



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 890 OF 2017

S W M.....PLAINTIFF

VERSUS

D G K.....1ST DEFENDANT

JOSEPH KINGORI MUCHOGO.....2ND DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 4th October, 2017 brought pursuant to section 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 1, 2 and 3(1) of the Civil Procedure Rules and all the other enabling provisions of the law. The Plaintiff seeks the following orders:

1. Spent
2. Pending hearing and determination of this suit, this court do issue an order prohibiting registration, change of registration in the ownership, leasing, allotment, occupation or any kind of right, title or interest by the Defendants their servants and/or agents in all that piece of land known as NGONG/ [Particulars Withheld] contrary to the Plaintiff/ Applicants rights and interests with any land registry, government department and all registering authorities until further orders of this court.
3. Pending the hearing and determination of this application, the 2nd Defendant/ Respondent, his servants and/or agents be restrained from remaining, entering, developing and/or interfering with land parcel No. NGONG/ [Particulars Withheld]
4. Pending the hearing and determination of this suit, the tenants in land parcel No. NGONG/ [Particulars Withheld] be ordered to deposit the rent in court.
5. The Chief Land Registrar Kajiado be ordered to furnish the Plaintiff with all the completion documents used in the transaction transferring land parcel No. NGONG/ [Particulars Withheld] .
6. The costs of this Application be awarded to the Plaintiff/Applicant.

The application is based on the various grounds where the Plaintiff avers that she was legally married to the 1st Defendant at the time of acquisition of land parcel number NGONG/ [Particulars Withheld] hereinafter referred to as the 'suit land'. Further that there is a pending Children's Case No. 960 of 2017 between the Plaintiff and the 1st Defendant, where she is claiming half of the rental proceeds to maintain their children. The Plaintiff sought to register a caution on the suit land but the same was not registered as it was transferred a day after the Plaintiff had conducted a search.

The application is supported by the affidavit of SWM where she avers that the husband acquired the suit land on 22nd April, 2015 and she thereafter supervised the construction of flats thereon and even borrowed money to chip in whenever the said construction stalled due to lack of funds. She contends that as a result of the breakdown in her marriage, she instituted the aforementioned children's case as the Defendant threatened to throw her out of the matrimonial home and orders were granted preventing the 1st Defendant from doing so. She claims she lodged an application for caution to safeguard her rights over the matrimonial home but the same was rejected on the grounds that the property had been transferred to the 2nd Defendant by the 1st Defendant. She denies being involved in the said transaction and states that this was matrimonial property which was disposed of without her spousal consent. She states that she is a stranger to the transaction and unless restrained by this Honourable Court, the Defendants shall continue to wrongfully deny her and their children the benefits from the suit property.

The 1st Defendant DGK opposed the application and filed a replying affidavit sworn where he confirmed that he was married to the Plaintiff

on 7th June, 2008 and they have two children. He states that they currently reside on land parcel number Nairobi/ Block [Particulars Withheld] also known as [Particulars Withheld] Court, [Particulars Withheld] Estate House Number [Particulars Withheld] which is their 'matrimonial home' that they jointly acquired on 27th February, 2014. He denies threatening to kick the Plaintiff out of their matrimonial home as alleged, as she has not provided proof. Further, that he duly complied with Hon. H. M Mbatia's orders issued on 21st July, 2017 to date, which orders were arrived at by Consent. He explains that in February, 2015, he learnt of the availability of the suit land for sale, through the Plaintiff who had been informed by her friend Ms. Fridah Nyaga, and thereafter purchased it from James Kimani Njenga for KShs. 2,700,000/=. He contends that he commenced constructing rental units on the suit land in November, 2015, with his finances and he engaged messrs Elimwa and Sons Company to do so. Further, that the Plaintiff lent him KShs, 500,000 on various periods, from her savings, which he paid back and she did not chip into the development as alleged. He insists the suit land does not constitute matrimonial property and the Applicant has failed to adduce evidence of any contribution she made at the point of purchase or development to enable her stake a claim on it. He reiterates that he purchased the suit land and developed it singlehandedly since the Plaintiff had clearly indicated to him that she was not interested in the same, and she did not supervise the construction as he employed a caretaker to do so. He avers that he did not sell the suit land illegally and without the Plaintiff's consent, since he adhered to all the legal processes while disposing off the property to the 2nd Defendant and kept to his rights as the registered proprietor. He further contends that the Court lacks jurisdiction to entertain this matter as the claim concerns matrimonial property and maintenance of children, and not solely touching on land. He states that the Plaintiff has not established a prima facie case, not shown any evidence of having suffered irreparable harm and the Application has been overtaken by events since the suit land is now out of his hands.

