuting the defendant's averments. That affidavit was sworn by **Grace Jeptum Ruto**, who deposed that she is the daughter and only child of the plaintiff and the defendant; and that she was born in **1956**. She further averred that she got married in **1974** and that all the marriage ceremonies were performed on the piece of land. She therefore averred that it is absurd for the defendant to disown her mother; yet he and her mother adopted her second born son in accordance with the Nandi Customs; granted that her parents had no son of their own. While conceding that the defendant got married to a second wife, one **Esther Kutto**, it was the averment of **Grace Jeptum Ruto** that the defendant has no basis for disowning her mother who is now advanced in age.

[5] A perusal of the court record also shows that a Notice of Preliminary Objection was filed herein dated **24 June 2019** by the firm of **M/s Kiprop Luseria & Company Advocates** on the ground that the Court lacks jurisdiction to entertain the suit as it is neither a subject of the **Matrimonial Properties Actm No. 49 of 2013**, nor the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**. On behalf of the plaintiff **Mr. Martim** challenged the Notice of Preliminary Objection contending that it was filed by a stranger to the suit, as the said firm of **Kiprop Luseria & Company Advocates** had not properly placed itself on record or replaced **M/s Mukabane Kagunza & Company Advocates** that was already on record for the defendant. Although **Mr. Kagunza** asked for time on **17 September 2019** to sort out this sticky issue of representation, it remained unresolved by the time directions were given for the disposal of the application.

[6] There is no gainsaying however that the issue of jurisdiction is pertinent and can be taken up by the Court even on its own motion. As was aptly stated in the **Owners of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd** [1989] eKLR, by Nyarangi, JA:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[7] And, according to the **Major Law Lexicon, Volume 4**, jurisdiction is defined as follows:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics..."

[8] From a perusal of the Plaint dated **10 May 2019**, it is plain that the main relief sought by the plaintiff is a declaration that the suit property constitutes matrimonial property. Accordingly, **Section 17** of the **Matrimonial Causes Act** is explicit that:

(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)—

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause and

(c) may be made notwithstanding that a petition has not been filed under any laws relating to matrimonial causes.

[9] In the premises, the Plaint is competent from the standpoint of **Section 17(2)(c)** of the **Matrimonial Causes Act**; and therefore the Court had the requisite jurisdiction to hear and determine this suit. I hasten to point out that, the key issue at this point is whether the plaintiff is entitled to conservatory orders. And as was aptly stated by the Supreme Court of Kenya in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others** [2014] eKLR one of the objects of a conservatory order is to uphold the adjudicatory authority of the Court. It held thus:

“[86] Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

[10] With the foregoing in mind, I have considered the written submissions filed herein by counsel for the plaintiff (no submissions have been filed, thus far, by the defendant). I have also looked at the pleadings and the pertinent affidavits. The contention of the plaintiff is that the suit property was purchased from the proceeds of their business and from the dowry paid for their daughter; and that the defendant had started disposing of portions of the suit property in utter disregard of her interests. It was therefore the submission of her counsel that the plaintiff stands to suffer irreparable harm if the orders sought are not granted. He cited **Giella vs. Cassman Brown & Co. Ltd** [1973] EA 358 to buttress his submission that the plaintiff has a *prima facie* case.

[11] Since the suit property is the sole subject matter of this dispute, there is no gainsaying that the very substratum of the adjudication would be undermined were the defendant to dispose of it, or any part thereof, before the hearing and determination of this suit. Accordingly, I am satisfied that this is a fit and proper case for the issuance of the conservatory orders sought. In the premises, the application dated **10 May 2020** is hereby allowed and orders granted as hereunder:

[a] That a conservatory order be and is hereby issued for the preservation of the suit property, more particularly known as **PLATEAU/CHEPKONGNY BLOCK 6 (ROTUGA) 25**, pending the hearing and determination of this suit.

[b] The costs of the application shall be borne by the defendant.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF SEPTEMBER 2020

OLGA SEWE

JUDGE