



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

ELC CASE NO. 361 OF 2015

MARY CIUMWARI NJERU.....PLAINTIFF

VERSUS

DANIEL NJERU THAGANA.....DEFENDANT

RULING

The parties herein are acting in person and this Court has had considerable difficulties following their respective claims. However, I have a responsibility to serve justice notwithstanding the deficiencies in the parties *“home made”* pleadings.

The plaintiff/applicant filed this suit on 28th December 2015 seeking orders to compel the defendant/respondent to transfer to her a portion measuring one (1) acre out of parcel of land known as NGANDORI/KIRIARI/878 and an order that the defendant/respondent pays her one third (1/3) share of the value of the commercial residential building erected on the land parcel NGANDORI/KIRIARI/878 and a further order that the defendant/respondent do refund her one third (1/3) of the total purchase price of a plot at Kagumori Town measuring 25 ft by 50 ft which they jointly purchased. Finally, the plaintiff/applicant sought an order compelling the defendant/respondent to allow her to continue plucking and harvesting tea bushes on the land subject of this suit pending its final determination as well as an order for costs.

From the plaint, it would appear that the parties previously cohabited as man and wife on the parcel No. NGANDORI/KIRIARI/878 (the suit land) from 1994 and had four (4) children but in 2005, the defendant/respondent chased away the plaintiff/applicant and married another wife. The plaintiff/applicant has therefore been forced to live with her children in a rented room yet she contributed towards the development of the suit land which is their matrimonial property registered in the defendant/respondent’s names in trust for both of them.

Simultaneously with that plaint, the plaintiff/applicant filed a Chamber Summons citing **Order 40 Rules 2 (1) and (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking the following orders:-

1. ***That pending the hearing and final determination of this suit, this Honourable Court be pleased to issue an order permitting and for allowing the plaintiff to commence plucking and/or harvesting five hundred (500) tea bushes on the family or matrimonial land title number NGANDORI/KIRIARI/878.***
2. ***That the defendant/respondent herein be restricted from evicting the plaintiff, refusing her access to the said land or in any way interfering with the plaintiff’s right of harvesting and delivering the said tea produce to Kathangari Tea Factory Company Limited through Tea Buying Centre No. TR 30 Karimari within Mbururi Sub-location.***

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

The said application which is the subject of this ruling is grounded on the applicant's affidavit wherein it is deponed inter alia, that between 1994 - 2005, she and the defendant/respondent lived on the suit land which is their matrimonial property before she was chased away and no longer has access to the five hundred (500) tea bushes that she used to harvest and which she requires to continue harvesting in order to earn an income to take care of herself and their four (4) children.

In resisting the application, the defendant/respondent filed a replying affidavit in which he denies having chased away the plaintiff/applicant from their matrimonial home although he admits that he stopped her from picking the tea bushes when she got married to another man. He adds therefore that the plaintiff/applicant has no right to inherit anything from him as she is no longer his wife.

The parties addressed me orally on their application.

I have considered their oral submissions together with the application and rival affidavits.

Order 40 of the Civil Procedure Rules grants the Court power to issue orders to stop the wastage, damage or alienation of any property that is in dispute pending the hearing of a suit relating to that property. In the course of hearing the parties during their oral presentations, it became clear that the parties are also involved in another case in the Children's Court wherein an order has been made for the defendant/respondent to meet the School fees of their children. As is clear from the pleadings herein, the plaintiff/applicant is also seeking orders that can only be granted by the Children's Court and not an Environment and Land Court. With regard to her claim that she needs money from the tea bushes in order to maintain herself and her children as ordered by the Children's Court and which is among the grounds set out in the Chamber Summons, she should pursue that claim in the Children's Court. It will then be upto the defendant/respondent to look for the money to do so from whatever sources he has.

Having said so, and notwithstanding the deficiencies in the pleadings herein, it is clear that the plaintiff/applicant seeks a share of the suit land which is matrimonial property that she contributed towards developing although the same is registered in the names of the defendant/respondent. She also seeks a refund of one third (1/3) of the un-identified plot measuring 25 ft by 50 ft situated at Kagumori Town.

Being an application for temporary injunction, it must be determined in line with the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

1. ***The applicant must show a prima facie case with a probability of success.***
2. ***An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages, and***
3. ***If in doubt, the application will be determined on a balance of convenience.***

A prima facie case was defined by the Court of Appeal in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS 2003 K.L.R 125** as a case, 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.

In his replying affidavit, the defendant/respondent concedes that the plaintiff/applicant was once his wife and had access to the tea bushes which she used to pick but he denies having chased her from the matrimonial home adding that she left together with her children and was married elsewhere and that was when he denied her access to the suit land and the tea. It is therefore obvious that between 1994 and 2005 the plaintiff/applicant not only bore the defendant/respondent four (4) children (one of whom is deceased) but she must also have contributed, directly or otherwise, towards the development of the suit land as to entitle her to a share in both the matrimonial property and the plot at Kagumori Town. Given those circumstances, it is not difficult to conclude that the plaintiff/applicant has demonstrated a prima facie

case with a probability of success at the trial.

On the issue of irreparable loss, this Court stands guided by the Court of Appeal's decision in the case of **MUIRURI VS BANK OF BARODA (KENYA) LTD 2001 K.L.R 183** where the Court held that land evokes a lot of emotions and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss. In the circumstances of this case, I am not even sure that the defendant/respondent would be in a position to pay any damages that may be awarded should it come to that.

Finally, as was held in the case of **FILMS ROVER INTERNATIONAL VS CANNON FILMS 1986 3 Ch. D 772**, the Court while considering an application such as this one should take the course that appears to carry the lower risk of injustice. In the circumstances of this case, the lower risk of injustice entails granting the application because if the property in dispute is sold, a greater injustice will have been caused to the plaintiff/applicant should it be confirmed at the trial that indeed she has a case to warrant granting her a share in those properties. And even on the balance of convenience, this Court is persuaded that the scales tilt in favour of the plaintiff/applicant to have an order preserving the properties subject of this suit until the dispute is heard and determined.

ultimately therefore, having considered all the matters herein, I allow the plaintiff/applicant's Notice of Motion filed herein on 28th December 2015 in the following terms:-

1. ***The defendant/respondent is restrained by an order of injunction from selling, charging, transferring or in any other way disposing the properties known as NGANDORI/KIRIARI/878 and plot measuring 25 ft by 50 ft situated at Kagumori Town pending the hearing of this suit.***
2. ***Costs in the cause.***

The parties to expedite compliance with **Order II Civil Procedure Rules** so that this suit can be heard and determined within twelve months from the date of this ruling otherwise the injunction shall lapse unless the Court decides otherwise.

B.N. OLAO

JUDGE

11TH MARCH, 2016

Ruling delivered this 11th day of March 2016 in open Court.

Plaintiff present in person.

Defendant present in person.

Mr. Nyaga Court clerk present.

B.N. OLAO

JUDGE

11TH MARCH, 2016