



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO 67 OF 2018

LINUS NGETICH.....PLAINTIFF

VERSUS

CECILIA CHELANGAT NGETICH.....1ST DEFENDANT

PAUL KIPNGETICH KORIR.....2ND DEFENDANT

BOMET COUNTY LAND REGISTRAR.....3RD DEFENDANT

RULING

Introduction

1. By a Notice of Motion dated 28th August, 2018 the Plaintiff /Applicant filed an application seeking temporary orders of injunction to restrain the defendants from leasing, selling sub-dividing, transferring, alienating erecting structures/ buildings, tilling, entering, remaining on, evicting and/or interfering with the plaintiff and his children's peaceful occupation and use of all that parcel of land known as L.R No. KERICHO/CHEMAGEL 488 pending the hearing and determination of the application interpartes.
2. Secondly, the Plaintiff prays for an order that pending the hearing and determination of the application interpartes, there be an order directing the 3rd defendant to transfer the parcel of land known as L.R No. KERICHO CHEMAGEL/488.
3. Thirdly, he prays that pending the hearing and determination of the application interpartes and the main suit, there be an order directing the 3rd Defendant to transfer the suit land to the Plaintiff.
4. The application is based on the grounds that the suit property is matrimonial property on which the Plaintiff and the 1st Defendant established their matrimonial home. The suit property though jointly owned was registered in the name of the Plaintiff. The Plaintiff subsequently transferred it to the 1st Defendant to hold it in trust for him and their children. The 1st Defendant however transferred it to the 2nd Defendant without obtaining the necessary spousal consent.
5. The application is supported by the plaintiff's affidavit in which he reiterates the above stated grounds and depones that he has been living on the suit property with his children. He states that the transfer of the suit property to the 2nd Defendant was fraudulent and illegal as the suit property constitutes their matrimonial home. He further depones that as a result of the unlawful acts of the 1st and 2nd Defendant, he and his children have been evicted from their home, their house has been demolished and they have been rendered homeless thus occasioning him immense loss, pain and suffering.
6. The application is opposed by the 1st and 2nd Defendants through their Replying affidavits and Grounds of Opposition. In her Grounds of Opposition the 1st Defendant states that the Applicant has not come to court with clean hands and he has failed to establish a prima facie case. She also states that the application has been overtaken by events.
7. In her Replying affidavit she admits that the suit property was jointly purchased by herself and the Plaintiff and they put up their matrimonial home between 1992 and 1997 but they never stayed in it as they were legally separated in the year 2000. Thereafter the Plaintiff built a temporary house on the suit property where he has been living with his 2 other wives and their children at different times. The 1st Defendant further depones that in 1993 the Plaintiff charged the suit property to Barclays Bank to secure a loan. He subsequently failed to repay the loan and in October 2001 the suit property was sold by the bank in exercise of its statutory power of sale.
8. The 1st Defendant depones that since she had sentimental attachment to the suit property she bought it through an agent named Nancy Cheron Muge who in turn transferred the suit property to the 1st Defendant on 29th May 2018. She depones that in the meantime she

allowed the Plaintiff to live on the suit property as her licensee. She further depones that at the time she transferred the suit property to the 2nd Defendant it was no longer a matrimonial property as it had been sold by the bank and it was now in her sole name. She has attached the advertisement for the sale of the suit property by public auction, Certificate of sale, discharge of charge, certificate of official search in the name of Nancy Cheronno Muge, title deed in her name and a letter of consent to transfer the suit property to the 2nd defendant.

9. On his part the 2nd Defendant filed Grounds of Opposition in which he states that the plaintiff's application is an abuse of the court process, incompetent and bad in law. He further states that the 2nd Defendant is the registered owner of the suit property and has taken possession thereof pursuant to an order issued by the Sotik Principal Magistrate's Court.

10. The 2nd Defendant also filed a Replying affidavit in which he depones that he purchased the suit property from the 1st Defendant after conducting due diligence and satisfying himself that it belonged to the 1st Defendant. He further depones that the Plaintiff's right over the suit property was extinguished after he mortgaged the land for a loan which he failed to pay and the suit property was sold by public auction to one Nancy Cheronno Muge in 2001. He states that the Plaintiff has failed to disclose that before he purchased the suit property the 2nd Defendant visited the same and was welcomed and taken round the farm by the Plaintiff meaning that he was aware of the intended sale. He only requested for time to sort out the issue of the sale with his family members but never reverted to the 2nd defendant.

11. He further depones that he has obtained the title in respect of the suit property, taken possession thereof and deposited some building materials thereon and the Plaintiff therefore has no reasonable cause of action against him. He has attached the sale agreement, title deed in his name dated 10th July 2018, photographs of the suit property and the building materials deposited thereon among others.

12. The application was canvassed by way of written submissions and counsel for the applicant and the 1st and 2nd Respondents filed their submissions.

Issues for determination

13. Arising from the pleadings, rival affidavits and submissions, the following issues fall for determination.

- i. Whether land parcel number KERICHO/CHEMAGEL/488 is the matrimonial property of the Applicant and the 1st Respondent.
- ii. Whether spousal consent was a prerequisite to the sale of the suit property to the 2nd defendant
- iii. Whether the Applicant is entitled to the orders sought.

