



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
MATRIMONIAL CAUSE NO. 3 OF 2015

IN THE MATTER OF THE MATRIMONIAL PROPERTIES AC, 2013

AND

IN THE MATTER OF THE MARRIAGE ACT, 2014

L N N.....PLAINTIFF

VERSUS

S N K.....1ST DEFENDANT

D N K.....2ND DEFENDANT

RULING

1. The Plaintiff and the 1st Defendant are husband and wife who got married in the year 1993 under the Kikuyu Customary Law. Since the year 1996, they resided in their matrimonial home situated on the parcel of land known as BAHATI/ [Particulars Withheld] (hereinafter referred to as the suit property) which was registered under the 1st Defendant. In the year 2014, the 1st Defendant sold this parcel of land to the 2nd Defendant who was then registered as the owner and issued with a title on 12th June, 2014.

2. The Plaintiff alleges that this sale was conducted fraudulently and without her consent or knowledge. In her further amended Plaint dated 16th May, 2015, she seeks a declaration that the suit property is matrimonial property, a permanent injunction restraining the Defendants from selling, subdividing or interfering with the suit property and an order cancelling or revoking the title issued to the 2nd Defendant.

3. Simultaneous with the Plaint, she filed a Notice of Motion under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The first 2 prayers have already been dispensed with by the order of the court that was issued on 11th February, 2015. What remains for determination are two prayers, THAT-

(3) Pending the determination of this suit, this Honourable court be pleased to grant an injunction restraining the Defendants/Respondents by themselves, servants, employees and/or agents from trespassing on, wasting, damaging and/or interfering with the suit property known as BAHATI/[Particulars Withheld]; and

(4) the costs of the application be provided for.

4. The application is supported by her affidavit that was sworn on 9th February, 2015.

The Preliminary Objection

5. The Plaintiff also filed a Preliminary Objection dated 18th May, 2015 which was argued together with the application. The objection was to the representation of the 1st and 2nd Defendants by the firm of Githui & Company Advocates who prepared the sale agreement of the suit property dated 30th May, 2015 which is in contention in this matter. She sought an order that this firm should be disqualified from acting for the two Defendants.

The 1st Defendant's Replying Affidavit

6. In his Replying Affidavit sworn on 24th May, 2015, the 1st Respondent did not deny that the fact of marriage to the Plaintiff or that they resided on the suit property. He married the Plaintiff after the death of his first wife with whom he had children.

7. In a family meeting held on 9th July, 2013 which was attended by the Plaintiff, it was resolved that the suit property would be sold and the proceeds used to purchase other parcels of land where the two families would be settled separately. Pursuant to this resolution the 1st Defendant sold the suit property to the 2nd Defendant. He then used the proceeds to purchase an alternative parcel of land, Plot No. 138 [Particulars Withheld], on which he has constructed a house. He annexed to the affidavit copies of the minutes of the meeting, the sale agreement for the purchase of the land and photographs of the constructed house which were marked as “**SKK 1(a) and (b), SNK 2 and SKN 3**” respectively. Therefore, the Plaintiff's claim that she was not consulted before the suit property was sold is false.

8. The 1st Defendant also argued that the 2nd Defendant has been improperly enjoined in these proceedings as an action under Section 17 of the Matrimonial Causes Act should be between a husband and wife. He also alleged that the prayers for injunction cannot be granted because, the suit property has already been sold to the 2nd Defendant. Her only remedy is for account of the proceeds of sale. He also contended that should this sale be set aside, he would be unable to refund the purchase price as he has already utilized the same.

The 2nd Defendant's Replying Affidavit

9. The 2nd Defendant contended that the 1st Defendant disclosed to him that the suit properties were sold with the consent of the members of both houses. He acted on the agreements of both families and that he was aware of their interests. He argued that there are no valid grounds which would warrant the cancellation of his title.

10. It was also contended that the application should be dismissed for material non-disclosure. The Plaintiff had misled the court by stating that she was not consulted before the property was sold yet she later admitted this fact.

11. He argued that the application has no merit and should be dismissed with costs.

The Plaintiff's affidavit in response to the 1st Defendant's Replying Affidavit

12. In the meeting held on 31st October, 2013, the parties agreed that the Plaintiff would participate in both the sale of the suit property and in the purchase of another alternative parcel of land. He however failed to inform her of the transaction with the 2nd Defendant or that he had purchased Plot No. 138 [Particulars Withheld].

13. She contended that should the suit property be sold, she would be rendered destitute.

Submissions

14. The application was argued by way of written submissions.

15. Counsel for the Plaintiff's submissions were that the preliminary objection was premised on the fact that the firm of Githui & Company Advocates prepared the agreement dated 30th May, 2014 between the 1st and the 2nd Defendants for the sale of the suit property and should therefore be disqualified from acting for the Defendants in this matter.

