



REPUBLIC OF KENYA
HIGH COURT OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KAPSABET

ELC APPEAL CASE NO. E 008 OF 2021

GILBERT KIPRUTO MENJO.....PLAINTIFF

-VERSUS-

JOB KIPLIMO MENJO.....1ST DEFENDANT

JOHN TIJI.....2ND DEFENDANT

JACKLINE GALO.....3RD DEFENDANT

EMILY JEPKEMBOI.....4TH DEFENDANT

RULING

1. Coming up for determination is the Plaintiff's Notice of Motion application dated 2nd December 2021 and the Plaintiff's Preliminary Objection dated 21st January 2022. The Plaintiff's application seeks the following orders: -

a. Spent

b Spent

c. That the Honourable Court do issue orders of mandatory injunction restraining the Defendant/Respondent from trespassing, selling, fencing, transferring, entering on all, that parcel of land known as NANDI/KAIBOI/38

d. The costs of this application be provided for.

2. The application together with the sworn affidavit by Gilbert Kipruto Menjo are premised on the grounds that the Plaintiff together with his siblings are legal beneficiaries and biological children of the Defendant/Respondent. That the 1st Defendant/Respondent married his wife in a Christian wedding and blessed with three issued one of them being the Plaintiff herein and since the time of marriage they have all lived in the suit land registration number NANDI/KAIBOI/38 as their matrimonial home. The Plaintiff indicated that upon the wife of 1st Defendant/Respondent move to the United States of America, the 1st Defendant/Respondent started selling the suit land hence threatening to render them landless. Therefore, it was in the interest of justice and fairness if the orders sought are granted.

3. The 1st Defendant/Respondent opposed the application vide Replying Affidavit dated 20th December 2021 on grounds that the 1st Defendant/Respondent together with the 2nd Respondent are the registered owners of the land parcel No. NANDI/KAIBOI/38. The 1st Defendant/Respondent indicated that he had authority from the 2nd, 3rd and 4th Respondents to reply to the application. He further stated that his wife and children of tender age then abandoned him to go to United States of America leaving him to raise the applicant and his brother as a single parent. The 1st Defendant/Respondent also indicated that being the legitimate owners of the suit parcel, they had every right to dispose off without the consent of his estranged wife one Ednah Chepchirchir Menjo having deserted him 21 years ago. The 1st Defendant/Respondent therefore seeks that the application be dismissed with costs.

4. The Plaintiff/Applicant in response to the Replying Affidavit filed by the 1ST Defendant/Respondent filed a Preliminary Objection dated 21st January 2022 on grounds that;

a) That the Replying Affidavit by the 1st Defendant/Respondent dated 20th December 2021 is incompetent, misconceived, vexatious bad in law and an abuse of the due process of the Court.

b) That the 1st Defendant/Respondent has no locus standi to swear the Replying affidavit dated 20th December 2021 on behalf of the 2nd, 3rd, 4th and 5th Respondents.

c) That the 2nd, 3rd and 4th and 5th Respondents have not filed a letter of Authority neither have they authorized the 1st Respondent to represent them in this suit.

d) That the 1st Respondent does not have any legal basis to purport to be a representative of the 2nd, 3rd, 4th and 5th Respondents. This is a total mischief in law.

e) That as a result of the contents of paragraph 1, 2, 3, and 4 above, the Plaintiff/Applicant prays that the Replying affidavit dated 20th December 2021 be struck out and/or Dismissed with costs.

5. In the Plaintiff's Applicants Submissions, dated 4th February 2022, they reiterated the averments set out in their application and preliminary objection adding that the suit property is an ancestral land and their matrimonial home. To this end they relied on article 45 (3) of the constitution of Kenya which states as follows: -

"Parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of marriage."

The Plaintiff/Applicant also relied on Section 93 (3) of the Land Registration Act 2012 which provides thus;

"where a spouse who holds land or a dwelling house in his name undertakes individually disposition, in that land the transferee shall it that disposition is a transfer of land be under duty to inquire of the transferor of whether the spouse(s) have consented to that transfer."

