



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HCC NO. 25 OF 2005

JEPKOECH TAPKILI METTO PLAINTIFF
=VERSUS=
HELLEN TUM alias CHEPOLEM 1ST DEFENDANTS
DAVID LELEI 2ND DEFENDANT
BARNABA LELEI alias ROOSEVELI 3RD DEFENDANT
NICHOLAS KIPKORIR KUGUN 4TH DEFENDANT
DAVID KIPKEMEI MONGONY 5TH DEFENDANT

RULING

On 30th March 2006, **Jepkoech Tapkili Metto** (hereinafter “**the plaintiff**”), instituted this suit against **Hellen Tum** (hereinafter “**the 1st defendant**”), **David Lelei** (hereinafter “**the 2nd defendant**”), **Barnaba Lelei** (hereinafter, the “**3rd Defendant**”), **Nicholas Kipkorir**, (hereinafter “**the 4th Defendant**”) and **David Kipkemei Mongony** (hereinafter “**the 5th Defendant**”). She sought the following reliefs:-

- (a) A declaration that the plaintiff is the legal owner of LR. No. Nandi/Kilibwoni/1023 (hereinafter “**the suit land**”).
- (b) A declaration that the license given to the 1st defendant and her family has been withdrawn and / or revoked and that they are trespassers on the suit land;
- (c) A declaration that the 2nd to 5th defendants and / or their families are trespassers on the suit land;
- (d) An order of eviction against the defendants and their families from the suit land;
- (e) A permanent injunction to restrain the defendants and their families from occupying or continued occupation, entering into, building any structures, fencing or destroying any fence, encroaching onto, wasting, damaging, leasing, selling, transferring, cultivating, tilling, grazing and /or dealing in any manner whatsoever and/or in any other manner interfering with the possession and /or ownership of the suit land;
- (f) Damages and mesne profits;
- (g) Costs and any of further relief the court may deem fit to grant.

The foundation of the plaintiff’s claim was that she was the registered owner of the suit land and in 1987 allowed the 1st defendant to stay on the suit land with her family as she looked for where to live; that she withdrew and or terminated her license and in 2003, 2004, and 2005 sought the eviction of the 1st defendant and her family from the suit land; that notwithstanding, the withdrawal/termination of her licence, the 1st to 5th defendants continue to trespass on the suit land hence the suit.

Simultaneously with the filing of the plaint, the plaintiff took out a summons in chambers in which she

sought an interlocutory order of injunction to restrain the defendants from entering, re-entering, ploughing, tilling, building any structures, fencing and / or felling trees, leasing out, selling, transferring and / or dealing in any manner whatsoever and/or in any other manner interfering with the possession and / or ownership of the suit land, pending the hearing and determination of the suit. All the defendants filed a joint defence in which they denied the plaintiff's claim. The 1st defendant specifically pleaded that she married the plaintiff under Nandi Custom of "**Woman to Woman marriage**" in 1987 and has since been a lawful wife to the plaintiff. The 2nd to 5th defendants averred that they entered the suit land lawfully and consentiously but that the 5th defendant had since left the same. In paragraph 10, the defendants pleaded that they have never laid claim to the suit land but the 1st defendant sought reciprocal quiet possession of the land as the wife of the plaintiff.

The 1st defendant, in her replying affidavit to the plaintiff's application for interlocutory orders of injunction, reiterated her status as the plaintiff's wife and that in that capacity, she had leased portions of the suit land to the other defendants for varying periods of time.

The plaintiff appeared ex-parte before **Gacheche J.**, on 31st March, 2005, and on her being satisfied with the prima facie merits of the application, granted an interim injunction in the terms sought in the application, pending hearing of the application inter-partes. The application does not appear to have been heard inter-partes but the interim order of injunction was extended from time to time.

The plaintiff then transferred the suit land to one **Johana Kipkemei** on 3rd March, 2010. That event appears to be the foundation of the defendant's application dated 16th August, 2011. The application is expressed to be brought under the provisions of sections 1A, 1B, 3A, 52, and 63 (e) of the Civil Procedure Act and order 51 Rule 1 of the Civil Procedure Rules.

The application seeks a raft of orders expressed as follows:-

- 1). That the plaintiff be summoned to court to explain how the court orders of injunction issued on 31st March, 2005 were raised.
- 2). That a Commission to examine **Johana Kipkemei** on how he acquired the suit land be issued.
- 3). That the court does investigate or commission an investigation of how the Court Orders registered on 3rd February, 2010 were obtained and registered.
- 4). That the Court restores the suit title to the plaintiff and the orders pre-existing before 3rd February, 2010 be re-registered.
- 5). That the plaintiff be compelled to provide for the 1st defendant and her children.
- 6). Costs.

