



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 2 of 2007

RUTH NJERI PLAINTIFF

VERSUS

CHARLES LILECHI LUGANO DEFENDANT

RULING

By a plaint dated 13th February 2007, Ruth Njeri sued Charles Lilechi Lugano seeking a declaration that,

- (a) *“there arose a presumption of marriage by virtue of long cohabitation and repute between her, the plaintiff and the defendant,”*
- (b) *a permanent injunction restraining the defendant its agents, servants and or people claiming through it from the suit premises LR No. 209/12221/27, House No. 222 FIVE STAR ESTATE PHASE II, SOUTH C, NAIROBI”.*

The plaintiff also prayed for the costs of the suit.

Grounded on the plaint, and filed the same day as the plaint was a chamber summons application seeking orders of injunction, *“directed at the defendant, his employees, servants, agents or anyone acting on his behalf from entering into, trespassing onto, evicting and or removing, alienating, committing acts of waste, or dealing in any manner with L.R No. 209/12221/27, House No. 222, Five Star Estate, Phase II, South C, Nairobi,”* pending the inter partes hearing of the application, etc etc.

Ruth Njeri’s affidavit supported her application to court.

In it she averred, inter alia, that, *“the defendant my husband is the registered owner of all that property known as.....”*

She averred further that the defendant purchased the property for “her” and their son Dennis Lilechi Lugano, born on 22nd January 1990.

Para 5 of the affidavit explains how the plaintiff came to take possession of the premises, and at para 8, Ruth averred,

“My son and I have beneficial interest in the said property which the said Charles Lugano Lilechi purchased for me and our minor son”.

Annexed to the affidavit were receipts of school fees for Dennis paid by the defendant, “family photographs” as the plaintiff called them, showing the plaintiff, the defendant Charles and in one of them Ruth and Dennis their son and again Charles, Ruth and Dennis and finally, Charles and Dennis.

There were also letters written to Master Dennis by his father Charles, the defendant.

Messrs Lutta & Co. advocates entered appearance for the defendant, and filed a replying affidavit which was sworn by the defendant Charles Lilechi Lugano on 16th February, 2007.

Charles denied having been married to Ruth Njeri “at any time”. Instead, he annexed a marriage certificate issued to him and his wife Alice Maina Lilechi, on 31st December, 1995 in Kitale.

But he conceded,

“the plaintiff and my self are parents of Master DENNIS LUGANO, who was conceived and born out of wedlock when we were friends”.

The defendant averred further at para 9,

“That I have been undertaking my parental responsibilities towards the said son, Master Dennis in terms of payments of his upkeep, shelter and education as a father would do towards his child.....”.

The application was 1st tabled in court on 13th February, 2007, *ex parte*. I directed that it be served. This was done and on 19th February 2007, I granted temporary orders of injunction in favour of the plaintiff who was also granted leave to file a further affidavit, at the request of her lawyer. This was to respond to the defendant’s replying affidavit.

Paragraph 6 of the further affidavit responds specifically to para 9 of the replying affidavit of Charles and states,

“Paragraph 9 of the replying affidavit is indeed partly true as the defendant has all through related to us as his family by providing us with our upkeep and shelter which is where he unfortunately wants to evict us from”.

Arguing the application in court, Mr. Lutta, advocate for the defendant submitted that the defendant was in the process of purchasing the suit premises and indeed paid the whole purchase price of Kshs.4,85 million and the agreement of sale was signed, but it was the plaintiff who entered the house sometime in 2006 and the defendant subsequently cancelled the sale. That in those circumstances, he cannot evict the plaintiff because he has cancelled the sale which means he no longer owns the house.

But counsel for the plaintiff submitted that the contents of the plaintiff’s further affidavit at para 12 shows that the defendant Charles still owns the suit premises, having purchased it.

Paragraph 12 of the plaintiff's further affidavit reads,

“That paragraph 25 of his (Charles') affidavit is false as the contract of sale is complete and he (Charles) has no evidence to show that there was any breach of the same on either his part or that of the vendors, and his statement is only meant to mislead this court.....”

