

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 15 of 2008

LEAH CHEPCHUMBA SUGUT:.....APPLICANT

VERSUS

KERING SUGUT ALIAS

STEPHEN KIPCHUMBA SUGUT:.....ARESPONDENT

RULING

Before the court is an application by way of Chambers Summons brought under Order XXXVI Rule 12 and Order XXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. This ruling relates to prayers e, f, g, h, and I, the earlier prayers having been dealt with in an earlier ruling. These prayers seek orders restraining the respondent, his servants, agents and employees, possessions and assigns or anybody acting for or through him from selling, entering into an agreement for sale, wasting or in any manner alienating, transferring, completing any conveyance whatsoever, charging, mortgaging, damaging, disposing of the properties therein listed, heads of cattle and other livestock at the matrimonial home, farm machinery including posho mills, motor vehicles, freezing bank accounts until the application is heard inter partes and later until the suit is heard and determined.

The application is grounded on the basis that the Respondent has the possession and control of the above mentioned properties and such properties were acquired by the joint efforts of both the Applicant and the Respondent and the Respondent holds the same in trust for himself and the Applicant. That there is real danger that the Respondent may alienate the said properties to the detriment of the Applicant and render the suit nugatory. That the Respondent has in the past alienated part of the property held in trust for the applicant exclusively to his benefit, that the Applicant has a prima facie case with high chances of success and has given an undertaking as to damages and if the orders sought are not granted the Applicant would suffer irreparably. The Applicant swore an affidavit in support of the application deponed as above only adding that the Respondent chased away the Applicant from the matrimonial home and he could deal with the properties of both of them to the detriment of the applicant and it is only right that the properties be preserved until the suit is heard. About the bank accounts the Applicant swore that some of the funds therein banked are from the proceeds of the sales of properties acquired by both of the parties herein.

The Application was opposed and a Replying Affidavit sworn by the Respondent was filed in which it is denied that the Respondent chased the Applicant from the matrimonial home but that she of her own accord left the matrimonial home and attempts to get her back have been unsuccessful. The Respondent depones that he acquired the properties in issue single handedly and whatever has been disposed off was so done jointly and for the school fees of the children of the parties herein as well as for their grandchildren. With leave of the court the Applicant filed a further affidavit countering the averments in the replying affidavit and a supplementary Replying affidavit was similarly filed.

At the hearing it was urged for the Applicant that all the properties in issue were acquired during the subsistence of the marriage and the Applicant contributed to their acquisition and that the Respondent was disposing off the same to the detriment of the Applicant. The Applicant's counsel submitted that a prima facie case had been made to warrant the grant of the orders sought.

For the Respondent it was submitted that the parties herein are still husband and wife and no matrimonial

proceedings had been commenced. It was denied that the Respondent had done anything detrimental to the Applicant. In a brief reply it was submitted for the Applicant that there need not be a divorce for S.17 of the Married Women's Property Act to come into operation.

The dispute here is between warring/earstwhile spouses. It has not been denied that the two have lived apart since 2006. It was not denied also that when the Applicant went back to the matrimonial home she was anot welcome as the Respondent saw her return as an act to vex him and to create a scenario for physical fights. It was also not denied that the properties in issue were acquired during the marriage between the parties, the issue of personal contribution is not for this court to determine at this stage that being for the trial judge. It is quite clear that the Applicant is not in possession or control of the assets in issue and the possibility that the Respondent could deal as he wishes with the same is real and palpable. In my considered view Applicant has made out a case to warrant the issuance of the orders sought. It has to be understood that this is matrimonial property and until the same is distributed either by the consent of the parties, which is unlikely in the instant case, or by an order of the court, the interest of justice requires that the same be preserved pending the determination of the suit. I was not shown any law or authority that would stop the court from interfering in this case. The conditions for granting an injunction that is to say that the Applicant has shown the existence of a prima facie case with a probability of success at trial and loss could be occasioned not adequately compensetable in damages have been met in my view. I am not in doubt above the above but even if there were to be any doubt I would hold that the balance of convenience tilts in favour of the grant of an injunction to preserve the matrimonial property until the suit is heard and determined. Accordingly I grant orders in terms of prayers e,f,g and h. Costs will be in the cause.

Orders accordingly.

DATED AND DELIERED AT ELDORET THIS 18TH DAY OF NOVEMBER 2009.

P.M.MWILU

JUDGE

IN THE PRESENCE OF

Mr. Mwinamo for the Applicant

Mrs. Toigat for the Respondent.