



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC NO. 569 OF 2012

R. W.....1ST PLAINTIFF/APPLICANT

B. N .N.....2ND PLAINTIFF/APPLICANT

-VERSUS-

R.W.N.....DEFENDANT/RESPONDENT

RULING

I have before me the Plaintiff's Notice of Motion application dated 4th September, 2012. The application seeks an order injunction on the following terms:-

That the defendant/respondent be and are hereby restrained by way of an injunction whether by herself, servant, agents, assigns or in any other manner howsoever from remaining on or continuing in occupation or possession of or from entering, interfering with, alienating, dealing in the suit premises until this suit is heard and determined.

The application is supported on the grounds appearing on the face of the application and on the further grounds contained in the supporting affidavit and further affidavit sworn by the 2nd plaintiff on 4th September, 2012 and 8th November, 2012 respectively.

The defendant opposes the application and has sworn an affidavit in reply dated 28th September, 2012. The parties have also filed written submissions in support of their respective positions.

The brief facts of the case is that one F.Y.N.M is the registered owner of Land title Number Dogeretti/Waithaka/1024 measuring approximately 0.38 hectares. The 1st Plaintiff is the wife of the said registered owner with whom she has been separated since 2008. The 2nd plaintiff is the sister to the said registered owner. The defendant according to the plaintiffs is a stranger who has no business to do with the subject suit property but the defendant claims to be the wife of the registered owner of the suit property married under the Kikuyu customary law in 2005 a fact that the said F. Y. N. M the registered owner confirms.

The defendant has a power of attorney donated to her by the said F.N which has been duly registered and which she argues entitles her to deal with her said husband's parcel of land and specifically to renovate the discussed house standing on the suit land.

The 2nd plaintiff contends that the suit land is ancestral land and that her brother Ng'ang'a was registered as trustee for the beneficiaries including herself. The plaintiffs contend that the marriage of the 1st plaintiff to Mr. F.N the registered owner of Title No. Dagoretti/Waithaka/1024 has not been dissolved and is still subsisting and therefore Mr. Ng'ang'a lacked any capacity to marry the defendant under any system of law and argues that to the extent that he power of Attorney was donated to the defendant on the basis that she was the wife of the said F.N the same is null and void as he had no capacity to marry the defendant as long as his statutory marriage to the 1st plaintiff was still subsisting. The plaintiffs further argue that the 1st plaintiff being the legal wife of the registered owner has an interest in the suit property and the same cannot be sold and transferred without her approval and/or consent.

F.N the registered owner of the suit property by a sworn affidavit dated 25th May, 2012 affirms that he is married to the defendant under the Kikuyu Customary Law and that they have lived together as husband and wife and have had 3 children together. The plaintiffs have alleged the power of attorney allegedly donated to the defendant is fraudulent and/or a forgery but have adduced no evidence to support this assertion.

To the contrary the defendant has furnished two powers of attorney exhibited as "RWN2a" and "RWN2b" which have been duly registered. The Power of Attorney Registered at the Lands Registry is shown to have been executed by F.Y.N.M and his signature attested by Lynne N. Muchira Advocate and equally the power of attorney registered under the Registration Titles Act as No. IP/A58440/1 is signed and the signature attested by the said Lynne N. Muchira. In my view the power of attorney was properly and validly made as there is no restriction as to who a person can appoint as their duly constituted attorney.

F.Y.N.M is the registered proprietor of the suit property and the registration does not show that he is holding the property in trust for the Plaintiffs and/or anybody else. The rights of a registered proprietor under Section 28 of the now repealed Section 28 of the Registered Land Act Cap 300 Laws of Kenya are absolute and are unfettered. Under the Land Registration Act No. 3 of 2012 Section 28 provides:-

“Unless the contrary is expressed in the register all registered land shall be subject to the following averring interests as may for the time being subsist and affect the same, without their being noted on the register-

a. Spousal rights over matrimonial property;

.....”

The 1st Plaintiff and the defendant each claim to be the wife of the registered proprietor of the suit land. There is no denial that the 1st plaintiff and the registered proprietor are separated. As I understand the matter the 1st Plaintiff is staking claim to the suit property on the basis that it is matrimonial property whereas the defendant apart from claiming to be the wife of the registered proprietor she states she holds a valid power of attorney that entitles her to deal with the suit property. In particular she states that she has the mandate to renovate the house on the suit property that has not been in use since 2008.