Mr. Waiganjo for the plaintiff prayed the court to grant the injunction, *“to enable the plaintiff to call evidence to show that she is a wife.....”*.

Mr. Lutta submitted further that the plaintiff's proceedings before court are not “proper”. That the plaintiff should have filed originating summons under the Married Women's Property Act, if she maintains that there is a marriage between her and the defendant Charles.

He referred the court to the Court of Appeal authority of THE SPEAKER OF THE NATIONAL ASSEMBLY – vs – HON. JAMES NJENGA KARUME, where it was held inter alia, that where there is a clear procedure prescribed by the Constitution or an act of Parliament, that procedure should be strictly followed.....

Mr. Lutta urged the court to follow the laid down procedure in matters of this nature, as the court's jurisdiction has not been properly invoked.

He referred to the defendant's affidavit which denies any marriage between him and Ruth Njeri. The defendant, however, conceded that he fathered master Dennis, to which Mr. Lutta submitted,

“the existence of a child does not result into a marriage. Charles is married to somebody else as he has sworn. He has no capacity to contract another marriage. To this extent, he relied on the authority of NJOROGI vs NJOROGI where the Family Law issues dealt with by Ojwang, Ag. J (as he then was) were whether a valid marriage can be contracted alongside a monogamous marriage protected by laws..... and the Judge found inter alia, that

“Even though the applicant had associations with the deceased, Section 37 of the Marriage Act provided an unchallenged protection to the 1st respondent's monogamous marriage.....”

Mr. Lutta invited court to look at the pictures annexed by the plaintiff which he said are “old”.

To this, the plaintiff said the following in her further affidavit at para 13,

“the facts are that they were taken early in our marriage when Dennis was much younger, and much later in our marriage when he was older and in school”.

According to Mr. Lutta, the plaint is brief and does not contain any averment of “cohabitation”. It seeks a declaration of “*presumption of marriage*”, and since it does not allege that Charles is not looking after Ruth and Master Dennis, “**no** cause of action has arisen”, and further, there is no evidence that the defendant gave the house to the plaintiff, who has not shown any evidence of contribution to the property.

Mr. Lutta’s letter dated 15.2.2007 cancelling the sale was annexed to the replying affidavit. Mr. Lutta’s final submission was that Charles the defendant does not “**own**” the property, so no orders can be issued against him. He referred to a Certificate of Title annexed to a letter sent to his firm dated 14.8.2006, by the Vendor’s advocates, Messrs Taibjee and Bhalla, advocates.

Mr. Waiganjo for the plaintiff submitted in reply that Charles, the defendant has provided shelter for the plaintiff and Master Dennis, his son, and that is what he has done by putting them into this house, from where he now wants to evict them.

The advocate urged the court to find that though Charles purported through his lawyer to cancel the sale of the maisonate and ask for a refund of the purchase price, no evidence was adduced to show that the sale was actually cancelled and the purchase price refunded. He prayed the court to grant the injunction sought.

I granted the advocates leave to file further submissions, if they so wished but they did not.

For the purposes of the injunction application, I have considered issues raised in the plaint, the affidavits plus the various annexures as well as the oral submissions from both advocates.

As already stated, the plaint seeks, inter alia, a declaration of

“a presumption of marriage by virtue of long cohabitation and repute, between the plaintiff and the defendant”.

As no defence to this suit has been filed, as yet, the averments in the defendant’s replying affidavit and submissions is all I can go by. These are such averments as the denial by the defendant of the alleged marriage between him and the plaintiff, and further, at para 5 of the replying affidavit, such averment as, “I am lawfully wedded to MRS. ALICE MAINA LILECH, having been publicly wedded to her on 31st December 1995, in Kitale”, and again at para 12 which reads,

“that I will be guilty of adultery and bigamy if I related with the plaintiff as husband and wife. I have no capacity to contract another marriage.” And further “That the plaintiff and myself are parents of Master Dennis Lugano who was conceived and born out of wedlock when we were friends”.

