



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ELC. NO.413 OF 2015(os)

IN THE MATTER OF SECTION 45(3) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 6 and 17 OF THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

AND

IN THE MATTER OF SECTION 93(4) OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF SECTION 13 OF THE MARRIAGE ACT 2014

AND

IN THE MATTER OF ORDER 40 RULE 1 & 2 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF SECTION 1A, 1B, 3, 3A AND 63(E) OF THE CIVIL PROCEDURE ACT CHAPTER 21 OF LAWS OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

ROSA JEPTOO LIMO.....PLAINTIFF/APPLICANT

VERSUS

RICHARD KIPKEMBOI KUTTO1ST DEFENDANT

GIDEON KIPLETING TUWEL.....2ND DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit by way of originating summons dated 12th November, 2015 seeking for orders that;

- 1) *Spent;*
- 2) *Spent*
- 3) *Spent;*
- 4) *Spent*

5) *A declaration be and is hereby issued declaring that the plaintiff is entitled to a whole share or such other shares as the court may award KAPSARET/LEMOOK/ & CHEPKATET BLOCK 1 (INDER) 83 measuring 0.3930 Ha currently registered in the*

name of **GIDEON KIPLETING TUWEI** but which is deemed a matrimonial home;

6) That any purported sale/transfer done without the consent of the plaintiff in contravention of section 93(4) of the Land Registration Act No. 3 of 2012 with respect to the abovementioned matrimonial home be declared null and void ab initio and a refund of the purchase price be ordered by this honorable court;

7) That in the alternative to all above, an order be and is hereby issued directing that the defendants are not entitled to any share of the above property, and/or at all being **KAPSARET/LEMOOK/ & CHEPKATET BLOCK 1 (INDER) 83** measuring 0.3930 Ha;

8) That upon the grant of any and/or all of the foregoing, a permanent injunction be and is hereby issued restraining the defendant by himself, his servants, agents and/or employees from interfering with the plaintiff's lawful enjoyment and quiet possession of the suit property.

9) That such other and/or further orders be granted as the court may deem fit, fair and expedient in the circumstances;

10) The defendant be condemned to pay costs and interest to the plaintiff."

The originating summons is supported by the affidavit sworn by Rosa Jeptoo Limo, the Plaintiff, on the 9th November, 2015 in which she deponed to the following among others; that the 1st defendant is her husband since 1998 and they have a pending divorce proceedings in *Eldoret CMC Divorce Cause No. 23 of 2015*; that they jointly purchased the suit property in 2009, that was registered in the name of the 1st Defendant; that they have lived on the said property as their matrimonial home and when differences arose in their marriage in 2013, the 1st Defendant started threatening to sell it without her knowledge; that she sought help from the office of the chief, Kapsaret location, who wrote a letter enabling her to lodge a caution on the suit property; that in October, 2015, she learnt the 1st Defendant had sold the land, and when she conducted a search, she found it had been transferred to the 2nd Defendant on the 17th July, 2015; that she received a letter from Igare Auctioneers dated 2nd November, 2015 threatening to levy distress for rent; that she filed *Eldoret HCC 29 of 2015* seeking for the division of their matrimonial property, and sought this court's intervention to prevent the deprivation of her share in the matrimonial property.

