



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 115 OF 2015

J K K.....PLAINTIFF/APPLICANT

VERSUS

M F N.....1ST DEFENDANT/RESPONDENT

NDERITU MICHUKI.....2ND DEFENDANT/RESPONDENT

RULING

1. I have before me for determination a Notice of Motion Application dated 15th July 2017. The Applicant J K K prays for an order of injunction to restrain the defendants, their employees and/or agents from encroaching upon, interfering, alienating, sub-dividing, selling and/or building on all that parcel of land known as Kilifi/Mtondia/[particulars withheld].

2. The said application is based on the grounds that:-

i. The Plaintiff/applicant and the 1st Defendant/Respondent are married and jointly own the said parcel of land as their matrimonial property;

ii. The 1st Defendant has started sub-dividing and selling the said parcel of land;

iii. The 2nd Defendant has stated erecting a fence, putting up structures and digging a borehole on the suit plot; and

iv. That if the Defendants are left to continue with the sub-division, settling and construction of structures on the said parcel of land, the Applicant together with her children shall be rendered homeless.

3. Responding to the application, the 1st Defendant M F N admits that the Plaintiff is indeed his wife. He however denies chasing the Plaintiff away for purposes of selling the land and avers that he is the legal owner of the land which he states had accumulated pending rates over the years. He avers that he is an old jobless man and that his wife was all along in the know when he agreed to sell a portion of land to the 2nd Defendant.

4. It is his case that he has no other source of income and that he needed to sell a portion of the land to clear the rates and to enable him put up a permanent house for himself and the Plaintiff. He states that if the Orders sought are granted, he is likely to suffer irreparable loss and damages as he has already used the sale proceeds in the aforesaid ventures.

5. On his part, the 2nd Defendant Nderito Michuki avers that the 1st Defendant approached him and informed him that he was in a predicament and needed monies to offset outstanding rates and to also build a permanent residential house.

6. The 2nd Defendant avers that the 1st Defendant offered to sell 2 acres of the suit premises to him and he agreed to buy the same on the basis that the 1st Defendants family will have no objection. It is his case that they entered into an agreement for the sale of the land upon confirming that his wife had no objection and he is now surprised that the 1st Defendant's family has made a complete turn around and now claim they were not consulted. He states that he has invested heavily in the suit premises and stands to suffer irreparable loss if the Orders sought by the Plaintiff are granted.

7. I have considered the application and the responses thereto. I have equally considered the written submissions and the authorities I was referred to by Mr. Myameta, Learned Counsel for the Plaintiff/Applicant.

8. It is not in dispute that the Plaintiff/Applicant is a wife to the 1st Defendant. It is also not in dispute that the parcel of land known as Kilifi/Mtondia/[particulars withheld] is registered in the name of the 1st Defendant and that a portion thereof measuring approximately 2 acres have been sold to the 2nd Defendant.

9. It is the Plaintiff's case that having been married to the 1st Defendant for more than 60 years she has acquired spousal rights over the suit property and that her consent ought to have been sought and obtained prior to the sale of the portion of the land. While not denying the Plaintiff's right over the said parcel of land, both Defendants however contend that her consent was sought and she was "all along in the know" about the transaction. No evidence was however put before me as to the nature of the consent the Plaintiff gave and/or how if at all, she got to be "on the know" about the transaction.

10. Section 93 of the Land Registration Act, No 3 of 2012 provides as:-

1.

2. 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.

3. Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house:-

a. The lender shall, if that disposition is a Charge, be under duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, consented to that Charge; or

b. The assignee or transferee shall, if that disposition is an assignment or a transfer of land be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.

c. If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection 3(a) or 3(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.

11. From the material placed before me, it was difficult to state with certainty when the sale transaction took place or when the 1st Defendant became registered as the owner of the subject parcel of land. Indeed, all parties herein were so scanty with information that neither a copy of the title to the land nor the sale agreement disposing a portion of the suit property to the 2nd Defendant were annexed to the three Replying Affidavits filed herein.

12. As it were, Section 93(2) of the Land Registration Act in my understanding imposes an obligation upon a party claiming entitlement to property registered in the name of one spouse to show that she/he has contributed by their labour or other means to the productivity, upkeep and improvement of the land in question before such a spouse can be deemed to have acquired an interest in any such land. In my view the Statement by the Plaintiff that they have stayed in the suitland for more than 60 years and that they have been blessed with 10 children with the 1st Defendant on its own without more qualifies the suit property as matrimonial property by dint of Section 93(2) of the Land Registration Act aforesaid. This is because under the Matrimonial Property Act, 2013, the word "contribution" is defined to include domestic work and management of the matrimonial home; child care, companionship, management of family business or property and farm work.

13. Be that as it may, all that the 2nd Defendant was required to do is to inquire from the registered spouse whether or not the other spouse had consented to the transaction. According to both the 1st and 2nd Defendant, this inquiry was made and even though no evidence was put before me as to the nature thereof, I note that there is no requirement in law that the same takes any particular form.

14. Given the scant information available herein, I think the issues raised in this application can only be ventilated at a full trial. Arising from the fact that both sides acknowledge the Plaintiff as the 1st Defendant's spouse and further the fact that as at July 2015 the 2nd Defendant had put up a fence and some buildings and/or structures on the suitland, I think it is proper that parties maintain status quo pending the hearing and determination of the suit.

15. Accordingly the parties are hereby ordered to maintain the status quo pending the hearing and disposal of suit herein.

16. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 19th day of April, 2018.

J.O. OLOLA

JUDGE