The 2nd plaintiff's claim over the suit property is stated to be beneficiary interest. With respect I consider this claim to be farfetched as it is not made against the registered owner and the registration details shows the property is not held by the registered owner as a trustee.

The house on the subject parcel of land is not being used as a matrimonial home by either the 1st plaintiff who has not lived in the house since 2008, or the registered owner who is domiciled in the USA and it

therefore makes sense to have the house renovated and rehabilitated to become a source of income. In my view therefore it was rights and proper for the registered owner to donate a power of attorney to the defendant to be able to take care of the house in the absence of the registered owner of the property.

The plaintiff's have contested the power of attorney on the basis that the defendant is not the wife of the registered owner of the Property. Mr. F.N has not disowned the power of attorney which on the face of it appears valid and is registered on the question of the validity of the marriage between the defendant and the said F.Y.N.M this court cannot make a determination of that issue in these proceedings save to observe that the registered owner has affirmatively stated that he defendant is his wife and the 1st plaintiff is his former wife.

In an application for injunction an applicant is required to satisfy the conditions precedent before a court can exercise its discretion to grant the injunction.

These conditions were enunciated and articulated in the often cited case of **GIELLA VS. CASSMAN BROWN & CO. LTD (1973) EA 358** and are as follows:

- i. The applicant must demonstrate that he/she has a prima facie case with a probability of success;
- ii. The applicant must show that he/she stands to suffer irreparable damage unless the injunction is granted and that an award of damages would not be an adequate remedy; and
- iii. That in case of the court being in doubt as relates to the above two conditions the court can determine the matter by considering the balance of convenience having regard to the attendant circumstances.

I have considered the pleadings, the affidavits and the plaintiff's submissions and I am not satisfied that the plaintiffs have demonstrated they have a prima facie case with a probability of success. Firstly, the registered owner of title number Dagoretti/Waithaka/1024 has not been enjoined in these proceedings although the plaintiff's complaints are levelled against him.

Secondly, the 1st plaintiff though married to the registered owner is said to be separated from him and does not reside on the suit property. To the extent that the 1st plaintiff is still a legal wife of the registered owner of the suit property she would under the provisions of Section 28(a) of the Land Registration Act No. 3 of 2012 be said to have spousal rights over the suit property as it would constitute part of matrimonial property.

On the basis of the material placed before the court I am not able to hold that the plaintiffs have demonstrated or shown that they would suffer irreparable harm that cannot be compensated for by an award in damages if the injunction sought is not granted. I however have considered that the 1st plaintiff by virtue of being married to the registered owner does have an interest in the suit property by virtue of the same forming part of what can be described matrimonial property between her and her husband. To that extent the 1st plaintiff would lawfully be entitled to be consulted in case the property is being disposed and/or alienated.

It is my view that the defendant even though she has a valid power of attorney and is entitled to deal with the suit property to the extent the power of attorney permits any dealing as would amount to a disposal and/or alienation would in the light of Section 28(a) of the Land Registration Act 2012 invite the approval and/or consent of the 1st Plaintiff. However in my view the power of attorney and/or consent of the registered owner would lawfully entitle the defendant to carry out any necessary renovations to the house on the suit property for purposes of preserving the same and to avoid it being wasted and/or damaged by reasons of non use. The defendant would also be entitled to utilise the suit property under the terms of the power of attorney.

In the premises and notwithstanding that I have held that the plaintiff's have not demonstrated that they have a prima facie case with a probability of success, I in the interest of doing justice to all the parties as the court is enjoined to do under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act Cap

21 Laws of Kenya and Article 159 (2) of the Constitution make an order that the defendant shall not utilise the power of attorney to cause the suit property to be sold, subdivided and or alienated pending the hearing and determination of this suit.

The defendant shall however be entitled to remain and continue in occupation and possession and to also carry out any necessary renovations on the house in the suit property pending the hearing and determination of the suit.

I make no orders as to costs for the instant application.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JUNE 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the Defendant