



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL CASE NO 37 OF 2011

CATHERINE CHEPKURUI TIROP.....PLAINTIFF

VERSUS

DAVID CHUMO.....1ST DEFENDANT

JONAH KIPKOROS CHELULE.....2ND DEFENDANT

JUDGMENT

The plaintiff who is the defendant's wife filed suit against the defendants seeking the following remedies;

- i) An order of inhibition prohibiting the Kericho District Land Registrar from registering any dealings and making any entries in respect of land parcel number KERICHO/KIPTUGUMO/413
- ii) A temporary and permanent injunction restraining the defendants by themselves, their servants or workers from harassing and/or interfering with the plaintiff's possession and occupation of land parcel number KERICHO/KIPTUGUMO/413
- iii) Costs of the suit together with interest thereon
- iv) Any other relief this court deems fit to grant

Simultaneously with the plaint, the plaintiff filed an application for an interlocutory injunction to restrain the defendants from evicting her from the suit property. The injunction was granted in July 2011 and has remained in force pending the hearing and determination of the suit herein.

The 1st defendant who is the plaintiff's husband purported to sell the suit property on which he had settled the plaintiff and their children to the 2nd defendant without the plaintiff's knowledge prompting her to file this case.

The defendants filed a rather unconventional joint defence on 28th June 2012 stating that the 1st defendant is the sole registered owner of land parcel number KERICHO/KIPTUGUMO/413 without addressing the issues raised in the Plaint.

When the case came up for hearing the plaintiff testified that she had been married to the 1st defendant since 1979. Initially the marriage was celebrated under Kipsigis customary law and later solemnized at the Free Pentecostal Church in 1984. The marriage was blessed with six children, four of whom died leaving two surviving daughters. It is the plaintiff's testimony that after the marriage she lived on land

parcel number KERICHO /KIPTUGUMO/413 in Kaitui location with the 1st defendant and their children. She clarified that she is not divorced from the 1st defendant.

The 1st defendant married a second wife in 2002 whom she settled on land parcel number KERICHO/KIPTUGUMO/589 in Soliat location. In 2003 the plaintiff disagreed with the 1st defendant and she temporarily moved to a quarry site where she was working at the time. While she was away she was informed that her house had been demolished and that the 1st defendant had sold the land to the 2nd defendant.

She then went to the Kericho Lands Registry to confirm if the sale had indeed taken place and she was informed that the 1st defendant had presented documents relating to the sale in which he indicated that his wife had consented to the sale. She denied having consented to the sale and explained that even though she was the one in occupation of the land, she had not been notified about the sale. Upon cross examination by the 2nd defendant she stated that she only learnt that the transfer documents had been signed by the 1st defendant's second wife when she went to the Land's office.

The Land Registrar, Grace Korir who testified as DW 4 indicated that once they received a complaint from the plaintiff they summoned the 1st defendant and stopped the transfer process. She also clarified that even though the 1st defendant applied for consent of the Land Control Board, none was given as there were no minutes to show that a meeting of the Land Control Board took place for purposes of approving the sale.

The plaintiff also filed a case at the Soin Land Disputes Tribunal and the Tribunal ruled in her favour. She then filed a case in the Principal Magistrate's Court (PMCC No. 453 of 2005 and obtained a temporary order restraining the defendants from interfering with her occupation of the suit land. She testified that even though the court had restrained the defendants from interfering with her, she opted not to resettle on the suit land owing to threats by the 1st defendant. She has however continued to use the land for farming purposes.

The plaintiff called 3 witnesses who corroborated her evidence. Samuel Kiplangat Meli, a village elder who testified as PW1 stated that he did not know about the sale though he confirmed that the 1st defendant had purported to evict the plaintiff. He said he was aware of the domestic problems between the plaintiff and the 1st defendant as he had been involved in trying to resolve the same. However, the 1st defendant later informed him that he had sent the plaintiff away as they were unable to reconcile.

The plaintiff's second witness Kipkemboi arap Chepkwony who is their neighbour also confirmed that the purported sale of land by the 1st to the 2nd defendant was done without involving the village elders and without involving the plaintiff.

