REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KITALE

ELC CASE NO. 5 OF 2018

ALICE MAKHOKHA KUPITI.....PLAINTIFF

VERSUS

HARON GITHUMBI.....DEFENDANT

CHRISTOPHER KUPITI KHAMALA....DEFENDANT

R U L I N G

1. The plaintiff brought an application dated **19/1/2018** seeking the following principal order:

> **"That the honourable court be pleased to issue an order of temporary injunction restraining the defendants /respondents jointly and severally from further construction and/or erection of posts fence, ploughing, planting, selling, charging, claiming, occupying, using or wasting the 7 acres out of original parcel no Trans Nzoia/Cherangany/208 (current plots no Trans Nzoia/Cherangany/1425-1435 pending the hearing and determination of the main suit".**

2. The grounds on which the application is based are on the face of the application and in the sworn supporting affidavit sworn by the 2nd plaintiff which is attached to the motion, and the further supporting affidavit dated 16th February 2018. In brief they are that: the plaintiff and the 2nd defendant are wife and husband and that they acquired the suit land by way of joint efforts; that the transaction vide which the land was sold to the 1st defendant suit land being family land and it required consent of the plaintiff, and there being no such spousal consent the same was null and void. The plaintiff also avers that the sold portion forms part of her homestead and the suit land is the only livelihood of the plaintiff which she has utilized for many years and now her crops thereon have been destroyed. The 1st respondent intends to put up permanent structures on the land and loss of the family land can not be compensated for by an award of damages. She avers that the suit property is family property while admitting that there is land in Bunyala which she however asserts is ancestral land to which she can not lay a claim.

3. The 1st defendant replied to the application through his grounds of opposition dated 12th February 2018 and his sworn affidavit dated 14th February 2018 in which he deposes as follows: that the plaintiff has come to court with unclean hands in that the land was bought in 1969 using the 2nd defendant's own monies and hence it is not family nor matrimonial land and the plaintiff's spousal consent is not required; that the plaintiff only moved to the suit land in 1998 contrary to her assertion that she has lived thereon for 50 years, that he bought 5 acres out of the suit land for Kshs.2,500,000/= which he has paid in full; that the sons of the plaintiff agreed to and witnessed the sale and made assurance that all the family was agreeable to the sale, that the plaintiff was aware of the sale and consented thereto even by her conduct and the 1st defendant took possession of the purchased portion and began using it in 2017 and has built his house thereon, that he never entered the land forcefully; and that no prejudice would be occasioned to the plaintiff if the orders sought do not issue; that the 2nd defendant gave the plaintiff 6 acres out of the said land and only sold 5 acres out of the remainder and confirmed that he has family land in Bunyala, that the proceeds were utilized to purchase a family vehicle which the family is using for business and that the plaintiff's suit has been filed simply out of disagreements with the 2nd defendant;

4. The 2nd defendant filed grounds of opposition dated 6th February 2018 and his affidavit sworn on the 9th February 2018 in opposition to the application. Those documents reiterate the defence of the 1st defendant hereinabove in part and add that the applicant has given no undertaking as to damages, that the plaintiff has refused to move to the family land in Bunyala, that no marriage was celebrated between the plaintiff and the 2nd defendant, that the suit land is registered in his sole name and the plaintiff did not contribute to its acquisition, that the plan to subdivide the land and share it out to children and wives was announced by the defendant at a family meeting and no one voiced any objection and the plaintiff got 6 acres thereof, that the defendant only sold land out of what was left for him after the subdivision and this only after the plaintiff had consented, that the proceeds catered for his medical expenses as he has no other source of income, that the sale did not prejudice the family.

5. The parties filed submissions on the application, with the plaintiff filing hers on the 21st February 2018, and the 1st defendant on 4th April 2018. Having gone through the file record I found no submissions of the 2nd defendant at the time of writing this Ruling. I have considered the application, the supporting affidavits and the replies thereto as well as the submissions filed.

6. The issues for determination in this matter are whether the plaintiff has demonstrated that she has a prima facie case with probability of success and whether she would suffer irreparable damage that may not be compensated for by way of damages.

7. The plaintiff has demonstrated a prima facie evidence that she is the 2nd defendant's wife and in any event I find that there is no dispute that the plaintiff is the 2nd defendant's wife as that has been admitted in the defence of the 2nd defendant.

8. I also find that the land has been subdivided into numerous parcels and that the 1st defendant is in possession of one of them measuring 5 acres and that he has developed the same. Therefore there is proof of sale of the land to the 1st defendant.

9. However the issue of whether or not there was spousal consent is an issue to be determined after the hearing has taken place. I find that the plaintiff has established that she has a prima facie case.

10. On the issue of damage, I find that the defendants' stance is that the plaintiff has been given 6 acres and she is not therefore in a desperate situation. I have no evidence before me that the sold land is part of her homestead or that any of the dwellings of the plaintiff may be demolished to pave way for occupation by the 1st defendant. I find that the plaintiff is still able to earn a livelihood from the acreage given to her which, having been confessed on oath herein I do not think the defendants can backtrack on. Besides, the plaintiff confesses that there is more family land at Bunyala as stated by her husband. I therefore find that there is no likelihood that the plaintiff may suffer irreparable loss that may not be capable of being compensated by way of damages.

11. Consequently I find that the application by the plaintiff does not meet the first and second criteria for the grant of injunction set out in ***Giella -vs- Cassman Brown [1973] EA 358.*** However, on a balance of convenience, this court also finds that the status of the suit land should be preserved so that there is no possibility of eventually making orders in vain at the judgement stage. As the 1st defendant is in possession, he shall remain in such possession of the land already sold to him, but there shall be no further erection of structures on or the committing of any acts of waste, or any disposal or alienation of that land pending the hearing and determination of this suit.

Each party shall bear its own costs.

It is so ordered.

Dated, signed and delivered at Kitale on this 29th day of May, 2018.

MWANGI NJOROGE

JUDGE

29/5/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Chebii for applicant

Mr. Ingosi for 2nd respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

29/5/2018