2. The Plaintiff's claim is opposed by the 1st Defendant through his replying affidavit sworn on 27th November 2015, in which he deponed to the following among others; that he has never been married to the Plaintiff as alleged; that he got married to one Rose Jepchirchir Sum in 1994 who he lives with; that the alleged divorce proceedings are an attempt by the Plaintiff to lay claim to his property; that the Plaintiff, also known as Aziza Cheptoo, got married to one Hassan Mohammed under the Mohammedan law on 7th July, 1990, which marriage was subject to dissolution proceedings in Eldoret Chief Kadhi's Court Divorce Cause No. 6 of 2000, and thus he could not have married the Plaintiff in 1998; that he never got married to the Plaintiff under any Kalenjin customs as no betrothal, (Koito), ceremony and payment of dowry in accordance with his Keiyo custom has been conducted; that the Plaintiff was an acquaintance who sought his help and permission to live on the suit property temporarily as she attended to her sick father, the late John Limo, but has declined to vacate; that he has never lived with the Plaintiff on the suit land but lived with his family on Eldoret Municipality Block 5/193 at West Indies; that the Plaintiff did not contribute to the purchase of the suit land, but he used to send her to make deposits with the bank; that the Plaintiff stole the deposit slips she has annexed in this case from his vehicle; that the Plaintiff has house number 100 in Pioneer Estate, that she had left for her late father, that she could return to and as such she was not destitute as claimed; that he sold the suit property in 2012 to the 2nd Defendant after having fallen into arrears in paying the purchase price installments; that he had charged Eldoret Municipality Block 5/193 to obtain a loan of Kshs.3,000,000 for the Plaintiff, and that she had defaulted in repaying, causing him to seek a further charge over the said property to safe it; that the plaintiff had sold his business Barbeque Hotel and Bar, about 20 bags of maize, and an accident vehicle at the suit property without his permission and kept the proceeds; that the Plaintiff was a tenant on the suit property and should renegotiate terms of tenancy with the owner, the 2nd Defendant; that he had not been served with any proceedings in HCC 29 of 2015.

3. The 2nd Defendant also opposed the Plaintiff's claim through his replying affidavit sworn on 27th November, 2015, in which he deponed among others that to his knowledge, the Plaintiff and 1st Defendant were not spouses; that he knew the 1st Defendant had bought the suit land from Willy Kibet Chepkuyeng, and that on 10th June, 2012, he lent the 1st Defendant Kshs.3,800,000 and retained the title as security; that upon defaulting in repayment the title to the suit land was transferred to him; that he contacted the Plaintiff to negotiate terms of tenancy over the suit land after he became the registered proprietor, but she declined; that he instructed Igare Auctioneers to levy distress for rent against the Plaintiff who then filed this suit in bad faith with the intention of dispossessing him from his lawful ownership of the suit property.

4. The Plaintiff filed a further affidavit sworn on 19th January, 2016. She reiterated that the 1st Defendant married her in the 1990's and they cohabitated together during which time they got the two daughters in 2006 and 2008; that the 1st Defendant's subsequent marriage of 1994 to the alleged wife was a nullity; that her marriage to Hassan Mohammed had been dissolved long before she started cohabitating with the 1st Defendant; that she personally contributed in paying for the suit land, where their matrimonial home is and where the 1st Defendant comes to visit their two children as ordered in *Eldoret Children's Court Case No. 23 of 2013*; that the suit papers on *Eldoret HCCC No. 29 of 2015* had not been served upon the 1st Defendant as her counsel was yet to get a date for its hearing; that the alleged sale and transfer of the land to the 2nd Defendant was without land control board consent as none has been availed and yet the land was agricultural; that the deposit slips she availed were of the money she contributed towards the purchase of the land, and were not of money given to her by the 1st Defendant to pay on his behalf.

5. During the hearing, the Plaintiff testified as PW1 and called Henry Togom, a chief, who testified as PW2. The 2nd Defendant testified as DW1.

6. The learned counsel for the Plaintiff filed their written submissions dated 9th December, 2020.

7. the following are the issues for the court's determinations;

- a. Whether the court has jurisdiction over the suit property and/or the cause of action.**
- b. Whether the Plaintiff is entitled to the prayers sought, or any of them.**
- c. Who pays the costs of this suit.**

8. The court has carefully considered the pleadings, affidavit, documentary and oral evidence presented, submissions by counsel, superior courts decisions cited thereon and come to the following findings;

a. That the main basis of the Plaintiff's claim is that the suit property herein is matrimonial property, that she contributed towards its acquisition, and therefore her estranged husband, the 1st Defendant, should not have sold and transferred it to the 2nd Defendant. The plaintiff has alleged a customary marriage between her and the 1st Defendant that suffices for a presumption of marriage. That following the marriage differences of 2013, and the 1st Defendant's threats to sell off the suit land, she instituted *Eldoret CMC Divorce Cause No. 23 of 2015* for divorce and *Eldoret HCC No. 29 of 2015* for division of the matrimonial property that are still pending before the respective courts.

