



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C CASE NO. 30 OF 2019

ROSE NYABOKE MOSETI1ST PLAINTIFF

GEORGE OKERO MOSETI.....2ND PLAINTIFF

RICHARD OMITI MOSETI 3RD PLAINTIFF

DOUGLAS ONDIEKI 4TH PLAINTIFF

ERNEST ONDARI MOSETI.....5th PLAINTIFFS

VERSUS

CHRISTOPHER NYAMONGO MOSETI.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

RULING

INTRODUCTION

1. What s before me is the Plaintiff's Notice of Motion dated 3.10.2019 seeking the following orders:

a) Spent

b) Spent

c) That pending the hearing and determination of this suit a temporary injunction do issue to restrain the 2nd respondent by itself, its agents, servants or assigns from paying, releasing, receiving or forwarding and depositing into the 1st defendant's account the compensation /award funds with respect to the land acquired for CHEBILAT-IKONGE-CHABERA road project being part of the land parcel known as NORTH MUGIRANGO/MWONGORI SETTLEMENT SCHEME/312.

d) That the costs of this application be provided for.

2. The application is anchored on the grounds stated on the face of the Notice of Motion and the supporting affidavit and further affidavit of Rose Nyaboke Moseki sworn on 3.10.2019 and 23.10.2019 respectively.

3. In the said affidavits she depones that the 1st defendant is her husband while the 2nd to 5th plaintiffs are her sons. The Applicant and the 1st Defendant established their matrimonial home on land parcel no. NORTH MUGIRANGO/MWONGORI SETTLEMENT SCHEME/312 where they have been living for over 40 years. The said land parcel is registered in the 1st defendant's name. She further depones that the 1st defendant has acquired a portion of the suit property for purposes of constructing the CHEBILAT-IKONGE-CHABERA road and it is about to release the compensation funds amounting to Kshs. 11,622,916 to the 1st defendant.

4. The applicant contends that she and her adult sons have a stake in the said cash as they have developed a portion of the suit property by building their house and crops, yet the 1st defendant is not willing to discuss how the money will be shared among his family members. In her Further Affidavit she admits that the 2nd Defendant has disclosed the figures for compensation for the improvements on each of the plaintiff's portions but states that being the registered owner of the suit property, the 1st defendant is the one who will receive the payment for the land on behalf of the plaintiffs.

5. The application is opposed by the Replying Affidavit of Christopher Nyamongo sworn on the 22.10.2019 in which he denies the applicant's allegations and depones that he has already apportioned the suit property among the applicant and her sons and each one of them has been paid a share of the compensation funds. He has annexed pay-out letters from the 2nd defendant to his affidavit. He depones that as the registered owner of the suit property, he is entitled to all the rights and privileges appurtenant thereto in accordance with section 24 of the Land Registration Act. He further depones that the applicant has failed to meet the conditions in **Giella v Cassman Brown** and is therefore undeserving of the orders sought.

6. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

7. Having considered the pleadings, Notice of Motion, affidavits and rival submissions, the following issues fall for determination:

- i. Whether the suit property is matrimonial property
- ii. Whether the applicant has met the conditions for grant of injunctive orders
- iii. Whether the applicant is entitled to the orders sought

ANALYSIS AND DETERMINATION

8. The starting point is to define matrimonial property. Section 2 of the Land Act, 2012 defines matrimonial property as

S.2 ***“any property that is owned or leased by one or both spouses and occupied by the spouses as their family home”***

The same definition is found in under section 2 of the Matrimonial Property Act 2

“a matrimonial home means any property that is owned or leased by one or both spouses and occupied by the spouses as their family home”.

9. Furthermore, Section 6 of the Matrimonial Property Act defines matrimonial property as follows:

S.6 *“For the purposes of this Act matrimonial property means:*

- a) *The matrimonial home or homes*
- b) *Household goods and effects in the matrimonial home or homes*
- c) *Any other movable or immovable property jointly owned and acquired during the subsistence of the marriage”*

10. It is common ground that the suit property is the plaintiff's matrimonial home where the applicant and 1st defendant have been living with their children for more than 40 years. The 1st defendant has confirmed that each of the plaintiffs has been given a portion of the suit property which they have developed and they have been compensated by the 2nd defendant for the developments on their respective portions. However, the suit property is registered in the name of the 1st Defendant.

11. The second issue for determination is whether the applicant has met the conditions for grant of injunctive orders. In order for the court to exercise its discretion in granting injunctive relief the applicant must meet the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

12. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is one 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”

13. Having established that the suit property is matrimonial property, it goes without saying that the applicant has a beneficial interest therein. Granted that the 1st defendant is the registered owner of the suit property, he holds the same subject to the applicant's rights therein as provided in section 28 (a) of the Land Registration Act. The said section provides as follows:

S.28 ***“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests that may for the time being subsist and affect the same without being noted on the register:***

(a) Spousal rights over matrimonial property.”

14. In view of the foregoing, it is my finding that the applicant has established a prima facie case with a probability of success.

15. I must now consider whether the applicant has met the second condition which is whether she is likely to suffer irreparable loss if the injunction is not granted. The applicant has argued that even though the 1st defendant has given her and her sons their portions of land which they have developed by constructing houses, planting crops and keeping livestock thereon, he still holds the title to the entire suit property and he is therefore the one who has entered into a compensation agreement with the 2nd defendant. The compensation is in respect of the land as well as the developments thereon. The applicant contends that so far, only the compensation in respect of the developments has been paid whereas the one in respect of the land is yet to be paid. It is her contention that unless an injunction is issued, she is likely to suffer irreparable loss as her right to enjoy quiet and peaceful possession of her matrimonial home will have been infringed by the Respondents and damages may not be an adequate remedy.

16. In the case of **Panari Enterprises Ltd -vs- Lijoodi & 2others (2014) eKLR Gitumbi J**, stated as follows:

“Land is unique and no one parcel can be equated in value to another though the value of the suit property can be ascertained, it would not be right to say that the plaintiff can be compensated in damages. I hold that the damages are not always a suitable remedy where the plaintiff has established a clear legal right or breach”

17. Applying the principles in the above-cited cases to the instant case I am persuaded that the applicant’s application has merit and I grant it and make the following orders:

- a) A temporary injunction is hereby issued restraining the 2nd defendant from releasing the compensation funds in respect of land parcel no. NORTH MUGIRANGO/MWONGORI SETTLEMENT SCHEME/312 to CHRISTOPHER NYAMONGO MOSETI, the 1st defendant herein pending the hearing and determination of the suit herein or until the plaintiff and the 1st defendant reach an agreement on the mode of distribution of the compensation money.
- b) The costs of the application shall be in the cause.

Dated, signed and delivered at Kisii this 21st day of January 2020.

J.M ONYANGO

JUDGE