



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 663 of 2007

PRISCILLA NJERI ECHARIA.....PLAINTIFF

VERSUS

PETER MBURU ECHARIA.....DEFENDANT

R U L I N G

The facts which gave rise to these proceedings may briefly be stated. The Plaintiff married the defendant in a civil ceremony held in Moscow USSR in 1964. As time went by their marriage hit the rock which culminated into protracted litigation which led into the dissolution of their marriage in Divorce Cause No. 55 of 1987. Another litigation followed for the distribution of the matrimonial property which ended in the Court of Appeal. Among the properties to be distributed was a piece of land in Kiambu known as LR TIGONI No. 6893 measuring about 118 Acres. The Court of Appeal awarded the wife 25 Acres and the rest went to the husband.

The order as extracted from the judgment of the Court of Appeal delivered on 2nd July 2007 read as follows:-

- (i) This appeal be and is hereby allowed.
- (ii) The order of Shields J dated 27th October 1993 and all consequential orders thereto be and are hereby set aside.
- (iii) There be substituted thereof a declaration that the Appellant and the Respondent hold beneficial interest in Tigoni LR No. 6893 in the proportion of three quarters ($\frac{3}{4}$) and one quarter ($\frac{1}{4}$) respectively.
- (iv) Tigoni LR No. 6893 be sub-divided and the appellant do transfer twenty-five (25) acres to the respondent.
- (v) The respondent's share be demarcated on the portion of the farm where the farm house and other buildings stand and shall include the matrimonial house and access to it.
- (vi) The parties shall pay for the subdivision and transfer charges equally.
- (vii) Costs in the superior court be paid by both parties equally.
- (viii) There be no order as to costs in this appeal.

Consequent to the said order of the Court of Appeal parties were to meet with a view to agreeing on how to effect the sub-division of the suit property in accordance with the Court of Appeal's order

aforesaid.

Apparently as gathered from the pleadings the portion to be occupied though the subdivision had not been effected was distinct and on the portion to be taken by the wife there were two houses which stretched to the portion designated for the husband and the husband sent his employees and/or servants who were harvesting tea indiscriminately including the portion designated for the wife.

This forced the wife to file this suit in the High Court being HCCC No. 663 of 2007 seeking among others an order for a permanent injunction restraining the Defendant by himself, his servants and/or agents or by anyone whomsoever interfering with her twenty five (25) acres portion of Tigoni LR No. 6893, damages for the trespass and loss of income and interest on damages and costs at court rates.

Simultaneously with her plaint the Plaintiff brought a Chamber Summons under certificate to urgency seeking injunctive orders to restrain the defendant either by himself his servants agents and/or employees or anyone whomsoever from trespassing, alienating or interfering with the Plaintiff's twenty-five (25) acres portion of Tigoni LR No. 6893 as outlined in the survey plan of Mr. Mugo Muriithi, Licensed Land Surveyor pending the hearing and determination of the Plaintiff's application dated 12th July 2007 in Civil Appeal (Application)75 of 2001. The application also sought that the costs be provided for.

The application came before the Duty Judge on 20th September 2007 who certified it urgent and fixed the same for interpartes hearing on 4th October 2007.

On 1st October 2007 Mr. Kamau Kuria filed Notice of Preliminary Objection to the Chamber Summons dated 7th September 2007 as well as the plaint seeking orders to strike them out with costs on the ground that the suit is invalid for offending mandatory provisions of Civil Procedure Act.

When the matter came before me for hearing on 4th October 2007 Mr. Kamau in prosecuting this preliminary objection submitted that the contention of the defendant is that the plaint as well as the Chamber Summons dated 7th September 2007 offend the provisions of Section 34 of the Civil Procedure Act which reads as follows:-

“34(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit

(2)

(3)”

Mr. Kamau submitted that all issues pertaining to execution ought to be handled or adjudicated upon by the court which passed the decree and not a separate court through a separate suit.

Mr. Njoroge counsel for the plaintiff in response to the preliminary objection submitted that Section 34 of the Civil Procedure Act does not apply in the instant suit as the issue here is not execution or discharge or satisfaction of decree

The issues in this suit is demonstrated from the claim in the plaint what the plaintiff is seeking in the plaint is an injunctive order restraining the defendant by himself, his servants or agents from trespassing alienating or in any manner whatsoever interfering with the Plaintiff's 25 acres of Tigoni LR 6893 awarded to her by the Court of Appeal as well as damages for trespass and loss of income.

The suit land was a matrimonial home which was shared through litigation. The Court of Appeal did resolve the dispute between the disputants who were at the time sweet lovers and did determine it finally. It gave Priscillah 25 acres to be carved out of Tigoni LR 6893 and it even intimated who should occupy where on the ground. But all that the Court of Appeal did was to declare the entitlement of each party but

as I said earlier this having been their matrimonial home, it has not been surveyed and bacons fixed. There is a process to be carried out to enable each party acquire registrable interest in the suit land. The parties ought to have commissioned a surveyor to subdivide the suit land and apply for registration as per Section 27 of the Registered Land Act Cap 300 interest in land can only be converted by registration. Before acquires interest in the 25 acres through registration her claim for trespass is not tenable. She is complaining that Peter is picking tea on her 25 acre portion. To bring this to rest both counsel to the parties in consultation with their clients should take up this matter in sober minds and commission a surveyor to move to the site immediately to survey the suit land and fix bacons and complete the process of transfer as soon as possible to enable each party to settle on his or her portion peacefully.

In the result the preliminary objection is upheld and the Plaintiff's Chamber Summons dated 7th September 2007 as well as the plaint is struck out with costs to the defendant.

Dated at Nairobi this 13th day of November 2007.

J. L. A. OSIEMO

JUDGE