The 2nd Defendant JOSEPH KINGORI MUCHOGO opposed the application and filed a replying affidavit where he deposed that around January, 2017 he approached the 1st Defendant with a view to purchasing the suit land and after conducting due diligence, they agreed on the purchase price, mode of payment including all issues relating to the transfer process in May, 2017. He confirms that upon settling of all issues relating to the sale/purchase of the suit land, they entered into a Sale Agreement and once the 1st Defendant obtained completion documents, the Sale was concluded. He contends that he made all the payments due to the Government and the title was registered in his favour, by the Registrar of Lands. He insists he followed all the due process to purchase the suit land. He reiterates that the Court lacks jurisdiction to determine the claims levelled by the Plaintiff against him and she has not established a prima facie case to warrant the grant of orders sought against him. He contends that the Plaintiff has not demonstrated any urgency to warrant the court in exercising any discretion in her favour and the prayer for the deposit of rent proceeds in court cannot be granted as it is beyond the Court's jurisdiction. He avers that he is not in contravention of the law but it is the Plaintiff who is in blatant breach of the law by trying to place a caveat on his property.

On 5th February, 2018 all parties' Counsels submitted on the application, which submissions the Court has considered.

The Plaintiff's Counsel reiterated her claim and submitted that since the transfer was effected a day after the Search raises eyebrows. She relied on Section 93 of the Land Registration Act and averred that the suit land was deemed to be matrimonial property. Further, she relied on the Matrimonial Property Act and stated that the 1st Defendant transferred the suit land to the 2nd Defendant to frustrate the Plaintiff., yet the Plaintiff and 1st Defendant are still married, which fact is corroborated by the 1st and 2nd Defendants respectively. She submitted that the Plaintiff also contributed to the construction of the suit land, challenged the averments in the replying affidavits, and questioned why the Defendants failed to annex the transfer documents to confirm how the transfer was effected and why the same was registered yet there was a caution over the suit land. She imputed malice and insisted the documents should be furnished in court.

The Defendants' Counsel submitted that there was no evidence tendered by the Plaintiff to prove how she contributed to the development of the suit land. He stated that there is no relationship between transfer of the suit land and contribution. He submitted that there is already a pending children's matter where orders were made by Consent. He contended that the suit land has now changed hands to the 2nd Defendant and the Plaintiff has not explained why her name was not on the title. Further, that the Plaintiff did not furnish court with tangible evidence to prove contribution or supervision in the development of the suit land as opposed to the 1st Defendant who has shared receipts. He submitted that issue of spousal consent would only arise where the Plaintiff proved contribution and the Defendants have confirmed proper processes were adhered to. In effecting the transfer, He submitted that Plaintiff has not proved damages and prayer No. 4 cannot be enforced by the Court. He further submitted that the Plaintiff has failed to discharge the burden of proof as required by section 107 of the Evidence Act. Further that the issues of children and matrimonial property are not within the jurisdiction of the Environment and Land Court. He relied on various authorities including **Nyanza Fish processors Vs Barclays Bank of Kenya** to support his argument.

