



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC APPEAL NO. 6 OF 2019**

**JANE NJERI KROP.....APPELLANT**

**VERSUS**

**GEOFFREY PKITE MOSOL.....RESPONDENT**

***(Being an Appeal arising out of the Ruling of M.M. NAFULA, Resident Magistrate Kapenguria***

***in Kapenguria LandCase No. 2 of 2019 delivered on 26<sup>th</sup> December, 2019)***

**JUDGMENT**

1. This is an interlocutory appeal.

By a Plaint dated **18/1/2019**, the Respondent filed a suit against the Appellant seeking a declaration that the respondent is the lawful and registered owner of the parcel comprised in Title No. **WEST POKOT/KERINGET 'A'/2866** and further that the appellant is a trespasser thereon who should be ordered to vacate therefrom failing which she and anybody claiming under her be forcefully evicted. A permanent injunction was also sought together with costs of the suit.

2. In the Plaint, the respondent alleged that he bought land (the suit property herein) vide a sale agreement dated **25/08/2017** from one **Dismus Mngangat Tiltei** who is the husband to the appellant in which he paid full consideration; that as per the sale agreement vacant possession was to be given forthwith; that with the consideration the respondent paid, the appellant was bought land in Chepchoina but she refused to move out of the suit property; that the appellant is trespasser and she ought to be evicted from the land.

3. The Appellant filed a statement of defence and counterclaim dated **7/2/2019** contending *inter-alia* that the alleged sale of the suit property on **25/08/2017** is fraudulent and an illegality and that she would seek to have the same declared null and void; that the appellant resides on the suit property with the children of her marriage between herself and **Dismus Mngangat Tiltei**, and vacant possession cannot be given to the respondent; that there is no evidence that other land has been bought for her at Chepchoina as alleged by the respondent; that the respondent and the appellant's husband intentions are to render her (Appellant) landless; that she is not a trespasser on the suit property; that the respondent's claim is not merited as she is lawfully on the land.

4. In her counterclaim, the appellant states that she and her husband **Dismus Mngangat Tiltei** in the year **2009**, purchased Land Parcel No. **West Pokot/Keringet 'A'/2866** and constructed their matrimonial home on the suit property in the year **2009** and took possession in the year **2010**; that she has carried extensive developments on the suit property and continues to do so; that the agreement between the respondent and her husband is null and void; she prays the court to enter judgment in her favour against the respondent for an order declaring the agreement between the respondent and **Dismus Mngangat Tiltei** on **25/8/2017** null and void and an order for cancellation of the title deed issued to the respondent on **18/1/2018** together with costs of the suit.

5. The respondent filed his reply to defence and Defence to counter claim dated **27/3/2019** denying the averments contained in the Defence and Counter claim.

6. By Notice of Motion dated **25/2/2019**, brought under Certificate of Urgency, the appellant moved the court seeking for orders inter alia that temporary injunction be issued restraining the Respondent and his agents and or servants from evicting the appellant and or in any other way interfering with the appellant's peaceful use and possession of Land Parcel No. **West Pokot/Keringet 'A'/2866** pending the hearing and determination of the application and the suit and that the Court be pleased to place an inhibition order over Land Parcel No. **West Pokot/Keringet 'A'/2866**, restraining any dealings pending hearing and determination of this matter.

7. A detailed affidavit sworn by **Lydia Njeri Kiprop** dated **25/2/2019** was filed to support the application. The Respondent filed a replying affidavit dated **27/3/2019** denying all the averments in the supporting affidavit; however, he admits that he bought land from the appellant's

husband and was well aware that the appellant was residing on the land with her children at the time of the sale.

8. The Application before the trial court was canvassed by way of written submissions; the Appellant filed hers on the **27/8/2019** whereas the Respondent filed his on the **21/8/2019**.

9. The trial court delivered its ruling on the **26/9/2019** disallowing the appellant's application thus giving rise to the appeal before me.

