



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 983 OF 2000

ESTHER MUTHONI KIMANI.....PLAINTIFF

versus

KHALID ABDALLA MOHAMMED.....1ST DEFENDANT

MARIAM SHARIF SAGAAF.....2ND DEFENDANT

RULING

On 27th June, 2000, the plaintiff filed her plaint and sought for declaratory orders as well as damages against her former husband and his mother. In her suit, in which fraud is alleged, she avers that her husband has fraudulently sold her matrimonial home to his mother, the 2nd defendant herein, thereby purporting to forever extinguish her claim to the said property.

On the same day when she filed the plaint, she also filed an application under order XXXIX rules 1, 2, 3 & 9 of the Civil Procedure Rules and sought several restraining orders. For this application which is now before me, Mr. Aloo learned counsel for the applicant seeks orders for only prayers Nos. 5, 6, 7, 8 and 9. These are:

5. Pending the hearing and determination of this suit, the Defendants herein be restrained, either by themselves or each of them, their and/or each of their agents, servants and or employees, by an order of injunction from selling, disposing of, alienating, wasting away and/or in any manner whatsoever interfering with the quiet possession and peaceful enjoyment by the plaintiff of the suit premises herein referred to as House No. 181, Nairobi Dam Estate, Title No. NAIROBI/BLOCK 106/218.

6. Pending the hearing and determination of this suit, the Defendants herein be restrained, either by themselves or each of them, their and/or each of their agents, servants and or employees, by an order of injunction from selling, disposing of, alienating and wasting away in any manner whatsoever and howsoever the suit vehicles, registration number KAB 170, Datsun and registration number KAK 323J Nissan Matatu.

7. Pending the hearing and determination of this suit, the Officer Commanding Station (O.C.S) Lang'ata Police Station be and is hereby ordered to enforce the Court order in terms of prayer 5 herein.

8. ALL FURTHER REGISTRATION or change of registration in the ownership, leasing, subleasing, allotment, user occupation or possession or in any kind of right, title or interest in the suit property House No.181, Nairobi Dam Estate, Title No. NAIROBI/BLOCK 106/218 **BE AND IS HEREBY PROHIBITED** until further orders of this honourable court.

9. Costs of this application be provided for.

The vehicles had already been transferred to a third party while the house was transferred to 2nd defendant.

The defendants have raised preliminary objection on points of law to the application and to the suit as a whole. It is their contention that the same are an abuse of the process of the court as the plaintiff has filed several other cases in other courts, which suits involve the same subject matter and the same parties. Indeed in paragraph 23 of her supporting affidavit, the plaintiff has acknowledged the existence of HCCC No. 1186 of 1999 between herself and the two defendants, which suit involves the subject premises. I find that quite contrary to the above fact, the plaint contains an averment that “there is no other suit pending and/or previous proceedings” between herself and the defendant over the same subject matter. She has also sworn an affidavit in support of the averments contained in the plaint.

In his objection to the preliminary objection, Mr. Aloo while not denying the existence of the other suits submitted that the issue of fraud had not been pleaded in the previous suits. However, in my humble opinion, what the plaintiff should have done, upon realising that the suit premises had been transferred, was to amend her pleadings in the other suit, instead of taking this new action. To allow her to come to court again by way a new and different suit, because she has realised that the properties have since been transferred would be to her contravene Section 6 of the Civil Procedure Act, which stipulate that:

“The court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim; litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

Where a litigant acts in contravention of that section, the court would normally stay the later proceedings, but I shall now proceed to determine the other issues raised in the application and shall refer to the matter at a later stage.

The applicant was married to the 1st defendant under Islamic law, the divorce between the plaintiff and the 1st defendant was pronounced on 28th September 1999. Under Islamic law and as clearly spelled out by the Chief Kadhi, after divorce she could only remain in the matrimonial home, after the waiting period known as Eddat which extends for three months if she is not pregnant or until she gives birth if she is pregnant. Thereafter, if she wishes to remain therein, it would be upon agreement of both the parties. No such agreement has been displayed in this matter.

The 1st defendant had been estopped by any court order from transferring the property or from dealing with it in any manner, and in my view the act of transferring the property to the 2nd defendant was an act in contempt of the court for which act, the applicant is at liberty to prosecute.

The applicant alleges fraud. It must however be appreciated that at this interlocutory stage, this court cannot determine whether or not the transaction was fraudulent as alleged, as in order to determine that issue, it would require the taking of viva voce evidence at a full trial. But even if it were to be found at a later date that the transaction was fraudulent in my opinion the applicants claim would only lie in damages.

In view of the above, the applicant who was divorced and who would have no right to remain in the home as aforesaid and whose plaint did not include a prayer for any interim order, has not been able to establish that she has a prima facie case with a probability of success. That being the case then, the orders that she prays for cannot be granted, and the application is dismissed with costs.

I shall however not order a stay of the proceedings but do order that in the interest of justice this suit be transferred to Milimani Commercial Courts and it be consolidated and be tried together with HCCC 1186/99.

Dated and delivered this 7th day of February 2001.

JEANNE GACHECHE

COMMISSIONER OF ASSIZE.

Delivered in the presence of Mr. Onindo for the applicant and Mr. Muia for the respondent