Rachel Kipkorir who is the plaintiff's daughter testified that she had lived on the suit land from the time she was born. She stated that her father (1st defendant) was unhappy with the plaintiff because she did not have sons. He became hostile to her and married a second wife in 2004. He then settled the second wife on another parcel of land in Soliat location. Thereafter the differences between the plaintiff and the 1st defendant escalated and the plaintiff was forced to move out temporarily to a nearby quarry site where she was working. While they were there, they learnt that the 1st defendant had demolished their house and sold the land to the 2nd defendant.

She accompanied her mother to the chief who advised them to seek the intervention of the Land Disputes Tribunal. She also accompanied her mother to the Kericho Lands Registry. On learning what had transpired, the Land Registrar summoned the 1st defendant, and stopped the transfer of the title to the 2nd defendant. She stated that due to the prevailing hostility between the plaintiff and the 1st defendant, the plaintiff has not been able to resettle on the suit land though she uses it for farming purposes.

The Defendant testified that the suit land was a gift from his maternal uncle. He stated that according to Kispsigis traditional culture, he was supposed to establish his matrimonial home with his two wives on his ancestral land. He accused the plaintiff of having committed adultery with one Mr. Bowen and it was clear from his testimony that he still harboured a grudge against her. He conceded that he had sold the suit land to the 2nd defendant although he claimed that he did so after the plaintiff had left. On learning about the sale, the plaintiff complained to the land Registrar who summoned him, recalled the title documents and stopped the process of transfer by reversing the entries in the register. Although he claimed to have obtained the consent of the Land Control Board, this was found to have been irregular. He stated that the plaintiff had dragged him to the Land Disputes Tribunal and various courts over the suit land.

The 2nd defendant's evidence is that he bought the suit land from the 1st defendant in April 2004 but his title was revoked after the plaintiff lodged a complaint at the Lands Registry. He claims the title deed he had been given was taken away from him. He produced a copy of the green card indicating that the entries made on the 3rd May 2004 which purported to transfer the title to him had been cancelled.

Thereafter the plaintiff filed a case at the Land Disputes Tribunal and even though the Tribunal ruled in the plaintiff's favour the court declined to adopt the award of the Tribunal as it found that the Tribunal had no jurisdiction. The Plaintiff then filed PMCC No 453 of 2005 where she obtained a temporary injunction to restrain the 2nd and 1st defendants from disposing of the suit land. The 1st and 2nd defendants were found to be in contempt of the said court order and they were jailed for three months. The case was subsequently dismissed for want of prosecution.

The 2nd defendant further testified that in addition to the civil suit, the plaintiff also instituted criminal proceedings against him and the 1st defendant in Criminal case no. 813 of 2011 where the defendants were charged with conspiracy to commit a felony contrary to section 393 of the Penal Code and malicious damage to property contrary to section 339 of the Penal Code. The Plaintiff alleged that the defendants had conspired to damage her house valued at Kshs. 60,000. The defendants were however acquitted of the charges after a full hearing.

The Kericho Land Registrar, Grace Korir who testified as DW 5 was summoned by the court at the instance of the second defendant to clarify whether the 1st defendant obtained the consent of the Land Control Board. She stated that the 1st Defendant had applied for consent of the Land Control Board but he failed to appear before the Board on various occasions. She said that there was a letter of consent dated 8th May 2003 allegedly signed by the Chairman of the Land Control Board although he denied having signed it. She explained that the entries in the register were cancelled and the transfer documents recalled after the plaintiff complained and it was discovered that no valid consent of the Land Control Board had been obtained. The title to the suit property then reverted to the 1st defendant.

There are two main issues for determination;

The first one is whether the plaintiff's purported sale of the suit land to the 1st defendant is valid.

The second one is whether the plaintiff is entitled the injunctive orders sought against the defendants.