The gist of the application is that an injunction order was issued in this suit preserving the suit land until the determination of the case, yet the suit land has now been transferred to a third party in circumstances which afford a reasonable suspicion of fraud and impropriety. In the premises, the defendants contend that it is fair and just that the suit land be preserved. The supporting affidavit sworn by the 1st defendant elaborates that position.

The application is opposed and there is a replying affidavit sworn by the plaintiff. It is deponed in the affidavit, *inter alia*, that the 1st defendant is not married to the plaintiff; that the injunction was not issued in favour of the defendants; that the said order was not registered against the suit land; that she has lawfully transferred the suit land elsewhere and that she required no consent of the 1st defendant to do so; that she was not duped in the transaction and that the application of the defendants is bad in law.

The application was argued before me on 26th October, 2011 by **Mr. Ngigi**, learned counsel for the defendants and **Mr. Wafula**, learned counsel for the plaintiff. Counsel maintained the positions taken by their clients in their respective affidavits. Counsel for the defendants introduced alleged breach of Constitutional Provisions in his submissions whereas counsel for the plaintiff countered that the matter was not founded on breach of constitutional provisions.

I have considered the pleadings, the application, the affidavits filed and counsels' submissions. I have also given due consideration to the authorities relied upon by counsel. Having done so, I take the following view of the matter.

The root of the defendants' application must be in the order of temporary injunction granted on 31st March, 2005. The said order is exhibited by the defendants as "**HTI**" to the application. That order reads as follows:-

"It is hereby ordered that:

- (1) Service of this application be dispensed with in the first instance;
- (2) A temporary injunction order do issue against the defendants jointly and severally, their family members, agents and or servants by this honourable Court restraining the defendants jointly and severally, their family members, agents and or servants from entering, re-entering, ploughing, tilling, cultivating, planting, grazing, building any structures, fencing and or destroying any fence , felling trees, leasing out , selling, transferring and or dealing in any manner whatsoever and or in any other manner interfering with the possession and or ownership of all that piece and parcel of land known as Nandi/Kilibwoni/1023 pending the hearing and determination of this application.
- (3) Inter-partes hearing on 13th April, 2005.

That order, as it is self explanatory, was obtained exparte and was given on the plaintiff's application against the defendants, among other people. The order restrained the defendants, among other people, from doing the acts specified therein. The order could not restrain the plaintiff in any way. The copy of the order exhibited was not registered against the said land as it does not have the registration stamp of the relevant Land Registry It beats reason that it is the same order upon which the defendants base their application.

The defendants have not demonstrated that any other order was given in these proceedings restraining the plaintiff from otherwise dealing with her piece of land. I have on my own detected none. As at the time the interlocutory injunction was issued, the suit land was registered in the name of the plaintiff absolutely. I have perused the copy of the Green Card exhibited by the defendants as "**HT 2**". The same indicates that on 27th November, 2009, a restriction was noted on the register of the suit land restricting dealings on the register until this suit is heard and determined. On that date i.e 27th November, 2009, this court had not issued any order in respect of the suit land. Then there is an entry made on the register that on 3rd February, 2010, the restriction referred to above was removed vide a court order. The property was on the same date transferred to one **Johana Kipkemei** whose particulars are given in the register. It is common ground that no order was issued in this suit removing the restriction. Then there is another entry made on 19th May, 2011, restricting the suit land on the basis of an advocate's letter.

It is apparent that none of the parties to this case sought and or obtained orders restricting or removing any restriction against the suit land.

It is therefore obvious that the said restrictions or removals of the same were affected by the relevant Land Registrar on the basis of information only he himself knows. The registered proprietor however, never sought those restrictions and was not impeded in any way in dealing with his property. She swears that she was not duped or otherwise unfairly, influenced when she transferred the suit land to the said **Johana Kipkemei**.

Having found that there was no impediment to the transfer of the suit land by the plaintiff to the said **Johana Kipkemei**, the complaints made by the defendants really have no substance.

There is therefore no basis to make any of the orders sought by the defendants in their application under consideration. It would also offend the Rules of natural Justice to make orders against a party who

has not been joined in these proceedings.

I also note that the defendants have not cross-claimed for anything in their pleadings. They all indeed acknowledged the plaintiff's title to the suit land. There is therefore also no basis to make an order against the plaintiff to make provision for the 1st defendant and her children in this application.

Before concluding this ruling I feel impelled to comment on the defendants' attempt to invoke the Constitution in this application. The attempt, in my view, would appear to have been an afterthought as nowhere in the pleadings and the application was breach of Constitution alleged. The submissions based on the Constitution therefore do not deserve a detailed discussion in this ruling.

The upshot of this matter is that the defendants' application dated 16th August, 2011, is without merit and is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT ELDORET
THIS 7TH DAY OF DECEMBER, 2011
F. AZANGALALA
JUDGE**

**Read in the presence of :-
Mr. Wafula for the plaintiff and the respondent.**

**F. AZANGALALA
JUDGE.**