On the same issue the Plaintiff/Applicant relied in the case of **MWK –VS- SKK** and 5 others where the house of Lords held in part;

" I accept that he wife did make indirect contribution to the welfare of the family by providing the services she said she gave namely working, looking after children n and taking them to school and generally running the matrimonial home in which the parties lived."

6. It is noteworthy that no authority or provisions of the law were provided their preliminary objection dated 21st January, 2022. Rather they reiterated the averments in the preliminary Objection. In conclusion he prayed that the application be allowed with costs.

7. The submissions by the Defendants/Respondents are dated 15th February 2022 where it is stated that the preliminary Objection raised by the Plaintiff/Applicant did not meet the threshold set out in the case of Musika Biscuit Manufacturing Company Ltd VS. West End Distributors Ltd (1969) EA 696 by law J. A. where it was stated that;

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which raised by clear implication out of pleadings, and which, if argued as a preliminary point may dispose of the suit."

On the same issue the Defendants/Respondents submitted that the Preliminary Objection raised issues of facts that would require evidence to be adduced to demonstrate that authority had or had not been given to the 1st Defendant by the 2nd, 3rd, 4th and 5th Defendants. They further submitted that the Plaintiff/Applicant dialed to indicate the provisions of the law contravened by the Defendants.

8. The Defendants further submitted that failure to file the letters of authorization was not fatal to the suit and relied in the decision of Omondi J in the case of Mathew Cheboi Kore –vs. Secretary General of the Association of Public Health Officers Kenya (APHOK) and Another (2018) eKLR. Similarly the made reference to the case of Presbyterian Foundation and Another vs. East Africa Partnership Ltd and Another (2012) eKLR. In collusion the Defendants/ Respondents urged the court to dismiss the application and maintain status quo.

9. On the application, the Defendants/Respondents filed submissions dated 10th February 2022 reiterating the depositions in their replying affidavit. It was submitted that the test to be considered while granting an interlocutory mandatory injunction was well settled in the Court of appeal case Kenya Breweries Ltd and Another vs. Washington O. Okeyo (2002) eKLR. It was also submitted that the injunction sought by the Plaintiff/Applicant was an equitable remedy that carried finality to it and it was upon the Plaintiff/Applicant to comply with test set out in Kenya Breweries Ltd and Another vs. Washington Okeyo (2002) eKLR. They added that no special circumstance or reasons were advanced by the Plaintiff/Applicant to warrant granting of mandatory injunction at the interlocutory stage. On this they relied in the Court of Appeal case of Nation Media Group and 2 others vs. John Harun Mwao (2014) eKLR.

10. They urged this Court to dismiss the application since the issues raised by the Plaintiff/Applicant called for full trial to enable the Court come up with a just and fair decision. The Defendants/Respondent submitted that granting of the orders sought would amount to eviction of the Defendants from the suit propriety legally owned by them.

ANALYSIS AND DETERMINATION: -

11. Having analyzed the application, replying affidavit, preliminary objection, rival submissions, legal framework and case laws, this Court sums the issues for determination as follows;

i) Whether the Plaintiff's Preliminary Objection dated 21st January 2022 meets the laid out threshold

ii) Whether the Plaintiff/Applicants application dated 2nd December 2021, meets the grounds for grant of interlocutory mandatory injunction.

iii) Whether the Plaintiff's Preliminary Objection dated 21st January, 2022 meets the laid out threshold.

12. The Preliminary objection seeks to strike out the replying affidavit by the 1st Defendant/Respondent on grounds that the 1st Defendant/Respondent has no locus standi to swear replying affidavit on behalf of the 2nd, 3rd, 4th and 5th Respondent since there is no letter of authority filed. It is trite law that a preliminary objection ought to be raised on a point of law. The locus classicus case on this is the case of Mukisa Biscuits vs. West End Distributors Ltd. (1969) E. A. 696 where it was stated that;

".....so far as I am aware, 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 off the suit."