Analysis and determination

14. Learned counsel for the Plaintiff/Applicant has submitted that the suit property is matrimonial property.

15. Section 6(1) of the Matrimonial Property Act defines matrimonial property as;

“the matrimonial home or homes, household goods and effects in the matrimonial home or homes, or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”

16. It is counsel's submission that the suit property having been acquired during the subsistence of the marriage between the Plaintiff and the 1st Defendant constitutes matrimonial property. It is therefore his contention that there is a rebuttable presumption that the property which was acquired in the name of one spouse was being held in trust for the other spouse. He relies on section 14 of the Matrimonial Property Act which provides that:

“Where matrimonial property is acquired during marriage;- in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse”

17. It has been submitted that even if the Plaintiff and 1st Defendant are separated, this does not take away the Plaintiff's right to the suit property.

Counsel has relied on the case of **AGNES NANJALA WILLIAM VS JACOB PETRUS NICHOLAS VANDER GOES, (CIVIL APPEAL NO. 127 OF 2011)** where the court held as follows:

“Article 45 (3) of the Constitution of Kenya provides that parties to a marriage are entitled to equal rights at the time of the marriage during the marriage and at the dissolution of the marriage. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and a constitutional statement of the principle that marital property is shared 50-50 in the event that dissolution of the marriage...”

18. On the other hand, learned counsel for the 1st Defendant has submitted that the suit property is not matrimonial property as it was sold by the bank in exercise of its statutory power of sale after the Plaintiff failed to service the loan. It therefore ceased to be matrimonial property in October 2001. She relies on the case of **E N W v P W M & 3 others (2013) eKLR** where, in dismissing the Plaintiff's application for an injunction, the Court stated thus;

“As a further observation I would like to state that where a property that would otherwise be considered as matrimonial property is tendered as security for a bank loan as in the instant matter, such property becomes a commercial commodity available in the market and liable to be sold by the chargee under the chargee’s statutory power of sale and the exercise of such power of sale cannot be defeated by a claim that such property constitutes matrimonial property.”

19. It is counsel’s contention that the 1st defendant later bought back the suit property without the Plaintiff’s contribution as they were separated and he can therefore not claim that it constituted matrimonial property. She relies on section 6 (1) (c) of the Matrimonial Property Act which suggests that apart from the matrimonial home or homes and household goods, any other immovable or moveable property must be jointly owned and acquired during the subsistence of the marriage.

20. From the material placed before the court so far it is apparent that the suit property ceased to be matrimonial property when it was sold by the bank to one Nancy Cheronu Muge in 2001. The 1st Defendant has stated that she used Nancy as her agent to buy the suit property at the auction. What followed thereafter is that the 1st Defendant had the suit property transferred to her by Nancy after which she sold it to the 2nd defendant. The 1st Defendant has stated that she was separated from the Plaintiff in the year 2000 and this has not been controverted by the Plaintiff. Whether or not the suit property was matrimonial property at the time it was sold to the 2nd Defendant is a matter that can only be determined at a full hearing.

21. As to whether it was necessary to obtain spousal consent before the sale of the suit property to the 2nd Defendant, this would depend on whether the property was matrimonial property. As I have stated above, the issue as to whether the suit property was matrimonial property at the time it was sold to the 2nd defendant is inconclusive at this stage.

22. The role of a Court faced with an interlocutory application for injunction is not really to make final findings but to weigh the relative strength of the parties’ cases. This was so held in the case of **Mbuthia Vs Jimba Credit Corporation Ltd (1988) KLR1**, where the court stated as follows: -

“in an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties’ cases,”

23. What the court is called upon to determine at this interlocutory stage is whether the Plaintiff has met the threshold for grant of an interlocutory injunction.

24. In order for the court to exercise its discretion in granting injunctive relief the Applicant must meet the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

The first issue that the court must determine is whether the Plaintiff has established a prima facie case with a probability of success.

In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is... one 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”

25. In the instant case the Plaintiff has not placed any material before the court to show that he has a legal or beneficial interest in the suit property. On the other hand the 2nd defendant has produced a title showing that the suit property has been transferred to his name. Furthermore, he has averred in his Replying affidavit that the Plaintiff was aware of the sale and he even took the 2nd defendant round the farm and asked for time to consult his family members about the sale. This affidavit evidence has not been rebutted by the plaintiff. Had the Plaintiff been opposed to the sale he would have taken steps before the sale was completed and transfer effected to the 2nd defendant. In the circumstances, I am not persuaded that the Plaintiff has established a *prima facie* case with a probability of success.

26. On the question as to whether the Plaintiff is likely to suffer irreparable loss which cannot be compensated by damages, the Plaintiff has deposed that he lives on the suit property with his children though he failed to disclose that these are not the children of the 1st Defendant. His assertion that he has no other home has been challenged by the 1st Defendant who has deposed that the Plaintiff has land elsewhere and that a family meeting had been held on 9th June 2018 where it was agreed that the suit property belonged to the 1st Defendant. The value of the land is also ascertainable and in the event that the Plaintiff succeeds, he can be compensated by damages.

27. As the court is not in any doubt the issue of the balance of convenience does not arise.

28. In view of the foregoing, I find no merit in the application and I dismiss it with costs to the 1st and 2nd defendants.

Dated signed and delivered at Kericho this 14th day of December, 2018.

J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Nyadimo for Mr. Mugumya for the Plaintiff/Applicant
2. Mr. C.Koech for the 1st Defendant/Respondent
3. Mr. J.K.Rono for the 2nd Defendant/Respondent
4. N/A for the 3rd Defendant/Respondent
5. Rotich – Court assistant