Analysis and Determination

Upon perusal of the materials presented in respect of the instant Notice of Motion dated the 4th October 2017, including the Counsels' submissions, the issues for determination are:

- Whether the Plaintiff is entitled to the injunctive relief in respect of registration of a Prohibition Order over the suit land.
- Whether the tenants in the suit premises should deposit rent in court
- Whether the Chief Land Registrar Kajiado should be ordered to furnish the Plaintiff with all the completion documents used in transfer of the suit land

The fulcrum of this suit revolves around matrimonial property. The Plaintiff contends that she contributed towards the development in the suit land, which the 1st Defendant disposed to the 2nd Defendant without her spousal consent. The 1st Defendant insists he solely purchased the suit land which he disposed to the 2nd Defendant legally, as he was the absolute proprietor, and is now out of his hands. The 2nd Defendant argues that he purchased the suit property for value and the orders the Plaintiff seeks are infringing on his rights. Further, the Defendants aver that the Court does not have jurisdiction to grant the orders sought as they touch on matrimonial property. The Plaintiff hence seeks injunctive reliefs against the Defendants which are enumerated above.

In line with the principles established in the case of **Giella Vs Cassman Brown (1973) E.A 358**, I wish to interrogate whether the plaintiff has established a prima facie case to warrant the granting of the orders sought.

As to whether a prohibition order should issue over the suit land, I note the Plaintiff contends that the suit land is matrimonial property, which the 1st Defendant sold to the 2nd Defendant without her spousal consent. She discovered the suit land had been transferred to the 2nd Defendant, a day after she had sought for a Search at the Land Registry. She insists she contributed to the development of the suit property and the 1st Defendant should have obtained her spousal consent before disposing it to the 2nd Defendant. The 1st Defendant on the other hand contends that the suit land is not their matrimonial home as alleged and that he acquired the same solely and legally sold it to the 2nd Defendant.

The Court of Appeal in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) K.L.R 125** described a prima facie case as follows:

“.... 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”.

I note the 2nd Defendant is already the registered proprietor of the suit property since 2nd August, 2017 and has a title deed to that effect that was furnished in Court. Further, I note the Plaintiff instituted this suit on 9th October, 2017, two months after it had passed to the 2nd Defendant.

Section 26 of the Land Registration Act provides as follows:

‘(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.’

Section 24 (a) of the Land Registration Act stipulates that **'Subject this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

In relying on the above provisions and this Judicial authority, I find that these legal provisions empower the 2nd Defendant who is the registered proprietor of the suit land and has a title deed in that effect, with vested rights and privileges therein and which no person including the Plaintiff should interfere with. I note the Plaintiff never tendered any evidence to allege fraud on the part of the 2nd Defendant in acquisition of the suit land. Further, I note the prayers the Plaintiff is seeking to prohibit the transactions on the 2nd Defendant's title would be tantamount to interfering with his rights and privileges as the registered owner of the suit land. It is against the foregoing that and relying on the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J.M Mutungi held that a registered proprietor is entitled to protection of the law in terms of section 26(1) of the Land Registration Act, I find that the Plaintiff has not established a prima facie case to warrant the registration of a prohibition order against the 2nd Defendant's title.

As to whether the tenants on the suit land should deposit rental proceeds in the court pending the outcome of the suit, since I have already established that the 2nd Defendant is already the registered proprietor of the suit land and is protected by sections 24(a) and 26 of the Land Registration Act. I find that from the plaintiff's averments, she did not adduce any evidence to prove that the 2nd Defendant acquired the suit land by fraud, I will decline to grant the said prayer.

In so far as she alleges the suit land is matrimonial property, I concur with the Defendants that Environment and Land Court does not have jurisdiction to deal with matrimonial property but the same is vested in the High Court. I opine that the High Court would be the best forum to seek for division of matrimonial property which includes proving contribution toward the development on the suit land herein, but not in this forum.

As to whether the Chief land Registrar should provide all the completion documents in respect of the transaction over the suit land between the 1st Defendant and the 2nd Defendant. I find that the plaintiff has a constitutional right to seek documents from a government institution and will grant her the said prayer and direct that the Land Registrar to furnish her with the completion documents within 60 days from the date hereon.

It is against the foregoing that I will allow prayer No. 5 only of the Notice of Motion application dated the 4th October, 2017.

Each party to bear their own costs.

Date signed and delivered in open court at Ngong this 21st day of June, 2018.

CHRISTINE OCHIENG

JUDGE