10. The grounds relied upon by the Appellant in her Memorandum of Appeal are that:

**1. The learned magistrate erred in law and in fact when she dismissed the application dated 25<sup>th</sup> February, 2019,**

**2. The Learned Magistrate erred in law when she failed to appreciate the provisions of Section 93(3) of the Land Registration Act,**

**3. The Learned Magistrate erred in law and in fact when she held that the Appellant had not set out a *prima facie* case,**

**4. The Learned Magistrate erred in law and in fact when she held that the Appellant had to be the legal owner to establish her claim.**

11. She prayed that the appeal be allowed and the ruling of the lower court be set aside.

12. The appeal before me was canvassed by way of written submissions as directed by this Court. Both parties filed their submissions which I have considered.

13. Ms. Arunga counsel for the appellant submitted that the Appellant's husband Dismus Mnangat Tilitei sold the land secretly without informing her; that the appellant is the second wife of Dismus Mnangat Tilitei and the Appellant has been residing on the land since 2010 until when her husband deserted her and went to Makutano to stay there with his first wife.

14. The Appellant submitted that the trial court failed to take into consideration that the suit land is her matrimonial home and that spousal consent should have been sought and given before the sale; that the learned magistrate ignored that fact and dwelt only on the issue of an injunction.

15. The Appellant further submitted that her husband sold her land without her consent and that on several occasions she had sought the Chief's assistance to help her on the issue but her husband went ahead to sell the land; that the respondent was aware of the conflict between her and her husband on the disposal of the land but he still chose to buy the suit property.

16. The Appellant relies on the Provisions of **Article 45 (3)** of the **Constitution of Kenya 2010** which recognizes the family as a fundamental unit of the society; that parties to a marriage are entitled to equal rights at the time of marriage and at the dissolution of the marriage. She submitted that the suit property is their matrimonial property with her husband **Dismus Mnangat Tilitei** which ought not to be disposed without her consent.

17. The appellant also relied on a number of authorities which I have read and considered.

18. The Respondent also filed his submissions. He opposed the appeal and prays for dismissal of the appeal. Respondent's counsel submitted that the appeal is incompetent for the reason that the order of **26/09/2019** appealed against has not been incorporated in the record of appeal; that the order incorporated in the record of appeal was the one given on **13/03/2019** which granted an *ex parte* injunction, that the order appealed against is not on record; that the appellant was obliged to extract the order dated **26/09/2019**, have it certified and incorporate it in the record of appeal; that **Article 159 (i) (d)** of the **Constitution** and **Sections 3A and 3B** of the **Civil Procedure Act** cannot be invoked to cure the appeal; that even on merits the appeal has no chance; that the respondent is with effect from **18/01/2018** the registered owner of the suit land; that he bought it from the appellant's husband on **25/08/2017**; that the appellant has refused to move out of the land hence the suit for eviction; that though the appellant contends that the land sold to the respondent comprised her matrimonial home and that she did not consent to the sale, the appellant has not stated when she was married to her husband; that she does not state that she contributed to the purchase of the land; that the appellant's husband has a first wife namely **Rosaline Chebet Kudungole** and that by the time he bought the suit land he had not met the appellant and were not married then; that after selling land to the respondent, the appellants husband bought land in Trans-Nzoia where he intended to settle the appellant; that the appellant has refused to vacate the land which was sold to the respondent; that the contents of the replying affidavit were not controverted and that it is not true that the suit property was the matrimonial home of the appellant but was the matrimonial property of the appellant's husband first wife.

19. Learned counsel further submitted that on Ground **No. 2** of the Memorandum of appeal that appellants counsel was wrong in relying on **Section 93 (3)** of the **Land Registration Act** which is now repealed; that the trial magistrate cannot be faulted for failure to appreciate law that was deleted in **2016**.

20. Learned counsel for the respondent submitted that the suit property does not form part of the matrimonial property. He relied on **Sections 5, 7 and 8** of the **Matrimonial Property Act** which I will not delve much into at this stage; he also relied on a number of decided cases which I have considered.

#### **ANALYSIS AND DETERMINATION**

21. I have considered the parties' submissions, the record and the law; but before I delve into the merit questions for determination in the appeal, I will first address the technical issues raised by the respondent herein. The respondent alleges that the appeal is incompetent for lack of inclusion of the order that is appealed against. I note that in the record, there is a ruling which the appellant has appealed against. I find this a procedural technicality curable under **Article 159** of the Constitution and which is not fatal to the Appeal.

