



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

ELC CASE NO. 60 OF 2016

KIPKIRUI ARAP SOI.....PLAINTIFF/RESPONDENT

VERSUS

ESTHER CHEPKEMEI SOIDEFENDANT/APPLICANT

RULING

Introduction

1. By a Notice of Motion dated 21st February 2018, the defendant filed an application pursuant to Order 40 Rule 1(a) and (b), Rule 3(1) and (3) of the Civil Procedure Rules as well as sections 1A, 1B and 3A of the Civil Procedure Act seeking the following orders against the defendant;-

1. Spent

2. THAT the plaintiff by himself, his workers, employees servants, agents and/or those claiming through or under him be restrained from entering and/or interfering with the defendant's possession, use and/or occupation of the defendant's share of land measuring approximately ten (10) acres comprised in title Number KERICHO/KIPTERE/1621 and in particular from demolishing and/or damaging her dwelling houses, household items, selling, alienating, developing, leasing and/or in any way or manner dealing with the defendant's said portion of land until the hearing and determination of this suit.

3. THAT the costs of this application be provided for.

2. The application is supported by the Applicant's supporting affidavit dated 21st February 2018. The plaintiff/respondent opposed the application by filing his Replying affidavit dated 8th May 2018.

Facts in brief

3. The defendant/Applicant is the second wife of the plaintiff/applicant having celebrated their marriage by way of Kipsigis customary law in 1967 and since then they have been cohabiting together in her matrimonial home situated on a parcel of land known as KERICHO/KIPTERE/1621. As result of the said marriage the Applicant and the Respondent have been blessed with ten (10) children born between 1967and 1991.

4. The applicant avers that on 13th December 2017 the respondent and his grandsons, workers and servants destroyed the applicant's matrimonial home, burnt, destroyed and threw away her clothes and household goods in an attempt to evict the applicant. The applicant has attached photographs of the destroyed items as exhibit "EC2".

5. The applicant reported the matter to the police and the respondent's workers were arraigned in court and charged with the offence of malicious damage to property in Kericho CM Criminal Case no.3192 of 2017.

6. The applicant avers that as a result of the respondent's malicious and inhuman acts, she has suffered untold loss and mental anguish as she currently has no permanent abode. The applicant avers that if the respondent is not restrained by this honourable court she will suffer irreparable loss.

7. In his Replying affidavit the Respondent avers that he is the registered proprietor of land parcel number KERICHO/KIPTERE/1621. He admits that the applicant is his second wife but denies that she has been residing on the suit property. He avers that the applicant's sons have

made major developments on land parcel number KERICHO/KIPTERE/318 implying that that is where she should reside.

8. He claims that instead of residing on land parcel number 318, she has trespassed upon the suit property.

9. The application was canvassed by way of written submissions and the parties' advocates filed their respective submissions.

Issues for Determination

10. From the pleadings, affidavits and rival submissions, the main issue for determination is whether the applicant is entitled to an order of temporary injunction.

Analysis of the law and determination

11. It is not in dispute that the parties herein are husband and wife. It is also common ground that the respondent is the registered owner of land parcel number **KERICHO/KIPTERE/1621**. What is in dispute is whether the applicant is lawfully occupying the suit land in her capacity as the respondent's second wife.

12. It is the applicant's contention that the respondent being her husband, holds the suit land in trust for her and their children and he can therefore not claim that she is a trespasser.

13. Under Kipsigis customary law which is the law governing the marriage between the applicant and the respondent a husband is under an obligation to establish the matrimonial home for his wife or wives.

14. At this interlocutory stage, the defendant needs to demonstrate that she has satisfied the conditions for the grant of a temporary injunction set out in **Giella v Cassman Brown Company Ltd 1973 E.A 358** which are as follows:

- a) That one must establish a prima facie case with a probability of success
- b) That one is likely to suffer irreparable harm for which damages would not be an adequate remedy
- c) That if the court is in doubt, it shall decide the case on a balance of convenience

15. On the first point of law, the plaintiff has demonstrated that the suit property is her matrimonial home and that she has a beneficial interest therein even though she is not the registered owner thereof.

16. The Constitution of Kenya, 2010 has fundamentally altered property rights within marriage. Article 45 (3) of the Constitution provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. With specific reference to the matrimonial home Article 68 (c) (iii) paved way for the enactment of the Matrimonial Property Act 2013 and other laws which protect the matrimonial home. In particular section 12 of the Act provides as follows:

An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.

(2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

(3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.

(4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except—

- (a) on the sale of any estate or interest in the matrimonial home in execution of a decree;
- (b) by a trustee in bankruptcy; or
- (c) by a mortgagee or charge in exercise of a power of sale or other remedy given under any law.

(5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.

17. The plaintiff has therefore established a prima facie case with a probability of success.

18. On the question as to whether the applicant is likely to suffer irreparable loss, the applicant has been thrown out of her matrimonial home in a most callous, undignified and inhuman manner. The photographs annexed to her supporting affidavit depict her personal effects and household goods destroyed and strewn all over her compound. This is the only home she has known since she got married in 1967 and she must have a lot of sentimental attachment to it. The manner in which she was thrown out must have occasioned her great shame, loss and mental anguish which cannot be compensated by damages.

19. Even though I need not go into the issue of the balance of convenience as I am not in any doubt, it is worth noting that this is not an ordinary case of trespass to land but one that involves alleged trespass to land belonging to a spouse of over 50 years with ten adult children. The balance of convenience is therefore in favour of the applicant.

20. I am aware that granting the application would amount to granting a mandatory injunction which should be done sparingly. I am however satisfied that the circumstances of this case warrant such intervention to stem the sheer injustice occasioned to the applicant.

21. The upshot is that the application has merit and I grant the following terms:

1. A temporary injunction is hereby issued restraining the defendant by themselves, their servants or workers from harassing and/or interfering with the plaintiff's possession and occupation of her matrimonial home comprised in land parcel number KERICHO/KIPTERE/1621 measuring 10 acres pending the hearing and determination of this suit.

2. The costs of the suit shall be in the cause.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 4TH DAY OF JULY 2018.

.....

J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Koske for the Plaintiff/Applicant

2. Miss Ngetich for Mr. Orina for the Respondent

3. Court assistant – Rotich