



**REPUBLIC OF KENYA**

**High Court at Kericho**

**Civil Case 17 of 2012**

**ROSEMARY CHEPKEMOI RUTO..... PLAINTIFF**

**VERSUS**

**JOHN MARITIM RUTO ..... DEFENDANT**

**RULING**

This application dated 29<sup>th</sup> March, 2012 is by way of Notice of Motion brought pursuant to **Order 50 rule 1 and 3, Order 49 rule 1(a)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** and all other enabling provisions of the Law. **Order 50 rule 1** is in regard to time within which an act has to be done. While **Order 49 rule 1(a)** is in respect of Special powers of a registrar. This is a wrong provision. That is however a technicality that I am called upon to disregard.

The application is for injunctive orders restraining the Defendant/Respondent herein and other persons acting on his behalf from denying the Applicant access and/or occupation of **Kericho/Kapsaos/2185**. Secondly that the Defendant be restrained from trespassing onto the said farm, plucking tea leaves, leasing, disposing off, alienating or in other way interfering with the Plaintiff's proprietary rights as his 1<sup>st</sup> wife and a beneficiary of that land being their matrimonial home.

The application is supported by grounds that the Defendant who was the registered owner of parcel No. **Kericho/Kapsaos/915** sub divided it into portions **Kericho/Kapsaos/ 2185 and 2186**. He registered **No. 2186** in his name and that of Linner Chebwogen his 2<sup>nd</sup> wife but did not register parcel **No. 2185** in his name and that of the Applicant his 1<sup>st</sup> wife. He has then denied the Applicant access to the portion. He has also deterred her from carrying out farming activities on that portion of land which is detrimental to her proprietary rights.

In response thereto, the Defendant said that they reached a mutual agreement that the portions would be sub divided and the costs of registration in joint names would be met by the wives. The Applicant however refused to pay the fee for sub division and registration. He denied having chased away the Applicant from the matrimonial home as she resides in his town house at Kericho. Denying being violent to the Applicant he averred that as the owner of the tea bushes that he personally planted he was entitled to them.

Rival submissions by both counsels have been considered.

Principles of granting an injunction were set out in the case of **Giella –vs- Cassman Brown & Co. Ltd (1973) E.A. 358**.

1. The Applicant must show a prima facie case with a probability of success.

2. The applicant must show that unless the injunction is granted he/she will suffer irreparable injury.
3. When the court is in doubt, it will decide the application on the balance of convenience.

With regard to the issue whether the Applicant has a prima facie case.

The Applicant herein is legally married to the Respondent. There is an annexure to the supporting affidavit to the application - a Marriage Certificate issued to the parties when their Marriage was solemnized in the year 1975. The Respondent herein also acknowledges her as his 1<sup>st</sup> wife. A Certificate for Search of parcel No. **Kericho/Kapsaos/2185** dated 16.1.2012 show that the parcel of land is registered in the name of **John Maritim Arap Ruto** the respondent. It was submitted by the Respondent's counsel that following customary law the Defendant would not have the property registered in the names of the Applicant perse. The property had to be registered both in their names, what he was willing to do save for payment of cost by the applicant.

Annexure "**JMRI**" is an agreement dated 18.2.2011 whereby it was agreed that the parcel No. **Kericho/Kapsaos 915** be sub divided into two (2) equal portions. The Respondent was to own the parcels jointly with each wife. Each of the wives was to meet expenses of processing the title deeds to be issued. The Applicant herein did not append her signature on the agreement which means that she declined to be a party to it. The averments of the Respondent were not disputed by the Applicant. There is an application for consent of Land Control Board, a consent and transfer of land forms duly filled by both the Respondent and Applicant herein in respect of title No. **Kericho/Kapsaos/2185**.

The Applicant didn't respond to the reply to enable this court to tell why she duly filled the forms. Her image was appended thereon but the transfer was not effected. The question to be answered would be how come the Respondent followed the process of registration if he was not willing to have the parcel registered in their joint names. It can therefore not be said with certainty that the Respondent has denied the applicant beneficial ownership of the portion by not registering the portion in her name.

With regard to the second issue of the Plaintiff suffering irreparable damage if the orders sought are not granted. The applicant has proved on a balance of probabilities that she has been entitled to the tea bushes. She however states that she cannot pluck the tea because the Respondent chased her away from the matrimonial home. He has threatened to lease out the tea bushes to Kaisugu Tea Company. This allegation was denied by the Respondent arguing that indeed the applicant lives in their town house. He further claimed ownership of the tea bushes though registered in the name of the applicant. To establish whether the Respondent chased away the applicant from their matrimonial home or if the Applicant abandoned the matrimonial home it would require some evidence which at this stage is lacking. There is however evidence that the applicant was the one receiving payment for tea, she is recognized as the grower by KTDA. Therefore if she is deterred from picking the tea she will definitely suffer some injury.

With regard to the third issue of deciding the matter on a balance of convenience. What can be deduced from the issue herein is the fact that the Applicant and Respondent are having a matrimonial dispute regarding property. Neither of them however talks of wanting to share the property. Therefore this court has to come up with a decision that is just in the circumstances.

The Applicant herein being a legal wife to the Respondent is a beneficial owner of the matrimonial home therefore it is her right to live in that particular home. She can therefore not be denied access to her home.

The Respondent on the other hand being the owner of the home can also not be denied his proprietary rights. He may however not dispose off property which is the applicant exercises beneficial rights over.

It is hence ordered that pending hearing and determination of the suit herein, the Respondent shall be restrained from denying the applicant access to the parcel No. **Kericho/Kapsaos/2185**.

The Respondent shall also be restrained from leasing/disposing off or alienating the said matrimonial home. No orders as to costs.

It is so ordered.

**DATED** at **KERICHO** this 20<sup>th</sup> day of November 2012

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**LILIAN N. MUTENDE**

**JUDGE**

**Counsel Appearing**

Mr. Miruka Advocate for the Applicant/Plaintiff

Mr. Motanya Advocate for Defendant/Respondent

Mr. Koech – Court clerk