It is apparent from the pleadings and evidence that the main reason why the plaintiff filed this suit was to protect her matrimonial home. Even though she is currently not in good terms with the 1st defendant, it is common ground that their marriage is still subsisting and that the suit land constitutes their matrimonial home as that is the land on which the plaintiff and the 1st defendant resided for about 20 years before he decided to marry a second wife and establish a separate home with her, leaving the plaintiff on the said land. It is also common ground that the 1st defendant entered into an agreement for the sale of the suit land to the 2nd defendant without the plaintiff's knowledge.

According to his evidence, the 1st defendant sees nothing wrong with what he did as he states that the suit land is registered in his sole name, implying that he was within his rights to deal with it as he wished

without consulting the plaintiff. However, from the circumstances of this case a constructive trust can be inferred from the 1st defendant's conduct as he settled the plaintiff on the suit land with the common understanding that this was their matrimonial home. According to Halsbury's Laws of England 4th Edition Vol 48 para 690;

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny the other party a beneficial interest in the property acquired”

I there find and hold that there is a constructive trust in favour of the plaintiff in respect of the suit land.

Furthermore, the Constitution of Kenya has laid down the principles with regard to property rights within marriage. Article 45 (3) of the Constitution provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. With specific reference to the matrimonial home Article 68 (c) (iii) of the Constitution of Kenya paved way for the enactment of the Matrimonial Property Act 2013 and other laws which protect the matrimonial home. In particular section 12 of the Matrimonial property Act provides as follows:

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 charge 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.

The 1st defendant's act of purporting to sell the matrimonial home without the plaintiff's consent flies in the face of the above provisions and is therefore unlawful.

Even assuming that the plaintiff had consented to the sale, the evidence of DW4, the Kericho Land Registrar shows that the defendants did not obtain a valid consent from the Land Control Board. Not only was the letter of consent disowned by the person who was supposed to have signed it, there were no minutes to confirm that indeed the Board sat and approved the transfer. The absence of Land Control Board consent would thus render the sale void in terms of section 6 (1) of the Land Control Act.

In their submissions the defendants stated that the alterations made by the Land Registrar were contrary to the provisions of section 31 (2) of the Land Registration Act. In view of my finding that the sale was null and void, the issue of alterations is of no consequence. The defendants have also submitted that the case is res judicata as the plaintiff filed a similar case against them in PMCC453 of 2005. It is however common

ground that the said case was not finally determined as it was dismissed for want of prosecution. This case is therefore not res judicata.

With regard to the second issue, the plaintiff needs to demonstrate that she has satisfied the conditions for the grant of an injunction set out in **Giella v Cassman Brown 1973 E.A 358** which are as follows:

- a) That one must establish a prima facie case with a probability of success
- b) That one is likely to suffer irreparable harm for which damages would not be an adequate remedy
- c) That if the court is in doubt, it shall decide on a balance of convenience

An analysis of the evidence shows that the plaintiff has established a prima facie case with a probability of success. The plaintiff has demonstrated that she has a beneficial interest in her matrimonial home which carries with it sentimental value which cannot adequately be replaced or compensated by damages. In her testimony the plaintiff mentioned that she has buried some of her children on the suit land hence her attachment to it. The balance of convenience therefore tilts in her favour. Furthermore, the purported sale of the suit land to the 1st defendant was null and void for the aforesaid reasons hence any orders issued by the court shall not be in vain.

The upshot is that the plaintiff has proved her case on a balance of probabilities and she is therefore entitled to the orders sought as follows:

1. An order of inhibition be and is hereby issued prohibiting the Kericho District Land Registrar from registering any dealings and making any entries in respect of land parcel number KERICHO/KIPTUGUMO/413
2. A permanent injunction be and is hereby issued restraining the defendants by themselves, their servants or workers from harassing and/or interfering with the plaintiff's possession and occupation of land parcel number KERICHO/KIPTUGUMO/413
3. The costs of the suit shall be borne by the defendants.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 29TH DAY OF SEPTEMBER 2017

J.M ONYANGO

JUDGE

IN THE PRESENCE OF:

The 1st and 2nd Defendants

No appearance for the Plaintiff

Court Assistant: Rotich