16. Counsel also relied on the decision of Onyancha, J in **Noorani vs Joyce Akinyi Ochieng' [2003] eKLR** where the court ordered that the firm that initially represented a Defendant in a land sale transaction be disqualified from representing the Defendant in that suit or other suits that may arise from the land sale transaction based on a letter of offer from the Defendant.

17. On the application, counsel submitted that it was not disputed that the Plaintiff and the 1st Defendant are husband and wife. It was also not disputed that the suit property is matrimonial property that was purchased through the contribution of both parties. Therefore, the 1st Defendant erred when he sold this property without the consent of the Plaintiff. The sale agreement was void ab initio and should be set aside.

18. Counsel regarded the 1st Defendant's contention that he had built an alternative home as an afterthought as he had not informed the Plaintiff of this and in any event, there was no solid proof of its existence. As the Plaintiff is in danger of being evicted from the home she has resided on for the past 20 years, it is only just that the status quo is maintained.

19. It was submitted for the Respondents that the preliminary objection should be struck out because it does not raise a pure point of law. Counsel argued that the disqualification of an advocate on the basis that he is a potential witness is under common law and the Advocates Act, factual in nature. It must be proved by way of affidavit evidence that the advocate drew the instrument in question. By raising this issue by way of a preliminary objection, the Respondents were denied the chance to present evidence to refute the claims. In addition, this was not an issue that emanated from the Notice of Motion and the Replying Affidavits.

20. Counsel argued that the preliminary objection did not have any merit on substance and should therefore be disallowed. He submitted that the Plaintiff did not show any prejudice that she would suffer as a result of the representation of the Defendants by the firm. She was not the firm's client and the firm does not possess any confidential information from the Plaintiff which she would wish to protect.

21. That the Plaintiff was guilty of material non-disclosure. In her supporting affidavit, she alleged that the 1st Defendant had never informed her of his intentions to sell the land. The 1st Defendant however successfully demonstrated that she was consulted and actually consented to the sale of the property and in her further affidavit, the Plaintiff admitted this fact. Therefore, she is estopped from claiming otherwise or presenting evidence to the contrary.

Determination

22. I will first determine the Defendants' preliminary objection to the representation of the defendants by the firm of Githui & Company Advocates. This objection was on the grounds that this firm prepared the sale agreement between the Defendants for the sale of the suit land. According to the Plaintiff this fact made Counsel a potential witness to the case. Therefore, that firm should be disqualified from continuing to act in this matter.

23. Counsel for the Respondents opposed the objection on the grounds that it did not fall within the

definition of a preliminary objection laid out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors [1969] EA 696:*

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

..... It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’ . . .”

24. The facts on which the preliminary objection is premised, that the Defendants’ firm drew the sale agreement, have been ascertained and have been admitted by the parties in these proceedings. The question is whether as a result the advocate who drew the agreement is a potential witness in this case and therefore should be barred from acting.

25. The court has not been called to determine any fact outside what is apparent on the record and has been admitted by the parties. It has only been called to determine whether those facts, place the advocate within the ambit of Rule 9 of the Advocate Practice Rules. I therefore find that the objection was properly filed.

26. I now turn to the substance of the preliminary objection. Rule 9 of the Advocates Practice Rules which provides that

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matters in which he acts or appears. ”

27. Under this rule, an advocate will not be disqualified from acting for a party solely because he drew the documents that are the subject of litigation nor will he be barred from acting for a party because he acted for the other or both previously. The court of appeal in *Deplhis Bank Limited v Chatthe & 6 Others [2005] 1 KLR 766* held that counsel will be barred if he acquired confidential information regarding transaction and that his involvement with the parties went beyond the fact that he drew the documents in question or when he is likely to double up as a witness.

28. The onus is on the person seeking disqualification to show the circumstances that should warrant the order of disqualification. In *Guardian Bank Limited v Sonal Holdings (K) Limited & 2 others [2014] eKLR*, the court held that the Applicant must demonstrate to the satisfaction of the court, the kind of evidence he seeks from the advocates, relevance of such testimony and how necessary the testimony is in relation to the matters in question.

29. Other than pleading that the firm of Githui & Company Advocates drew the sale agreement in contention, the Plaintiff did not show that the testimony of the named advocate would be useful to her case. There is no intimation that by the Plaintiff that she intends to call counsel to testify. The fact that the agreement was made for the sale of the suit property and its contents are not in dispute in this case. What the Plaintiff’s case is hinged on is the legality of the sale on the basis that her consent as a spouse was not obtained.

30. In addition, it was important for the Plaintiff to state the nature of evidence that counsel would be required to give. Under the Rule, Counsel has a discretion to withdraw or continue acting in non-contentious matters. However in contentious matters he must withdraw from acting if he is a potential

witness whether for the party for whom he is acting or the adverse party. (See Mwendwa vs M'Mwendwa [2004] KLR 621 and Dephis Bank Limited vs Chatthe & 6 Others supra).

