



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

O S MATRIMONIAL CAUSE NO. 14B OF 2020

KM.....APPLICANT

VERSUS

MM.....RESPONDENT

RULING

1. Before the Court is an application dated 3rd February 2021 seeking inhibition orders preventing any dealings on the register of L.R No. TIMAU/SETTLEMENT SCHEME/[Particulars Withheld] and a temporary injunction restraining the Respondent from disposing off or alienating the said land and in the alternative, an order for maintenance of the status quo.

Applicant's Case

2. The Application is supported by the grounds on the face of it as well as by the Applicant's supporting affidavit sworn on 3rd February 2021. She states that she got married to the Respondent in 1958 under the Kimeru Customary Marriage; That she contributed to the acquisition of the suit property measuring approximately 18 hectares albeit registered under the Respondent's name; That at one time when the Respondent was imprisoned for over 7 years, she followed up on the issue of the land and paid all the requisite fees and that the Respondent came and found that she had already built a home thereon; That they have their matrimonial home on the suit land being a house she purchased from a white man; That since then, the Respondent has been mistreating her, quarrelling her and thrown her out of her house whilst allowing other to live thereon and has prevented her from utilizing part of her land; That on or about 27th, 28th and 29th January 2021, the Respondent came to the land with surveyors and purported to subdivide the land and allocate it to other people; That the Respondent has been threatening to lodge complaints at Timau Police Stations so that when she is locked in, he can easily subdivide and sell the land; That they had done a case with the Njuri Ncheke elders who ruled that she shall get a share of the land; That she has filed a divorce case being Meru Divorce Case No. 19 of 2020.

3. She also filed a supplementary affidavit sworn on 3rd March 2021 stating that she contributed more than 80% to the acquisition of the suit property which is more than 46 acres; That all her children are fathered by the Respondent; That she has never been married to any other man other than the Defendant and it is now that she is seeking a divorce; That the Respondent chased her from the suit land in 2017; That the Respondent participated in the case before the Njuri Ncheke and he called his witnesses; That from his averments the Court can only draw the conclusion that the Defendant is not a person of good character, he is not a fair person and is fighting with his children.

Applicant's Submissions

4. The Applicant also filed submissions dated 20th April 2021 claiming that she was prompted to file the instant application owing to the clear indications from the Respondent that he wanted to subdivide the land and give it to 3rd parties. That the Respondent had shown clear intentions of interfering with the register and as such, she has sought inhibition orders to preserve it pending the hearing and determination of the suit and it is therefore important to preserve its status. That she has also sought restraining orders so that the status of the land on the ground will remain the same. She submits that her affidavit, demonstrates that the orders sought are merited and that certain issues such as how the suit was acquired and contribution of each party towards the same, and if there was ever a divorce between the parties can only be proven by way of evidence.

Respondent's Case

5. The Respondent opposed the application vide his replying affidavit sworn on 18th February 2021. He states that he is the registered owner of the suit property which was allocated to him by the Government in 1964; That they were married in 1958 but divorced in 1984 and the Applicant therefore doesn't have to sue her as her husband to share his land with her; That out of the 6 children the Applicant has, only 2 are his biological children; That the Applicant never settled in marriage as she used to hop from one man to the other i.e she was married to Mr. M who she divorced in 1957; and married him; and later in the year returned to her husband's house; and in 1959 returned to the Respondent's house; and returned to her former husband in 1963 where his son was born; and that a year later she returned to him and that in 1967 she went back to her former husband; that they separated in 1984 and she returned to her parents home and in 1984, she got married to

his immediate neighbour; That after their separation, there were some reconciliation efforts but these were unsuccessful and they divorced; That she then returned to her son's home in his farm and he instructed them to settle in Plot No. [Particulars Withheld] Laikipia East which he had allocated her; That the Applicant never contributed any money towards paying the loan as alleged; That the Applicant's children have ignored and/or refused to vacate his land as was ordered by Court in Nanyuki CMCC No. 29 of 2017 prompting him to file a contempt of court application and he has reported the matter to the Police; That it is not true that he was ever imprisoned; That the proceedings before the Njuri Ncheke were biased; That all his children will own the land jointly through a company that he has incorporated where each child is a shareholder of the company.

