



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 76 OF 2018

KAHASO MWAROME CHIBO.....PLAINTIFF

VERSUS

KATANA RIBA KAI

ALFRED SIFA DENA

FLORENCE TABU BIRYA.....DEFENDANTS

RULING

1. By this Notice of Motion application dated and filed herein on 6th April 2018, the Plaintiff prays for an order of a temporary injunction to restrain the three Defendants from interfering with the Plaintiff's quiet possession of all that parcel of land known as Plot No. 96 Kijipwa Settlement Scheme pending the hearing and determination of this suit.

2. The application which is supported by an affidavit sworn by the Plaintiff-Kahaso Mwarome Chibo is premised on the grounds:-

a) That the Plaintiff is the wife to the 1st Defendant-Katana Riba Kai with whom they reside on the suit property;

b) That the 1st Defendant has allegedly sold the said parcel of land to the 2nd and 3rd Defendants without the consent of the Plaintiff and/or other family members;

c) That the Plaintiff and her family stand to be rendered destitute unless the orders sought herein are granted.

3. In response to the said application, Alfred Sifa Dena(2nd Defendant) and Florence Tabu Birya(3rd Defendant) have jointly filed a Notice of Preliminary Objection dated 21st May 2018 objecting to the application on the grounds that:-

1. This Court lacks the requisite jurisdiction to hear and determine the suit as filed by the Plaintiff because:

a) It(is) filed contrary to Section 11 of the Civil Procedure Act which provides thus:-

“Every suit shall be instituted in the Court of the lowest grade competent to try it....”

2. The Plaintiff/Respondent herein lacks the requisite locus standi, interest and/or authority to institute these proceedings in her own name or that of any other person contrary to the Civil Procedure Rules.

4. In addition to the Objection, the 2nd Defendant on his own behalf and that of the 3rd Defendant has sworn an affidavit in reply filed herein on 28th May 2018 in which he denies that the Plaintiff and the 1st Defendant jointly own the parcel of land as alleged. It is the Respondents case that on 15th March 2014, they entered into a Sale Agreement with the 1st Defendant upon which they purchased one (1) acre of land from the said Plot No. 96 Kijipwa Settlement Scheme.

5. The 2nd and 3rd Defendants further aver that the said parcel of land belonged to the 1st Defendant and his former 2nd wife who had been gifted the parcel of land by her father. The two assert that the Plaintiff is the 3rd wife of the 1st Defendant and she therefore has no interest whatsoever in the disputed parcel of land.

6. I have considered the application and the response thereto. I have also considered the written submissions as filed by the Learned Advocates for the parties.

7. In their Notice of Preliminary Objection, it was first contended by the Respondents that this Court lacks the requisite jurisdiction to hear this matter on the basis that the suit ought to have been instituted in the Court of the lowest grade competent to try it. While it may be true that this suit was not filed in such a Court given the purchase price which the 2nd and 3rd Respondents have put at Kshs 500,000/- I did not think that fact *ipso facto* deprives this Court of jurisdiction in the manner stated herein. This Court can therefore not be said to lack jurisdiction simply because the value of the subject matter could have been dealt with by a Court subordinate to it.

8. The second limb of the Preliminary Objection, I think relates to what the Respondents have detailed in their Replying Affidavit herein. It was the Respondents' case that the Plaintiff herein has no right or interest in the suit property. According to the two Respondents, the suit property was gifted to the 1st Defendant's second wife by her (2nd wife's father) and the Plaintiff as the 3rd wife of the 1st Defendant had no basis filing this claim.

9. As it were, the Plaintiff's claim herein is based on her contention that the land in dispute was part of their matrimonial property. She accuses her husband the 1st Defendant herein of selling the same to the 2nd and 3rd Defendants without her consent and/or that of her family members.

10. The Defendants did not deny that the Plaintiff is the 1st Defendant's wife. It is however their case that the land belonged to the 1st Defendant's second wife who received the same from her father as a gift. According to the 2nd and 3rd Respondents, the unnamed Second Wife has since left the 1st Defendant and remarried elsewhere but they looked for her and she gave her consent to the transaction.

11. As it were, nothing was placed before me to demonstrate that the land was a gift to the unnamed second wife. It was also not clear to me when she left her marriage with the 1st Defendant and on what basis the 1st Defendant was selling the land if indeed it was her own. The Plaintiff herself claims to be residing on the suit property with her family including the 1st Defendant who did not file any response to this application.

12. Section 28(a) of the Land Registration Act 2012 provides that:-

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

a) Spousal rights over matrimonial property.

13. Arising from the foregoing, I think it would be important that an inquiry first be made as to whether the disputed property is matrimonial property. Given that the Sale on 15th March 2014 is admitted to have been done without her consent, I think she is entitled to an order of injunction pending the inquiry to be made at the trial herein.

14. Accordingly, I do find merit in the Plaintiff's application dated 6th April 2018. The same is allowed with costs.

Dated, signed and delivered at Malindi this 26th day of June, 2019.

J.O. OLOLA

JUDGE