



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 275 OF 2013

LEAH NJOKI KIBOKO PLAINTIFF/APPLICANT

VERSUS

JUSTUS KIBOKO MURIUKI DEFENDANT/RESPONDENT

RULING

This is in respect to the plaintiff/applicant's Notice of Motion dated 26th July 2013 and filed in Court the same day seeking an injunction restraining the defendant/respondent from any further dealings in land parcel numbers L.R. KIINE/KIANGAI/3233, 3231, 3229, 3230 (formerly L.R KIINE/KIANGAI/3233 pending the hearing and determination of this suit. The same is supported by the affidavit of the applicant and based on the grounds, inter alia, that the said property is matrimonial property yet the defendant/respondent is sub-dividing and selling the same without consulting the applicant.

The application is opposed and in his replying affidavit, the defendant/respondent has deponed that the above parcels of land are infact sub-divisions of L.R KIINE/KIANGAI/23 which he inherited and are not therefore matrimonial property as alleged by the plaintiff/applicant. He adds further that L.R KIINE/KIANGAI/3232 and 3233 were sold to one CHARLES MURIMI NGURE and L.R KIINE/KIANGAI/3229 to one DAVID MAINA NGURE with the knowledge and consent of the plaintiff/applicant yet the two are not parties to this suit which was actuated by malice when the defendant/respondent attempted to register L.R KIINE/KIANGAI/3230 in his name and that of plaintiff's co-wife.

I have considered the application within the parameters set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358**. I have also considered the submissions by counsels and the various annextures attached to the parties respective affidavits.

The applicant herein is seeking an interlocutory injunctive relief and the first principle set out in the **GIELLA** case (supra) which she has to satisfy is that she must show a prima facie case with a probability of success at the trial. From her pleadings, her claim to the suit property is that it is matrimonial property. However, the defendant/respondent has annexed to his replying affidavit the Certificate of Confirmation of Grant in Kerugoya S.R.M Succession Cause No. 77 of 2005 dated 9th March 2006 confirming that L.R No. KIINE/KIANGAI/23 was infact part of two properties that the defendant/respondent inherited from his late father one HEZRON MURIUKI (see annexure **JKM 1**). It is also clear that the properties subject of this suit are resultant sub-divisions of L.R. No. KIINE/KIANGAI/23. Clearly therefore, the plaintiff/applicant's claim that the suit property are matrimonial properties cannot be true because there is cogent evidence in the form of the grant, which is not rebutted, that the said properties were part of the defendant/respondent's inheritance from his father. Plainly put, there is no evidence placed before me to demonstrate that suit properties were "**acquired**" by the plaintiff/applicant in the cause of her marriage to the defendant/respondent as pleaded in the plaint or

that the said properties are “*matrimonial property*” as alleged in the supporting affidavit of the plaintiff/applicant. A prima facie case with a probability of success has therefore not been established by the applicant as required. If anything, the defendant/respondent has demonstrated that the properties subject of this suit are his inheritance. The plaintiff/applicant has therefore failed to surmount the first hurdle in the GIELLA case (supra).

The applicant has also not demonstrated what irreparable harm she would suffer that cannot be adequately compensated for by an award of damages which is the second principle in the GIELLA case (supra). In her supporting affidavit at paragraph 18 she simply depones that she “*stands to suffer irreparable damages*” but does not demonstrate what those damages are. There is no suggestion, for example that she resides in any of the properties. Only in the counsel’s submissions is it indicated that she derives her livelihood from the land which she also uses to educate her son but such submissions can only support what has already been pleaded. In any event, such loss can easily be quantified.

Even if this Court were to determine this application on a balance of convenience, it is clear that some of the properties subject matter of this suit have infact already been sold to third parties who are not parties to this suit and therefore granting the orders sought would amount to condemning them without giving them a hearing.

In the circumstances, the applicant has not satisfied this Court that she is deserving of the orders sought as she has not met the threshold set out in the GIELLA case (supra). The Notice of Motion is accordingly dismissed and as the parties are family, there will be no order as to costs.

B.N. OLAO

JUDGE

30TH JANUARY, 2014

30/1/2014

Coram

B.N. Olao – Judge

CC – Mwangi

Ndegwa for Plaintiff absent

Mr. Muchiri for Defendant present

COURT: Ruling delivered this 30th day of January 2014 in open Court.

Mr. Muchiri for defendant present

Mr. Ndegwa for plaintiff absent.

B.N. OLAO

JUDGE

30TH JANUARY, 2014