Respondent's Submissions

6. He also filed submissions dated 8th April 2021. In his submissions, he highlights the provisions of Section 68 (1) of the Lands Registration Act which gives the Court powers to issue an inhibition order. Relying on the case of **Mwambeja Ranching Co. Limited & Another v Kenya National Capital Corporation Limited (Kenyac) & 6 Others (2015) eKLR** he submits that the orders of inhibition envisaged under Section 68 of the Lands Registration Act are in the nature of prohibitory injunction and they act to preserve the suit property just as an interlocutory injunction would do and that such applicant must satisfy 3 conditions i.e that the suit property risks being disposed of or alienated to the detriment of the applicant; that refusal to grant the order would render the suit nugatory; that the applicant has an arguable case.

7. He submits that in the present matter, he is the registered owner of L.R No. TIMAU/SETTLEMENT SCHEME/[Particulars Withheld] and that he has no intention whatsoever to dispose of his land and that he lives on the said land and he has established his home thereon; That the Applicant has no interest of any nature over the said property and she is being used by 3rd parties who are wetting their appetites over to have the said property against the wishes of the Respondent; That in particular, the children of the Applicant for whom he is not their father and third parties are eyeing to buy the land from the said children and their mother.

8. He submits that the Applicant has never been his wife and their relationship, if any did not amount to any form of marriage legally recognized by any system of law in Kenya as the Applicant would hop from one man to another as itemized in his replying affidavit. (**This averment is contrary to what is stated in his replying affidavit where he admitted that he got married to the Applicant in 1958**) He submits that they separated in the year 1984 and the Applicant only appeared in 2019 when she returned to her son who the Respondent asked to settle her in Plot No. 1019 Laikipia. That the Applicant has never been a wife to him.

9. He submits that the Applicant is being used as a conduit in the interests of 3rd parties and that she has filed several suits in different courts in the last one year with the intention to paint the Respondent a caricature that suits their interests and in particular, Tigania PM Divorce Cause No. 19 of 2020 despite that the Applicant and himself have never been married in any system of law recognized in Kenya and she does not enjoy the protection and privileges envisaged in the Matrimonial Property Act. He submits that the instant suit was filed with the ill intention of disobeying court orders issued in Nanyuki CMCC No. 29 of 2017 on 12th June 2018. He submits that he was allocated the suit land by the Government in 1964 through his own effort without any contribution from the Applicant or anyone else.

10. He highlights the definition of matrimonial property under Section 6, 7 and 9 of the Matrimonial Property Act, 2013 and states that the Applicant has never established her home on the Respondent's land L.R No. TIMAU/SETTLEMENT SCHEME/[Particulars Withheld] and that she has no matrimonial home there and the last time she was on the said land was in 1984 when she left the Respondent and went to look for greener pastures. That she never made any contribution towards the acquisition of the said property and that whatever contribution she made in maintenance, improvement of any has been overtaken by events and she is not entitled to a share of the said property. He submits that the Applicant has not proved that she has a *prima facie* case to warrant the court to exercise its discretion to grant the orders ought.

Issues for Determination

11. The only issue for determination is on whether or not to grant the inhibition order and/or restraining orders as sought by the Applicant.

Determination

12. An order of inhibition and a restraining order serve injunctive purposes. The principles for such applications are well established. An applicant must establish that he or she has a *prima facie* case with a probability of success; that if the orders sought are not granted he/she will suffer irreparable loss which would not be adequately compensated by an award of damages and if the court is in doubt, it will decide the application on balance of convenience (**See Geilla vs. Cassman Brown Ltd E. A 1973 pg. 358**).

