



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1437 OF 2013

EDITH NYAMBURA MWANJERA.....PLAINTIFF

VERSUS

SYMON MWANJERA NDARA.....DEFENDANT

SAMMY MACARIAH.....1ST INTERESTED PARTY

THE COMMISSIONER FOR LANDS.....2ND INTERESTED PARTY

RULING

The Plaintiff's Application

The application before this Court for determination is the Chamber Summons dated 20th August 2013 brought by the Plaintiff, who is seeking the following orders:

- a. That Sammy Macariah, together with the Commissioner of Lands be enjoined in this suit as Interested Parties
- b. The sale agreement between the Defendant and the said Sammy Macariah be declared as null and void and or illegal and that the same be cancelled.
- c. An injunction of the transfer and the process of the issuance of a new title to the suit property do issue against the Defendant and the intended interested parties herein.
- d. The Defendant do furnish an audited account of the sale proceeds.
- e. The Defendant do deposit the sale proceeds of the matrimonial home in court and the funds be distributed equally between the parties to the marriage.
- f. The valuation of the matrimonial property be carried out.

The grounds for the application are stated in the supporting affidavit sworn by the Plaintiff on 18th August 2013, wherein she states that she is legally married to the Defendant and that they jointly acquired the suit property herein being Plot L.R No. 13330/587 (previously known as L.R 4921/3/R plot No. 178) situated at Thome 5 Estate as their matrimonial property. Further, that on 3rd June, 2013 the High Court issued an order restraining the Defendant from transferring the suit property, which order was served upon him and is in force after it was extended. The Plaintiff annexed a copy of the order and the affidavit of service of the same.

However, that instead of complying with the court order, the Defendant appointed counsel to respond to the suit and has admitted to selling and disposing of the suit property. Therefore, that the sale of the suit property should be in the circumstances be declared to be null and void, and the same should be set aside and or reserved pending the hearing and determination of this suit. Further, that enjoining the

Commissioner of Lands and Sammy Macariah the purchaser of the suit property as Interested Parties is important for purposes of implementing the orders the Plaintiff is seeking and to facilitate the effective enforcement of her rights as a spouse.

The Plaintiff further stated that the Defendant never shared the proceeds of the sale of the matrimonial property, and that he should be compelled to furnish an audited account of the sale proceeds and a valuation of the suit property should be carried out so as to inform this exercise. Further, that on 30th July, 2013 the Plaintiff's advocates requested for particulars of the sale of the suit property from the Defendant's advocates, which request elicited no answer. A copy of the said letter of request was annexed.

The Defendant's Response

The Defendant filed a replying affidavit he swore on 18th September 2013 in which he stated that he sold the suit property to one Sammy Macariah before the institution of this suit, and that the Plaintiff could not stop the sale since the transfer had already been registered. Further, that the reason why the order for injunction that the Plaintiff obtained could not be registered when presented to the Registrar of Lands, is because it had already been overtaken by events. The Defendant claimed that he is the one who bought the suit property and developed it, and that the Plaintiff did not make any contribution thereto. He stated that at the time the Plaintiff left for the United States of America, he had already constructed the residential property on the suit premises in which they were residing.

The Defendant further stated that the consent which is required before the transfer of the suit property is from the Commissioner of Lands and not the Plaintiff. Further, that he is still legally married to the Plaintiff and the demand that he shares out the sale proceeds when they are still husband and wife is legally untenable. The Defendant averred that the purchaser of the suit property is innocent, in that he bought the property when it was put up for sale and paid the sale proceeds. He also averred that enjoining the said interested parties is futile since they have nothing to do with a domestic matter and the sale is already concluded. Lastly, the Defendant stated that the sale proceeds had already been utilized since he had bought another property which is income generating and for the benefit of the whole family.

The Issues and Determination

The parties were directed to canvass the issues arising from the Plaintiff's application by way of written submissions. The Plaintiff's Advocates filed written submissions dated 10th July 2014, while the submissions filed by the Defendant's Advocates were dated 25th July 2014. I have carefully read and considered the pleadings and submissions made by the Plaintiff and Defendant. The issues for determination are firstly, whether Sammy Macariah and the Commissioner of Lands should be joined as interested parties to this suit, and secondly, whether the Plaintiff has met the threshold for the grant of the various mandatory injunctions sought.

On the issue of joinder of the Interested Parties, the Plaintiff submitted that the Commissioner of Lands disregarded the law in respect of spousal consent when he allowed the Defendant to transfer the property, and that Sammy Macariah ought to have done due diligence before purchasing the property without the Plaintiff's consent and therefore should bear the consequences.

Order 1 Rule 10 of the Civil Procedure Rules gives this court discretion at any stage of court proceedings to add parties whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.

Order 1 Rule 10(2) provides as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or

whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

The Plaintiff in her Originating Summons dated 10th May 2013 and filed on 31st May 2013 is seeking declarations that the suit property is the matrimonial home held in trust by the Defendant for both of them, and that she enjoys a 50% interest and rights in the said property. The Plaintiff is also seeking a permanent injunction restraining the Defendant from disposing of the suit property. I note in this regard that the Defendant admits that Sammy Macariah purchased the suit property herein from him, and the Plaintiff is also alleging that the law required her consent be given for the said sale.