31. In all the authorities cited above, the constitutional right to representation by counsel of one's choice was restated. The court will only interfere in the clearest cases. The Plaintiff in this case failed to satisfy the court that the firm of Githui & Company Advocates should be barred from representing the Defendants. She did not demonstrate that he was a potential witness in this case. It follows then that the preliminary objection must fail. It is therefore dismissed.

32. The application for injunction

33. The principles for granting an injunction were laid out in Giella v Cassman Brown & Co Ltd [1973] EA 358. The Applicant must show that he has a *prima facie* case with a probability of success, that if the injunction is not granted he will suffer damage that cannot be compensated by way of damages and if the court is in doubt, it will decide the matter on a balance of convenience.

34. What constitutes a *prima facie* case was defined by the Court of Appeal in Mrao Ltd. v First American Bank of Kenya Ltd & 2 others [2003] KLR 125 as follows

“In civil cases, a *prima facie* case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”

35. This definition was adopted by the same court in the latter case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR, when the court expounded on the definition further:

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

36. The suit property has already been sold to and registered in favour of the 2nd Defendant. The Plaintiff therefore wishes to restrain the 2nd Defendant from taking possession of the suit property until the suit is finally determined.

37. Her claim is that she has a beneficial interest as a spouse in the suit property which is their matrimonial home defined under section 2 of the Matrimonial Property Act, 2013 as **“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.”** Section 14 of the Matrimonial Property Act provides that where property is acquired during marriage in the name of one spouse, there shall be a presumption that the property is held in trust for the other spouse. **Section 90(2)** of the Land Registration

Act also provides that a spouse may acquire an interest in the nature of ownership in common by way of contribution to its improvement, upkeep and development.

38. Her interest is recognized by Section 28 of the Land Registration Act No. 3 of 2012 as an overriding interest to which registered land is subject even though that interest is not indicated in the register. Therefore section 90 (3) places an obligation on the person who is acquiring an interest to inquire from the seller whether a spouse or spouses have consented to the sale of that land and where that consent has not been given, the sale may be set aside unless the spouse consents to it.

“90(3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house—

(a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or

(b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.

(4) If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3) (b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.”

39. Therefore, the 2nd Defendant’s title is not absolute and infeasible. Section 26 of the Land Registration Act provides that it is only *prima facie* proof of ownership. It may be challenged on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. Failure to obtain consent as per Section 90(4) above constitutes an unprocedural irregularity which may vitiate a sale. This applies even when the purchaser is misled by the seller that the consent has been obtained.

40. In this case, the 1st Defendant did not make a mere representation of the fact that the spouse had consented to the sale of the land but also issued the 2nd Defendant with the minutes of the family meeting when the consent was given and the same had been signed by the Plaintiff. The Plaintiff also admitted that she consented to the sale of the suit property. Her only dispute is that she was not involved in the transaction between the 1st and 2nd Defendants as per the family agreement dated 31st October, 2013.

41. I remind myself that I am not required to make any findings of fact that may prejudice the trial of the suit. The questions of whether the 2nd Defendant’s title may be set aside for lack of spousal consent for that particular transaction when there is a signed consent by the Plaintiff on record sanctioning the sale of that property is one for the trial court to determine.

42. I have perused the agreement to sell the suit land alluded to by the 1st Defendant. I note that it contains a clause that the Plaintiff and the 1st Defendant will sell the land together and buy the alternative land together. Thus the Plaintiff has made out a case as to whether the sale and transfer without her involvement was regular. Accordingly I find that a *prima facie* case has been established.

43. In addition to establishing a *prima facie* case, the Plaintiff is required to show that should the injunction not be granted, she will suffer irreparable damage that cannot be compensated by way of damages.

44. In the instant case, the suit property has been the matrimonial home of the Plaintiff and the 1st Defendant. Title has passed to a third party under circumstances which have been challenged by the Plaintiff. If an injunction was not issued, no doubt the Plaintiff is likely to suffer irreparable damage as

she will be evicted and there is the danger that unless restrained, the 2nd Defendant may sell the property to a third party.

45. It must be borne in mind that the purpose of the interlocutory injunction is essentially to preserve the rights of the parties and the property in dispute until the suit is finally determined. They must show that if those rights are not preserved or property protected by way of an injunction, the suit will be defeated. I am fortified in this finding by the words of the court of appeal in Nguruman Limited V. Jan Bonde Nielsen & 2 others (supra) and I quote:

“we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.”

46. For the above reasons, I find that the application for injunction has merit. It is therefore allowed in terms of prayer (3). The Plaintiff shall have the costs of the application.

Dated, Signed and Delivered at Nakuru this 19th day of November, 2015

A. K. NDUNG'U

JUDGE