13. This positions was buttressed by the Supreme Court of Kenya in Kenya National Commissions on Human Rights vs. Attorney General; Independent, Electoral and Boundaries Commission and 16 others (interested parties) (2020) eKLR under paragraph 83 where the following pronouncement was made;

".....we find it quite clear that a Preliminary Objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion that the facts are incompatible with that point of law..."

14. The question to be answered therefore is whether the ground that the 1st Defendant/Respondent has no locus standi to swear the replying affidavit on behalf of 2nd, 3rd, 4th and 5th for lack of letter of authority is an issue of fact or law.

15. In order to determine whether the 1st Defendant/Respondent had authority to swear replying affidavit on behalf of the 2nd, 3rd, 4th and 5th Respondents, the court has to call for and scrutinize documents.

16. In the Supreme Court of Kenya case of Zacharia Okoth Obado vs. Edward Akongo Oyugi and 2 others (2014) eKLR, the Court had this to say on when a question of law becomes a question of fact;

".....for a questions to be one of law, the same must not involve an examination of the probative value of the evidence presented by litigants or any of them. The resolution of the issue must rest solely on what the law provided on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented the question posed is one of fact....."

17. Consequently, the issues raised by the Plaintiff/Applicant vide Preliminary Objection dated 21st January 2022 are not points of law therefore it essentially fails.

ii) Whether the Plaintiff/Applicants application dated 2nd December 2021 meets the grounds for grant of mandatory injunctions.

18. The orders sought in the application by the Plaintiff/Applicant dated 2nd December 2021 is mandatory injunction restraining the Defendant/Respondents from trespassing, selling, fencing, transferring, entering on all that parcel of land known as NANDI/KAIBOI/38. It is however not indicated for how long the said order will last, by virtue of the fact that this application has been made at this stage, it can be presumed it is pending hearing and determination of this suit.

19. An applicant in a mandatory injunction must prove their case on a standard in prohibitory injunction and must also establish the existence of special circumstances. In the case of Kenya Breweries Ltd and Another vs. Washington O. Okeya (202) eKLR, the Court of Appeal stated as follows on mandatory injunctions;

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover before granting a mandatory injunction the Court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

20. In the instant case, it is clear from the evidence provided by the Plaintiff/Applicant i.e. the search certificate "GK3", that the suit property is jointly owned by the 1st and 2nd Respondents. Whether the Respondents are tenants in common or joint tenants is a question that cannot be answered at this stage. It is the same property that the Plaintiff/Applicant claims as their matrimonial home.

21. All I can say is that at this stage, it is neither overwhelmingly clear not exceptional from the evidence presented that the whole or part of suit property was the Plaintiff matrimonial home. On this basis I decline to grant interlocutory mandatory injunction.

22. That being said, the substratum of the subject matter must be preserved pending hearing, and determination of the suit. Paragraph 28 (k) Practice Directions on Proceedings in the Environment and Land Courts as well as the Court of Appeal in the case of Mugah vs. Kunga (1988) KLR 748 upheld the practice of issuing status quo orders in land matters. The Court of appeal stated thus:

“status quo orders should always be issued for purposes of preserving the subject matter. This Court’s practice direction vides Gazette Notice No. 5178/2014 have followed suit. Practice direction No. 28 (k) is relatively clear. It gives the Court the leeway and discretion to make an order for status quo to be maintained until determination of the case.”

23. The circumstances of this case therefore call for his Court to exercise its discretion by making an order for status quo to be maintained pending hearing and determination of this suit.

24. I consequently disallow the Plaintiff/Applicant’s application dated 2nd December 2021 with costs in the cause and order that status quo before filing of suit which requires the Defendant not to transfer the properties to third parties be maintained pending hearing and determination of the suit.

25. Orders accordingly.

DATED AND DELIVERED IN KAPSABET THIS 10TH MARCH, 2022.

HON. M. N. MWANYALE,

JUDGE

In the presence of Mr. Ondieki for the Plaintiff/Applicant

Ms. Kogo for the Defendant/Respondent