To the extent that Sammy Macariah has purchased and therefore has a beneficial interest of the suit property, and to the extent that the prayers sought by the Plaintiff would affect his interests in the said property, he is thus a necessary party in this suit for the court to be able to assess and determine all the issues in dispute relating to the suit property. However, as the Plaintiff is seeking to be declared a part owner of the suit property which the said Sammy Macariah has already purchased, he can only be joined as a Defendant and not as an interested party, as the orders sought if granted will affect any title that he may have to the suit property. This Court notes that Order 1 Rule 3 of the Civil Procedure Rules provides as follows as regards parties who may be joined as defendants:

“ All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

I am also guided by the decision in Werrot and Company Ltd and others v Andrew Douglas Gregory and others, Nairobi (Milimani) High Court Civil Case No. 2363 of 1998 (1998) LLR 2848 (CCK) where Ringera J. (as he then was) held as follows:

“For determining the question whom is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.”

With regard to the joinder of the Commissioner of Lands, I note that no prayers are sought in the Originating Summons filed by the Plaintiff that require action to be undertaken by the said office as all prayers sought are of the nature of declarations. In addition the said office no longer exists and its functions have since been taken over by the National Land Commission.

The outstanding issue that remains to be decided is whether the Plaintiff has met the threshold for the grant of the mandatory injunctions sought. It was held by the Court of Appeal in Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215 as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is 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.”

The Plaintiff in her submissions stated that she is legally married to the Defendant and that the suit property is the matrimonial home in which they lived in with their children. She relied on various provisions of the law to show her entitlement to the suit property as follows:

- a. That the suit property falls within the definition of matrimonial property under section 6 of the Matrimonial Property Act of 2013.
- b. That under section 14 of the Matrimonial Property Act of 2013, where matrimonial property is registered in the name of one spouse only, the registered spouse is presumed to hold the property in trust for the unregistered spouse
- c. That the Plaintiff has an overriding interest over the suit property under section 28 of the Land Registration Act of 2012 as against any other person's interest
- d. That the Plaintiff's interests in the suit property are insulated under section 93(2) of the Land Registration Act of 2012 since she also gave monetary contribution to the acquisition of the suit property, and took care of the affairs of the home.
- e. That she is entitled to equal protection and benefit of the law and equal rights in marriage as provided for by Articles 27 and 45 of the Constitution.

The Defendant on his part submitted that the Plaintiff's application had been overtaken by events, and that the sale agreement with Sammy Macariah with respect to the suit property was entered into in good faith with the Plaintiff's prior knowledge and consent. Further, that the proceeds of the sale have already been utilized, and that the order sought that the sale proceeds be deposited in court would be an order in futility. In addition that there is no dispute as to the valuation of the property and therefore the prayer for valuation has not been substantiated. Lastly, that the marriage between the Plaintiff and Defendant is still subsisting, and division of matrimonial property can only be done upon dissolution of a marriage under section 7 of the Matrimonial Property Act. The Defendant's Advocates also cited various judicial authorities in support of these arguments.

This Court has already noted that the Plaintiff is seeking a declaration that the suit property is their matrimonial home and that the Defendant holds the suit property in trust for both of them. Further, that she has a 50% interest in the said property. The applicable law as regards what is matrimonial property is the Matrimonial Property Act of 2013 which in section 6 defines matrimonial property as follows:

(a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

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

A matrimonial home is in addition defined under section 2 of the said Act to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property. It is admitted in this respect by the Defendant in the replying affidavit he swore on 18th September 2013 that before the Plaintiff went to the United States of America, they were residing on the suit property. He also did not bring evidence of any other matrimonial home that he and the Plaintiff are currently residing in.

It is also the position in law that that the various sections cited by the Plaintiff provide for certain rights of a spouse over matrimonial property. Of particular relevance to the facts of the Plaintiff's application is section 28(a) of the Land Registration Act, which provides for spousal rights over matrimonial property as one of the overriding interests that may being subsist and affect registered land, without their being noted on the register. In addition section 93(2) of the said Act states as follows:

“If land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered .”

Section 14(a) of the Matrimonial Property Act similarly provides that where matrimonial property acquired during marriage is registered in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.

The Plaintiff has brought evidence of a sale agreement she and the Defendant entered into with a third party as purchasers of the suit property, and of a statement showing money she sent to the Defendant which she alleges was used to acquire the said property. It is my view that this evidence coupled with the admission by the Defendant that the suit property was their matrimonial home leads to a finding that the Plaintiff has shown a *prima facie* case.

However, the Court notes that the suit property has since been sold and allegedly transferred to a third party. In addition most of the orders sought by the Plaintiff are of a final nature, and given that the Defendant is contesting the Plaintiff's contribution to the acquisition of the suit property, and that the third party purchaser of the said property has not been given an opportunity to be heard, the said orders cannot be granted at this stage and will have to await the hearing and determination of the Plaintiff's suit. The Court will however exercise its discretion and grant orders to preserve the suit property pending the hearing and determination of the suit.

The Plaintiff's Chamber Summons dated 20th August 2013 is accordingly allowed only to the extent of the following orders pursuant to the provisions of section 3A and 63(e) of the Civil Procedure Act and Order 1 Rule 3 and 10 of the Civil Procedure Rules:

1. That Sammy Macariah be and is hereby joined as the 2nd Defendant to this suit.
2. That the Plaintiff is granted leave to file and serve an amended Originating Summons within 20 days of the date of this ruling.
3. That the Defendants herein are hereby restrained from selling, transferring, charging, alienating or in any other manner disposing of the property known as Plot L.R No. 13330/587 (previously known as L.R 4921/3/R plot No. 178) situated at Thome 5 Estate, pending the hearing and determination of this suit or until further orders.
4. The costs of the Plaintiff's Chamber Summons dated 20th August 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 14th day of October, 2014.

P. NYAMWEYA

JUDGE