REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

Civil Case 42 of 2006

ELIZABETH LANGAT.....PLAINTIFF

VERSUS

HELLEN LANGAT.....1ST DEFENDANT

KIPSOIARAP LANGAT.....2ND DEFENDANT

RULING

The applicant, Elizabeth Langat is the wife to the 2nd respondent Kipsoi Arap Langat. The 1st respondent, Hellen Langat is the co-wife to the applicant. On 5th December, 2006, the applicant filed an application under Order XXXIX Rules 1 (a), 2A (1), 3 (1) of the Civil Procedure Rules and Section 3A and 63 (c) of the Civil Procedure Act seeking the orders of this court to restrain the 2nd respondent from subdividing, demarcating, disposing off, transferring or dealing adversely with parcel No. Kericho/Kipkelion/Barsiele block 7(Masibun)/58 (*hereinafter referred to as the suit land*) pending the hearing and determination of the suit. The grounds in support of the application are that the applicant contends that she is apprehensive that the 2nd respondent intends to deal with the suit land to her detriment as a beneficiary of the said parcel of land. The application is supported by the annexed affidavit of the applicant.

The application is opposed. The 2nd respondent has filed a replying affidavit in opposition to the application. He deponed that he had subdivided the suit land so as to settle the members of his family. He deponed that he had settled the applicant on two other parcels of land while he intends to settle the 1st respondent on the suit land. He deponed that the allegation by the applicant that she had participated in the purchase of the suit land were not true. He deponed that he purchased the suit land using his own resources. He deponed that he had no intention of disposing off the suit land and only intends to settle the members of his family by subdividing the same among them. He further deponed that the applicant was unhappy that he had not taken into account her wishes when he made the said subdivision. He urged this court to disallow the applicant's application with costs.

At the hearing of the application, I heard the submissions made by Mr. Bii, Learned counsel for the applicant and by Mrs. Bett, Learned counsel for the 2nd respondent. I have also carefully read the pleadings filed by the parties to this application. The issue for determination by this court is whether the applicant has established a case so as to enable this court to grant her the orders of interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the said application for injunction are well settled. In Giella vs. Cassman Brown [19731 EA 358, the Court of Appeal held that an injunction would normally not issue unless the applicant has established that he has a prima facie case with a probability of success. The applicant must also establish that he would suffer irreparable injury which is unlikely to be compensated by an award of damages. Finally, if the court is unable to decide the application on the above principles, then it will decide the application on a balance of convenience.

In the present application, the issues raised by the applicant are rather novel. The applicant's suit is based on adverse possession. The applicant claims that she should be declared to have acquired title of the suit land by adverse possession. As stated at the beginning of this ruling, the applicant is the wife to the 2nd respondent. From the pleadings filed, there is nothing to suggest that they are either separated or divorced.

This court is unable to comprehend how a wife who has resided on a parcel of land belonging to the husband, with his permission, would file a suit that she be declared to have acquired title in respect of the said parcel of land by adverse possession.

This is the first case that this court has dealt with where a wife is seeking to be declared to have acquired a parcel of land registered in the name of the husband by adverse possession. Adverse possession, by its very nature is the hostile take over of a parcel of land by a person who is in possession of the said parcel of land. A case similar to the present one was decided by Owuor J (*as she was then*) in Nyambura vs. Nthige [1987] KLR 594 where she held that a wife cannot acquire by adverse possession a parcel of land which is registered in the name of her husband. I agree with her decision. This is because one of the principles to be considered by the court in deciding whether or not adverse possession has been proved is whether the person seeking to be so declared has been in possession of the suit land without the permission of the registered owner. In the present case, it cannot be said that the applicant is residing on the suit land without the permission of the 2nd respondent, her husband.

It is therefore clear from the aforegoing that the entire foundation of the applicant's suit is a quicksand. It cannot therefore be said that the applicant will establish a prima facie case if this court were to grant her temporary injunction. The applicant in this case is unhappy with the proposed subdivision of the suit land by the 2nd respondent. It is apparent from the affidavit evidence on record, that the 2nd respondent intends to subdivide the suit land so as to settle the members of his family. The applicant wants a say in the manner in which the said parcel of land is to be subdivided among the members of the family of the 2nd respondent. Unfortunately for her, there is no law that can compel a registered owner to deal with a parcel of land in a particular way especially when the person seeking such compulsion has no registrable interest on the said parcel of land. In a recent Court of Appeal decision at Nyeri i.e CA Civil Appeal No. 181 of 2002 Margaret Mumbi Kagiri vs. Kagiri Wamaire & 3 others (*unreported*), the Court of Appeal held at page 9 of its judgment as follows:

"Again, if the appellants claim was based on the fact that she was the wife of the 1st respondent, that claim was bound to fail too. From the pleadings, the Learned judge made a finding that the original piece of land was exclusively registered in the name of the 1st respondent. It was also not disputed that the suit land was registered under the Registered Land Act (cap 300) Laws of Kenya

tion 27 (a) of the Act".

This court is therefore unable to hold that the applicant has established a prima facie case. The dispute between the applicant and the 2nd respondent is a family dispute and ideally should be resolved in a family setting. There is nothing the law can do to address the sense of grievance that the applicant feels in the manner in which the 2nd respondent is dealing with the suit land.

The upshot of the above reasons it that the applicant's application lacks merit and is hereby dismissed with costs.

DATED this 22nd day of March, 2007.

L. KIMARU

JUDGE