



REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 267 of 2012

ZIBRETTA ATAMBA SHIKUMBA.....PLAINTIFF

V E R S U S

LIVINGSTONE SHIKUMBA SHIKHUYU.....1ST DEFENDANT

WILLIAM A. SAYIA.....2ND DEFENDANT

R U L I N G

The plaintiff filed her notice of motion dated 27th September 2012 seeking an order of temporary injunction restraining the two defendants whether acting by themselves, agent, servant or any of them from entering into, remaining in, trespassing upon or in any other manner, shape or form interfering with the plaintiff's peaceful user and occupation of property known as **N/KABRAS/MATSAKHA/772**. The plaintiff is also seeking an order directing the 1st respondent to restore the applicant's matrimonial house.

The application is supported by the applicant's affidavit. Mrs. Ingutia counsel for the applicant submitted that the applicant is the wife of the first respondent. The applicant has been utilizing the suit land since 1986. The 1st defendant fraudulently disposed off the land to the 2nd defendant. The defendants obtained eviction orders from the Butali Court and have evicted the applicant from her matrimonial home.

The applicant contends that the 2nd defendant was aware of the applicant's interest. No consent to transfer was issued by the Land Control Board. The applicant did not participate in the Butali court suit. Applicant has no other place to reside and will suffer irreparable damage.

The first respondent, Livingstone Shikhuyu, relied on his replying affidavit filed on 19th October 2012. The 1st respondent maintains that after marrying the plaintiff, they have been residing on plot number **ISUKHA/MURANDA/1093** as well as at his ancestral home at plot number **IDAKHO/LUKOSE/231**. He purchased the suit land using his own money which he got as damages from a road accident. The 1st respondent intended to sub-divide the suit land to his four wives but the plaintiff objected to his proposal. He has now sold the land to the 2nd defendant and has been evicted from the land through a court order. The properties that were on the suit land were constructed by the 1st defendant. The 1st respondent contends that he used the sale proceeds to buy other parcels of land and would like to settle the plaintiff on plot number 1836 at Kambiri.

Mr. Khayumbi, counsel for the 2nd respondent opposed the application. Counsel submitted that they filed an application dated 1st October 2012 which sought to have the interim orders discharged. Counsel submitted that the 2nd respondent is in occupation and obtained eviction orders from the Butali Court. The

court orders were executed. The plaintiff is not using the land and has been offered an alternative place to settle. Counsel submitted that this is a land matter and the court lacks jurisdiction as the Chief Justice made directions on land cases. **Section 150** of the **Land Act** vests jurisdiction on land disputes to the Land Court. The land was transferred to the 1st respondent in 2005 and therefore the applicant cannot contend that she has been utilizing the land since the 1980s. The 2nd respondent also maintains that the matter is res-judicata as there was *Butali Civil Suit No. 70 of 2012* as well as *Miscellaneous Application number 1 of 2011*. The 2nd defendant contends that he notified the plaintiff his intention to buy the land and the plaintiff had no objection.

The main issues for consideration is whether the applicant has a prima facie case with a probability of success, will the applicant suffer any irreparable damage not capable of compensation by way of damages if the orders are not granted? If the court is in doubt, what is the balance of convenience.

The plaintiff's case is that she is the 1st respondent's wife. She has lived on the suit land since 1986. She was not involved in the sale of the land to the 2nd respondent. She contends that her matrimonial home was demolished and she was evicted. The transfer to the 2nd defendant was done fraudulently. She registered a caution against the title but the same was removed by a court order. The plaintiff's position is that the two defendants acted jointly so as to evict her from the suit land.

The defendants contend that the 1st respondent was the absolute registered owner. He sold his interest to the 2nd respondent who managed to take over the land.

The issue of a prima facie case revolves around the plaintiff's interest on the suit property. She had her matrimonial house demolished. She exhibited photographs showing the demolished house. It is her contention that she got married to the 1st defendant since December 1971 and they are blessed with four children. Her interest on the land is that she is a beneficial owner of the land having established thereon her matrimonial home since 1986. Although the land was registered in the names of the 1st defendant, she still has interest as she resided on the land.

A prima facie case has been defined as 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 as to call for an explanation or rebuttal from the latter (**MRAO LTD. V FIRST AMERICAN BANK of KENYA LTD. & 2 OTHERS [2003] KLR 125.**)

The issue of a prima facie case can be looked at through the manner in which the 2nd defendant got himself registered as the owner of the land. It is the plaintiff's contention that the registration was fraudulent. The plaintiff exhibited pleadings from the Butali court, vide Butali Civil Case No. 70 of 2012 between the 2nd defendant as the plaintiff and the 1st defendant as the defendant. A decree in that suit shows that the court issued an eviction order against the 1st defendant on 13th September 2012. This eviction order was used to evict the plaintiff. There was a caution registered against the title but that was removed through *Butali Miscellaneous Application number 1 of 2011*.

