



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 50 of 2004

ESTHER CHEPKEMOI KESUI PLAINTIFF

VERSUS

JOSEA KIPLAGAT KESUI DEFENDANT

JUDGMENT

The parties in this suit are husband and wife; **Esther Chepkemoi Kesui**, the plaintiff instituted this suit against her husband, **Josea Kiplangat Kesui** the defendant. The plaintiff has sought for an order that a permanent injunction restraining the defendant, his agents, servants and or employees from any way transferring, disposing or in any manner whatsoever with Land Title number **Molo South Langweda Block 3/11 (Set Kotes)**.

Simultaneously with the filing of this suit, the plaintiff also sought for interim orders of injunction to restrain the defendant from transferring the suit premises pending the hearing and determination of this suit.

On 16th March 2004, the court ordered that the *status quo* be maintained regarding the suit premises. This matter proceeded to the hearing before *Hon. Apondi J* who has since left this station and he heard the plaintiff's case. I heard the defence case and I now summarize the material that was placed before this court. It was the plaintiff's case that she married the defendant in accordance with the Kipsigis Customary Law in 1965. During the subsistence of the marriage, the parties were blessed with seven (7) children all of whom have attained the age of majority.

During the marriage, the plaintiff testified that they purchased the suit premises which was registered in the defendant's name in 1987. The plaintiff stated that in the year 2004, the defendant attempted to sell this parcel of land but two of the children successfully lodged a caution with the Land's office, that prevented the defendant from dealing with the parcel of land. However, the defendant bribed the two children who withdrew the caution and when the plaintiff inquired from the Land's office, she was advised to secure her interests by filing a court case, and hence this suit. The plaintiff contended that the suit premises was purchased for the benefit of the whole family. The defendant was registered as a trustee to hold the property on behalf of the plaintiff and the children. The plaintiff told the court that the defendant had deserted the home and started living with another woman at the shopping centre. Moreover, the defendant had on a previous occasion sold another plot being a plot with seventy (70) rental houses without involving the plaintiff and he did not share the proceeds from the sale. Besides the sale of the plot, the defendant also squandered a family business where they were running a wholesale shop in Bomet and the whole stock in trade worth Kshs.10 Million was wasted. The plaintiff further complained that the defendant sold two family vehicles; a Pick Up and Saloon car and did not account for the sale proceeds. The dispute was referred to the clan elders and the area Chief who declared that the

land should be utilized by both parties and the defendant was advised to return to his matrimonial home to stay with the plaintiff. However, the plaintiff persisted in his desire to sell the suit premises and thus the plaintiff filed this suit.

The plaintiff's case was supported by their son **Eric Langat**. He testified that the children have been cultivating the suit premises and he is opposed to the same being sold so that he and the other children can continue cultivating on the same.

On the part of the defendant, he filed a defence, he contended that the plaintiff's case is frivolous and she not being a registered proprietor of the suit premises, her interests in the same are non-existence in law. The defendant gave evidence and gave the details of how he purchased the suit premises single handedly. He educated his seven (7) children to the level of their attainment and even the last born who is a University student, he said he has been paying school fees. He produced a bundle of payment receipts for the monies he remitted to the University when **PW 2** was at the University in India and for the last born son at Jomo Kenyatta University of Science and Technology. The defendant denied that he has squandered the family fortunes and that selling the suit premises is a good thing as the property is not put into much use after the main house was demolished during the tribal clashes and the income he gets from there is only **Kshs.5,000/-** per month. The defendant testified that if he succeeds in selling the suit premises, the proceeds thereto shall be invested in completing a commercial plot where the monthly expected income shall be **Kshs.70,000/-**. Besides defendant said that the plaintiff owns her own property next to the suit premises a twenty two (22) acre plot as per the search certificate. She also owns about nine (9) acres in Sosiot which is through family inheritance.

The defendant is also the owner of several properties a 2½ acre also parcel of land within Kericho Municipality where he has built a matrimonial home with self contained bedrooms for the plaintiff. He also produced several titles for six parcels of land which he said were in his name. He therefore urged this court to dismiss the plaintiff's claim as lacking in merit.

From the above evidence, the issue for determination is whether the plaintiff has proved her case to the required standard. It is not disputed that the plaintiff is the wife of the defendant and the suit premises was acquired during the subsistence of the marriage. The contention is whether the plaintiff is entitled to the prayer sought, of permanent injunction. It should be born in mind that this is not a declaratory suit under the **Married Women's Property Act**. It is also not under the provisions of **Order XXXVI of the Civil Procedure Act**. This is a civil suit brought by way of a plaint. The other undisputed fact is that the defendant is the registered proprietor of the suit premises, there is no allegation of fraud or other overriding factors which are stipulated under **Section 30 of the Registered Lands (Cap 300) Act**. The evidence by the plaintiff, which was supported by her son was to the effect that it is the children who have been cultivating the land. The plaintiff resides in a matrimonial home within Kericho Municipality and runs a shop for her maintenance. She does not derive her livelihood from the suit premises. As regards the interest of the children, the defendant has given them reasonable education, they are also not residing on the suit premises. In the case of **Jecinta Wanjiku Kamau –vs- Isaac Kamau Mwangi C.A No. 59 of 2001**. The Court of Appeal while upholding the decision of the High Court whereby **Hon. Aganyanya J** had delivered himself as follows: -

“until recently it has never been the practice and certainly not a legal requirement that before the legal proprietor of a piece of land disposes of it he or she should consult any third party be it his/her husband or wife”

The court of appeal held

“That being the position, the 1st respondent was perfectly entitled to subdivide his land and sell it to any willing purchaser.”

Of course the defendant if he intends to sell his land, he has to seek the consent of the Land Control Board consent who have the duty of ensuring that proprietors of land do not sell their land while leaving their families destitute. Having considered all the evidence and the material placed before me, it is clear

the dispute herein involves the husband and wife and the wife could have sought her remedies by invoking the jurisdiction of this court under the provisions of **Section 17 of the Married Women's Property Act of England**. This civil suit under the civil jurisdiction, the plaintiff has failed to prove her claim to the required standard as the defendant's ownership of the title is not encumbered, there are no overriding interests; there is no caution over the property. Besides the plaintiff does not use or reside on the suit premises and accordingly her claim cannot be sustained. It is hereby dismissed. This being a family matter, there is no order as to costs.

It is so ordered.

Judgment read and signed on 8th December 2006.

MARTHA KOOME

JUDGE