b. The 1st Defendant's defence as gathered from the pleadings is a denial of the alleged marriage. He alleges that the Plaintiff had no capacity to marry him as she had been married to another man in 1990, in the marriage that was only dissolved in 2005 in *Eldoret Chief Kadhi's Court Divorce Cause No. 6 of 2000*. He further alleged his own incapacity to marry the Plaintiff in 1998 as he had married another lady under statutory law in 1994. That though the 1st Defendant pleaded to other facts pertaining to the acquisition and sale of the suit land, his defence primarily disputes the existence of marriage to the Plaintiff, and her claim of contribution.

c. That the obvious first question that comes to the fore for determination is whether the instant proceeding is a matrimonial proceeding or an ordinary claim to land. That as the Plaintiff's claim will require determination of the question of her marriage to the 1st Defendant in order to set the stage for the suit property to be considered as matrimonial property, then this suit is by its nature matrimonial. The Plaintiff has challenged the sale of the suit land to the 2nd Defendant claiming among others that it lacked the spousal consent as required by section 93(4) of the Land Registration Act No.3 of 2012, and hence was an invalid agreement. The submissions filed for the Plaintiff by her learned counsel has extensively dealt with the issue of her marriage to the 1st Defendant.

d. That as the issue of whether or not the Plaintiff and the 1st Defendant were married will most probably be determined in *Eldoret CMC Divorce Cause No. 23 of 2015*, while the issue of determination and distribution of all the matrimonial properties acquired between the two parties during the subsistence of their alleged marriage will definitely be dealt with in *Eldoret HCC No 29 Of 2015*, then question that arises is what jurisdiction is left for this court to exercise in the matrix of the parties relationship. The court is reminded of the decision in the classical case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*, where the court held that;

"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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

e. That the issue of whether or not the Plaintiff was married to the 1st Defendant, and whether the suit property was acquired with the Plaintiff's contribution, and whether it was part of the parties' matrimonial properties, are matters that are subject matter before the other two courts. That was the Plaintiff's claim been among those falling under Article 162 (2) b of the Constitution of Kenya 2010, and section 13 of the Environment and Land Court Act No. 19 of 2011, this court would definitely be with jurisdiction if the issue of marriage was not disputed, and if there was no pending proceeding between the parties over the determination and division of matrimonial properties including the suit land, in a court of coordinate jurisdiction. The fact that the Plaintiff has in her pleadings in this suit made reference to the High Court suit over their matrimonial properties, including the suit property herein, is enough for this court to conclude that suit was filed before this matter.

f. That the Plaintiff should have pursued her claim through that other court where the suit over the matrimonial properties is pending. The Plaintiff should have, and still can, seek for conservatory orders in respect of the suit land through the court dealing with the matrimonial properties claim, instead of filing this suit over a property that is already part of the subject matter in that other suit. That the obvious conclusion this court comes to is that, it is without jurisdiction in the issues raised herein for determination in view of their nature, and the existence of that High Court case over the parties' matrimonial properties.

g. That due to the relationship between the Plaintiff and the 1st Defendant, the court is of the view that each party should bear their own costs, the provision of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya notwithstanding.

9. That from the foregoing, the court finds that the Plaintiff has failed to establish her case on a balance of probabilities, and having concluded that the court is without jurisdiction, the suit is hereby struck out with each party bearing his/her own costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 23RD DAY OF FEBRUARY 2022

S.M.KIBUNJA,J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

PETITIONERS: ...Absent.....

RESPONDENTS: ...Absent

COUNSEL: ...Mrs.Sawe for Plaintiff.....

COURT ASSISTANT: ONIALA

S.M.KIBUNJA,J.

ELC ELDORET