The plaintiff also contends that no consent of the Land Control Board was issued to authorize the transfer of the land to the 2nd defendant. The plaintiff exhibited minutes of the Land Control Board meeting held on 12th April 2012 which indicate that the issue of a consent for plot number **KAKAMEGA/MATSAKHA/772** was deferred on two occasions namely on 7th April 2011 and 15th September 2011.

Counsel for the 2nd respondent contends that the applicant cannot claim to have resided on the suit land since 1986 as the transfer in favour of the 1st defendant was effected in 2005. That contention is contrary to the averments of the 1st defendant in his replying affidavit: paragraph 8 of the 1st defendant's affidavit avers that the suit land was bought earlier than 2005 but the vendor did not effect the transfer immediately. The 1st defendant also annexed documents to show that the transfer documents were lost at

the lands office.

The plaintiff annexed a letter dated 26th June 2012 from the Kakamega North District Commissioner showing that the 1st defendant made an application to the Land Control Board to have the suit land subdivided. The application was deferred on 7th April 2012 and 15th September 2011 and the minutes numbers are given by the Kakamega North District Commissioner. The reasons given for the deferment are that the 1st defendant's wife and children were not present during the deliberations so that they could give their opinion.

The Sale Agreement between the 1st defendant and the 2nd defendant was made on 18th February 2012. The consideration is KShs.1,920,000/=. The agreement indicate that the 1st defendant was seeking the whole suit property measuring 2.40 Hectares. The 1st defendant, in his supporting affidavit in Miscellaneous Application number 1 of 2011 before the Butali court sworn on 14th December 2011 states as follows:-

4. THAT due to financial constraints, I disposed off a portion measuring 2 acres of my parcel of land No. N/KABRAS/MATSAKHA/772 and sub-division has already been conducted and the same cannot be registered at the lands office on grounds that the respondent has placed caution on this parcel of land.

The 1st defendant annexed in that affidavit copies of the sale agreement which are not annexed herein. It is not clear how the 1st defendant stated that he had sold two acres but soon thereafter in February 2012 entered into another agreement selling the entire land.

From the pleadings herein, I am satisfied that the plaintiff has established a prima facie case with a probability of success. The mere fact the land was registered in the names of the 1st defendant does not mean that the plaintiff's interest on the land were extinguished. The 2nd defendant was obviously aware that the plaintiff was residing on the suit land. The 1st defendant sold the land and had himself sued so that he could be evicted. If indeed the plaintiff had willingly sold the land to the 2nd defendant, why would he be sued for eviction. The decree in *Butali PMCC No. 70 of 2012* indicate that the case was heard and the 1st defendant testified. The proceedings were not annexed. The contention that the plaintiff has already been evicted does not hold. The plaintiff was not party to those proceedings. The eviction of the plaintiff from the suit land was unlawful as the decree was not against her. It is also clear that the Butali Resident Magistrate had no jurisdiction to issue eviction orders. The 1st defendant simply colluded to have eviction orders issued against himself while knowing that there was a permanent house where the plaintiff was residing on the suit land with her children. The suit is not res-judicata as the plaintiff did not participate in the eviction proceedings. She was not a party to that suit. The Miscellaneous Application No. 1 of 2011 at Butali in relation to the issue of removal of a caution. Misc. Application number 70 of 2012 was between the two defendants. The issues are totally different are totally different.

With regard to the issue of jurisdiction, I do find that since the Land and Environment Court is not yet in place. This court has jurisdiction to hear and determine this suit. The guidelines by the Chief Justice cannot operate in a vacuum. A court has to be in place to hear cases. It cannot follow that members of the public have to fight one another and the mightier evicts the weaker from her land and the court watches helplessly just because the court that is expected to hear the dispute is not in place.

The contentions by the 1st defendant that the land was bought out of damages awarded in an accident case cannot hold. The land was bought when he was lawfully married to the plaintiff and therefore the plaintiff also contributed to the purchase of the land. Contribution need not be direct financial payment. Similarly, his contention that he has been living with the plaintiff in a different matrimonial home is doubtful. How comes the plaintiff annexed photographs of a demolished homestead? Why was it necessary to obtain eviction orders if the plaintiff was not living on the land. According to the defendants, obtaining an eviction order against the husband would have been sufficient to evict the wife and children too.

In the end, I find that the plaintiff has a prima facie case with a probability of success. Her matrimonial home was demolished and she contends that she has no-where to reside. That is an irreparable damage not capable of compensation by way of damages. The application dated 27th September 2012 is merited and the same is granted in terms of prayers (b) and (c).

I do grant prayer (c) as I find that the 1st defendant participated in the process leading to the demolition of the matrimonial home.

Costs to the applicant.

Delivered and dated at Kakamega this 8th day of November 2012

SAID J. CHITEMBWE
J U D G E