I am considering the above averments by the defendant against the plaintiff’s statement in the plaint at para 3 that,

“The plaintiff has been living with the defendant as husband and wife since the year 1986 and they were blessed with one issue namely Dennis Lugano Lilechi born on 22nd January 1990.”

So I may pose the question here, that of the 2, whose story is to be believed? Is it the plaintiff or the defendant as far as their relationship is concerned, the relationship which started in 1986 and resulted in the birth of Master Dennis Lugano in 1990?

It is the relationship and or association which the plaintiff is asking the court in the plaint to, “*presume as a marriage by virtue of long cohabitation and repute...*”

Further evidence on record shows that the relationship between the plaintiff and defendant existed before the defendant’s statutory marriage to Alice Maina Lilechi on 31.12.1995 in Kitale.

When I consider the evidence on record, I find that I am unable to make a conclusive decision on this point at the moment without further evidence to clarify certain issues. It is only after such further evidence that I can decide whether this case falls within the principle of law enunciated in the decision of NJOROGI vs NJOROGI quoted above.

As the plaintiff is seeking a declaration of “*presumption of marriage*” between her and the defendant, I do not find the decision of THE SPEAKER OF THE NATIONAL ASSEMBLY vs HON. JAMES NJENGA KARUMUE, relevant to this case.

Having said the above, I now turn to the issue of the plaintiff’s occupation of the suit premises together with Master Dennis, who is Charles’ biological son whom he has been caring for by “paying for his upkeep, shelter and education”.

Charles does not, however, explain in what way he has been providing “shelter” for Master Dennis, whether by payment of rent or provision of a house. It is Ruth, the plaintiff, who gives this information in para 9 of her further affidavit when she says as I have already quoted,

“.....the defendant has all along related to us as his family by providing us with our upkeep and

shelter, which is where he wants to evict us from”.

(the above underlining is mine)

Ruth states further in the same affidavit that it was the defendant who directed her to find “**a suitable house**”, which she did, but the same was still under construction and when it was completed, “the defendant decided to proceed and buy the house for her and her son....”.

It is on record from the defendant’s counsel that he cancelled the sale of the house and asked for a refund of the purchase price. However, there is no evidence on the court file to that effect. Further was the denial by the defendant’s counsel of the ownership of the house in question by the defendant, but a reading of the defendant’s replying affidavit at paragraphs 18,19,20,21 and 22, reveals that the defendant bought the house, and this is, in my considered opinion shows that the house belongs to him.

Given the facts and circumstances of this case which I have considered in such great detail, I am satisfied that the plaintiff, Ruth Njeri, has established a prima facie case as far as occupation of the house is concerned, and is therefore entitled to the orders sought in the chambers summons application dated 13th February 2007.

I therefore proceed to grant prayers 2,3 and 4 in the following terms,

2. “That there be issued an injunction order directed against the defendant, his employees, servants, agents, or anyone acting in his name from entering into, trespassing onto, or evicting, alienating, committing acts of waste or dealing in any manner with the property known as L.R No. 209/12221/27, House No. 222, FIVE STAR ESTATE PHASE II, SOUTH C Nairobi, pending the hearing and final determination of this suit”.
3. There be issued an interim injunction directed against the defendant, his employees, servants, agents, or anyone acting in his name from entering into, trespassing onto, or evicting, alienating committing acts of waste or dealing in any manner with L.R No. 209/12221/27, House No. 222, FIVE STAR ESTATE, PHASE II, SOUTH C, Nairobi, pending the hearing and determination of this suit”, and
4. “The orders issued herein be served upon the OCS Langata police station, to ensure compliance”.

Finally, the defendant is condemned to pay the costs of this application.

Dated and Delivered at Nairobi this 10th day of May 2007.

JOYCE ALUOCH

JUDGE