



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE**

Civil Case 83 of 2008

MARY CHEPOCHEYENTO ATOMPLAINTIFF.

VERSUS

ATOM DEYA PAUL.....DEFENDANT.

RULING.

By a chamber summons dated 9th December, 2008, pursuant to the provisions of section 128 of the Registered Land Act and order XXXVI Rules 12 of the Civil Procedure Rules, the applicant seeks orders:-

1. THAT, the application be certified as urgent and service thereof be dispensed with in the first instance.
2. THAT, an inhibition order be made inhibiting the registration of any dealing with land parcel No. West Pokot/chepareria/107 pending the hearing and determination of this application.
3. THAT, an inhibition order be made inhibiting the registration of any dealing with land parcel No. West Pokot/Chepareria/107 pending the hearing and determination of this suit.
4. THAT, costs of this application be in the cause.

The application as based on the grounds:-

1. THAT, the plaintiff/applicant and defendant/respondent are wife and husband respectively.
2. THAT, the relationship between the two parties is very tense, as a result of the defendant abandoning the plaintiff and her children in the year 1998.
3. THAT, the plaintiff and her children are still residing on the suit property, which they have occupied since 1976.
4. THAT, the defendant has not supported his family since 1998 when he abandoned them.
5. THAT, the defendant has failed to protect the suit property, and is instead acting in a manner to suggest that he intends to deal with the property to the detriment of the plaintiff and her children.
6. THAT, though registered in the defendant's name, the suit property was acquired by the plaintiff and defendant jointly, and hence this suit.
7. THAT, having been served with the originating summons herein, the plaintiff is apprehensive that the defendant will move fast to defeat her interests in the suit property and to frustrate this suit.
8. THAT, an inhibition order shall not prejudice the defendant in any way, as he has been living outside it for the last 10 years.
9. THAT, it would be in the interests of justice that the orders sought be granted, so that the property may be preserved.

The application is predicated upon the annexed affidavit of Mary Chepocheyento Atom sworn on the 9th day of December, 2008.

On behalf of the applicant, it was argued that the applicant and the respondent are husband and wife having been married under Pokot

customary law in 1973. In the year 1998, the respondent abandoned the matrimonial home and upon investigations, I established that he had married another wife.

That since his second marriage the applicant has resided on the suit property together with the children.

That the defendant has never set foot on the suit property or helped in upbringing or educating their children. In addition thereto the defendant has failed to protect the suit property. The defendant was sued by Silva Chepochepkerich before the Chepareria Land Tribunal which awarded her three (3) acres, which award was adopted by the Kitale Chief Magistrate's Court Land case No. 52/2005 on 24th February, 2006. The copy of the award and the decree are annexed as Exhibit "MCA1" 1 (a) and (b) respectively.

That although the land is registered in the defendant's name, the same was acquired through a joint effort of the parties.

That due to the previous conduct of the defendant, he is apprehensive that the respondent may defeat her interest and also to frustrate the suit hence this application.

That the inhibition order shall be beneficial to both parties as it will serve to preserve the suit property until this suit is determined.

The application was served upon the respondent as per the affidavit of service of Thomas O. Ochieng sworn on the 3rd day of February, 2009. The respondent failed to put grounds of opposition or replying affidavit as enjoined by the provisions of order 4 L Rule 16 (3). On application I granted the applicant leave to proceed ex-parte.

On behalf of the applicant, I was urged to find that although the subject land is registered in the respondents name there should be an inhibition order to preserve the interest of both parties pending the hearing of the substitute suit.

It is common ground that the subject land is registered under the Registered Land Act (Cap 300) Laws of Kenya Section 27 of the Registered Land Act provides:-

" Subject to this Act:-

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;*
- (b) the registration of a person as the proprietor of a lease shall vest in that person the lease hold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease."*

In the light of the aforesaid provision it is clear to me that the respondent rights to the subject parcel is absolute. It would be unlawful to fetter his rights by an inhibition.

Quite apart from the foregoing the application is made pursuant to the provisions of order XXXVI Rule 12 of the Civil Procedure Rules. However, order XXXVI Rule 3F of the Civil Procedure Rules provides:-

"An application under the Registered Land Act, other than under sections 120, 128, 133, 138, 143 and 150 thereof shall be made by originating summons unless there is pending a suit involving the same lands when the application may be made by summons in chambers in that suit."

To my mind there is a pending suit being Civil Case No. 83 of 2008 (O.S.). In the circumstances this application should have been made by chamber summons in that suit. To the extent that the application has been brought by originating summons in an originating summons suit, to that extent is this application defective.

Accordingly, I find no merit in the application. I dismiss the same with no orders as to costs.

Dated and delivered at Kitale this 3rd day of June, 2009.

N.R.O. OMBIJA.
JUDGE.

Mr. Mokoros for Njuguna for Plaintiff/Applicant.

N/A for Defendant/Respodnent