13. This being an application filed in a matrimonial property cause, the test for determining whether there is a *prima facie* case is on whether the parties were married and whether the property in dispute is matrimonial property.

14. It is clear that the parties hereto were married in 1958. Although in his submissions, the Respondent denies having been married to the Applicant, in his replying affidavit, he admitted as much that the two were married. He states that they divorced in the year 1983. The Applicant has however annexed the proceedings of Meru Divorce Cause Number 19 of 2020 between the two. The Respondent has admitted this fact. In the premises, this Court concluded that the parties hereto are married and that there is a pending divorce cause.

15. Matrimonial property is defined under **Section 6 of the Matrimonial Property Act ("the Act")** to mean: -

a) the matrimonial homes or homes;

b) household's goods and effects in the matrimonial homes;

c) any other immovable or movable property jointly owned and acquired during the subsistence of the marriage.

16. *Section 2 of the Act* defines contributions as:-

“Monetary and non-monetary contribution and includes:

- a) domestic work and management of the matrimonial home.***
- b) Childcare***
- c) Companionship***
- d) management of family business or property and***
- e) work”.***

17. The search record dated 3rd August 2020 annexed to the Applicant’s supporting affidavit indicates that 17.506 Ha of the property belongs to the Respondent and 5.606 Ha belongs to someone else. There is also a caution by one SM who claims licensee interests.

18. Although the property is registered in the sole name of the Respondent, the Applicant claims that she paid the requisite fees and even bought a home from a white man, which home is situate on the suit property. She has however not attached evidence to support her allegations that she made some contributions either by way of receipts and/or any form of agreements to show that she bought the alleged house. This is however a matter that will be fully determined at the hearing of the main suit.

19. The Court has also observed some form of ruling issued in an alternative dispute resolution process, purportedly conducted by Njuri Ncheke elders following which the Applicant was allocated some property. The Respondent has raised questions on the fairness of that process. This notwithstanding, the fairness of this process is not a question currently before the Court. For this Court, the fact that parties seem to acknowledge that the process took place is a consideration that this Court will take into account.

20. Other than the allegations made in her affidavit, the Applicant has not annexed any real evidence to demonstrate that the Respondent is indeed about to subdivide the property. This Court is however alive to the need to preserve matrimonial property in view of the provisions of law requiring spouses not to dispose of matrimonial property without the knowledge or consent of either spouse. Section 12 of the Matrimonial Property Act, 2014 provides as follows: -

12. Special provisions relating to matrimonial property

(1) 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

21. Section 28 of the Lands Registration Act also identifies spousal rights over matrimonial property as one of the overriding interests that will affect the lands register without it being noted on the register.

22. In the premises, despite the lack of evidence to support the Applicant’s apprehension that the property is about to be sold, this Court observes that the parties hereto were indeed married and there is a pending divorce cause, and owing to the Petitioner’s interests in the suit property, this Court finds that the balance of convenience tilts towards preserving the suit property pending the hearing and determination of the matter. Should the Court fail to preserve the property and the same is indeed disposed, the matter will be rendered nugatory.

23. Noting that there is another party who has some 5.606 Ha interest in the property, this Court will not issue a blanket inhibition or restraining order to affect the entire parcel. In the circumstances of the case, this Court finds that an order for maintenance of the status quo, only with respect to the 17.506 Ha owned by the Respondent would best serve the interests of justice.

24. In the premises, the Court makes the following orders: -

i) An order of status quo maintaining the suit property as it is hereby issued.

ii) For the avoidance of doubt, this order only applies to the 17.506 Ha portion of the property registered in the Respondent’s name.

Order accordingly.

DATED AND DELIVERED ON THIS 10TH DAY OF JUNE, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S M. G. Kaume & Co. Advocates for the Applicant

M/S Maitai Rimita & Co. Advocates for the Respondent