22. I find that the merit questions arising out of the appeal is whether in arriving at the impugned decision to decline the injunction orders sought, the learned magistrate erred in law and in fact.

23. So as to determine whether or not to grant injunction sought, the learned magistrate was exercising discretionary powers. That being the case, the court can only interfere with such discretion under certain well defined principles explicitly set out in the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** where the court held inter alia as follows:-

**“2 the Court of Appeal may only interfere with the exercise of a court’s judicial discretion if satisfied:-**

- a. The judge misdirected himself on law, or**
- b. That he misapprehended the facts; or**
- c. That he took account of considerations of which he should have not taken account ; or**
- d. That he failed to take account of consideration of which he should have taken account;**
- e. That his decision, albeit a discretionary one, was plainly wrong.”**

24. What was before the trial court was an injunction application therefore in deciding whether or not it should be granted, the court is required to satisfy itself that the principles as laid down in the case of **Giella vs Cassman Brown Limited (1973) EA 358** have been met. These are:

- “1. that an applicant must show a *prima facie* case with a probability of success**
- 2. that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages**
- 3. that if the court is in doubt, it will decide an application on the balance of convenience.”**

25. In deciding whether there was a *prima facie* case established, the trial Magistrate concluded as follows:

**“Since the applicant has not demonstrated before this court that she is the legal owner of the suit property, I find that she has not demonstrated a *prima facie* case as against the respondent.”**

26. A *prima facie* case is defined in the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125 Bosire, JA** defined a *prima facie* case as follows:

**“I would say that in civil cases it is a case on which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

27. Further in the case of **Nguruman Limited versus Jan Bonde Nieson & 2 Others (2004) eKLR** the Court of Appeal stated that:-

**“We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges....”**

28. I find that the learned trial magistrate misdirected herself in deciding that the appellant had not demonstrated that she is not the legal owner of the suit property. The appellant needed not to prove ownership at the interlocutory stage. In any event the appellant was challenging a registration that had been effected without her consent.

29. Indeed from the pleadings, it is not in dispute that the Appellant is the wife of the initial registered owner who sold and transferred the property to the Respondent herein. It is true that she does not have a title to the suit land. However, she may be having an unregistered interest attached to that land which needed protection by an injunctive order pending hearing and determination of the rights of parties in a final judgment in the suit.

30. I will refrain from delving much on the serious legal issues raised by the parties in this case at this stage since it is not part of the courts' function at this stage of litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may

ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. Those are matters to be dealt with at the trial. **See American Cyanamid Co. (No1) vs Ethicon Ltd (1975) UKHL 1**

31. I think that the learned Magistrate also failed to put into consideration that the appellant has been and is still in possession of the suit property with her children and that is the only place they call home a fact well known to the Respondent. In the event of any doubts, I think that the balance of convenience tilts in favour of the Appellant since she has admittedly been in possession of the suit land together with her children for a considerable duration of time and it is this land that she knows as home. If the respondent evicts them before judgment, the Appellant and her children shall suffer great loss.

32. All in all, I find that the issues both parties have raised need to be escalated to an oral hearing in court which will definitely make apposite findings. It will therefore be necessary to preserve the suit property pending hearing and determination of the main suit. Given the fact that the appellant is residing on the suit property together with her children the balance of convenience tilts on her favour.

33. I find that the appeal has merit and is hereby allowed. Consequently, the ruling and order of the lower court dated **26/9/2019** is hereby set aside and in lieu thereof I order as follows:

**a. That the *status quo* prevailing before the issuance of the order of the trial court of 26/9/2019 shall be maintained by the parties herein pending the hearing and determination of the main suit. For avoidance of doubt, the Appellant shall continue to be in possession of the suit land till hearing and determination of the suit.**

**b. Both parties should comply with the provisions of Order 11 of the Civil Procedure Rules within 21 days of delivery of this ruling and be heard on priority basis.**

**c. Costs of the appeal shall be borne by the respondent.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 3RD DAY OF MAY 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE**