



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CIVIL CASE NO. 93 OF 2010 (OS)

MARY WACHANA WAFULA..... PLAINTIFF.

VERSUS

JOSEPH W. OWIDI)

RAILI OWIDI)DEFENDANT.

RULING.

1.The plaintiff/applicant filed an originating summons under the provisions of sections 27 & 28 of the Registered Land Act and section 17 of the Married Women Property Act. Simultaneously with the filing of the originating summons, the applicant filed a chamber summons seeking for a temporary stay of execution of the decree issued in Kitale HCCC No. 131 of 2000 between the defendants and Wafula Sitialo pending the hearing and determination of the suit. This application is premised on the grounds that the applicant is a joint registered owner of title No. Trans Nzoia/Makutano/47.

2.The defendants obtained a decree against the applicant's husband and in the event that the decree is executed, the plaintiff's interest will substantially be affected. This application is also supported by the applicant's affidavit sworn on 17th March, 2011. She has annexed a copy of the Title in respect of the suit property as well as a mutation form that shows the suit property was combined after a licenced surveyor identified the boundaries. According to the applicant her husband has not encroached on the boundaries of the defendant's suit premises.

3. This application was opposed; counsel for the defendant relied on the replying affidavit sworn by Joseph Wandera Owindi on 22nd March, 2010. The defendants have averred that they are the joint owners of the property known as Trans Nzoia/Makutano/31 measuring 2.428 hectares. As the registered owner of that suit property they instituted Kitale HCCC No. 131 of 2000 seeking for an order of eviction of Wafula Sitialo who encroached on their portion of their land measuring 0.528 hectares. The matter was determined after evidence was given and District Registrar and surveyor both tendered evidence that confirmed the encroachment. This applicant also filed a notice of objection against the execution proceedings and objection was dismissed. The applicant also filed an Appeal being Civil Appeal No. 8 of 2009 which appeal was withdrawn thus the defendant were at liberty to execute the decree.

4. The applicant also opposed the execution and an application was dismissed after which the applicant

filed Civil Appeal No. 5 of 2010 in Kitale which is still pending. According to the defendants, the matters raised in this application are Res Judicata because they have been adjudicated by this court and a decision was delivered. It was further argued that this application is an abuse of the court process. The matters having been litigated upon in Kitale HCCC No. 131 of 2000 which is still an active file and in the Court of Appeal Civil Appeal No. 201 of 2007 and multiplicity of suits revolving the same issues is prejudicial to the defendants. It was also noted by the court that the applicant registered herself over the suit premises 4 years after the defendants had commenced the suit for eviction in Kitale HCCC No. 131 of 2000. Moreover the applicants should have enjoined herself in HCCC NO. 131 OF 2000.

5. In further arguments, Counsel relied in several decisions especially in the case of **Mungai vs. Mungai [1995] LLR 405 (CAK)** where the Court of Appeal held that an application under section 17 of the Married Women's Property Act of the 1882 being a procedural section, merely declares the rights of a married woman to properties jointly held by spouses or by the husband. According to counsel for the defendant the applicant cannot sustain a suit seeking an interest in matrimonial properties from the defendants who are not her husbands. Furthermore the dispute is not one that is contemplated under the Registered Land Act, because this was a dispute regarding encroachment of the defendant's property that has nothing to do with the plaintiff's absolute ownership that is envisaged under the provisions of section 27 and 28 of the Registered land Act. The applicant having filed objection proceedings and application for stay of execution cannot now institute another suit in another court which is tantamount to stealing a march over the defendants.

6. The above is the summary of salient issues raised in this application and the affidavit in opposition as well as submission by counsel for the applicant and the respondent. This application seeks for an order of stay of execution on the grounds that the plaintiff/applicant is a joint owner of the suit premises with her husband who is the defendant in Kitale HCCC No. 131 of 2000. This suit was filed in Eldoret where the applicant was granted interim orders. This file was transferred to Kitale where the suit premises and where the same parties have been involved in litigation over the same subject matter. The issues raised by the respondent regarding the bona fides of this application are varied issues of law.

7. Firstly, the plaintiff's interest over the suit premises regarding the defendants who are decree holders was determined when the court indeed found that the plaintiff registered herself as the joint owner of the disputed property in the year 2004 when the suit by the defendant over the issue of encroachment was still pending. The application for stay of execution by the applicant was also dismissed. The applicant while knowing there is an appeal being C A No. 201 of 2007 went ahead to file a fresh suit. This persistent filing of multiple suits by the applicant lends credence to the defendant's submission that the applicant is actually abusing the court process. The plaintiff's claim has no foundation because she is not a wife or spouse of the defendants therefore she cannot institute a claim under section 17 of the Married Women Property Act of 1882.

8. The claim also under sections 27 and 28 of the Registered Land Act would have no foundation because as at the time the plaintiff registered herself as co owner of the suit land in 2004, there was already a claim by the defendants. Moreover, the claim by the defendant is not touching on the plaintiff's right to absolute ownership but a claim of encroachment of the defendant's land. In addition to the above findings, the applicant's application has not satisfied the grounds for granting a stay of execution by providing security.

This application is without merit and I hereby dismiss it with costs to the respondent.

Ruling read and signed this 25th day of March, 2011.

M. KOOME.

JUDGE.