



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.10 OF 2016

LILIAN WAIRIMU KIMOTHO.....PLAINTIFF

VERSUS

SAMUEL NJOGU KIMOTHO.....1ST DEFENDANT

SMART MOVERS.....2ND DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff being wife to 1st defendant; husband selling portion of suit land to the 2nd defendant; claim that there was no spousal consent; status quo before the sale ordered to be maintained pending hearing of the case).

1. This suit was commenced by way of plaint on 21 January 2016. The suit was originally filed over the land parcel Bahati/Wendo /Block 2/33 (Ruguru). The plaintiff is the wife of the 1st defendant having been married first under Kikuyu customary law in the year 1958. In the year 1965, they solemnized their marriage in church and they have four issues. In her original plaint, the plaintiff pleaded that the land parcel Bahati/Wendo Block/ 2/55 (Ruguru) is their matrimonial home. What prompted her to file suit was her belief that a portion of the said land parcel No. 55 had been sold to two persons, namely, Paul Karuga and Kibe Njenga, who were named in the original plaint as 2nd and 3rd defendants . Together with the suit, the plaintiff filed an application to stop the 1st defendant from transferring the portion sold.

2. In his response to the motion, the 1st defendant did point out that on 9 June 2015, he sold a portion of the land to Smart Movers Ltd, and the land parcel No. 55 was then subdivided into two portions to bring forth the parcel numbers 258 and 259, the latter of which is now in the name of Smart Movers Ltd.

3. The emergence of this evidence caused the plaintiff to amend her plaint to remove Paul Karuga and Kibe Njenga as defendants and instead substitute them with Smart Movers Ltd as the 2nd defendant. In her amended plaint, the plaintiff inter alia wants a declaration that the subdivision and sale of the land parcel No. 259 to the 2nd defendant company is void for lack of spousal consent. She thus wants the restoration of the land to the original land parcel No. 55.

4. The plaintiff also amended her application for injunction to now seek orders to restrain any disposition over the land parcel No. 259 and unlimited access and use of this land pending hearing of the case.

5. The defendants have opposed the application for injunction through a replying affidavit sworn by the 1st defendant. He has affirmed that he subdivide and sell a portion of the original land parcel No. 55 to

the 2nd defendant on 9 June 2015. He has deposed that he followed all the legal channels in doing so. He has annexed some minutes of a meeting where he has argued that it was agreed that he or the plaintiff could sell part of the land without restriction. He has explained that he sold part of the land because he has been sickly and in need of medication and upkeep.

6. I have considered the above material together with the submissions of Ms. Nancy Njoroge for the plaintiff and Mrs. Mukira for the defendants.

7. What I have before me is an application for injunction and the principles to be considered in an application of this nature were laid down in the case of **Giella vs Cassman Brown (1973) EA 358** wherein it was stated that to succeed in an application for injunction, the applicant needs to demonstrate a prima facie case with a probability of success; demonstrate irreparable loss if the order is not granted; and where the court is in doubt, consider the balance of convenience.

8. The case of the plaintiff in my view, is hinged on the argument that the 1st defendant did not seek spousal consent before selling the land. Ms. Njoroge in her submissions referred me to the provisions of Section 28 and 93 of the Land Registration Act, Act No. 3 of 2012.

9. On her part, Mrs. Mukira raised some technical objections on the competency of the application but I believe I can waive any irregularity by utility of Article 159 of the Constitution. She also submitted that the 2nd defendant was an innocent purchaser for value, I think on the argument that the land certificate, showed the 1st defendant as proprietor.

10. It is not in contention that the plaintiff and the 1st defendant are man and wife. The disposition took place in June 2015. By that time, both the Land Act, 2012 and Land Registration Act, 2012 were in force. Section 93 of the Land Registration Act provides as follows :-

93. (1) Subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or, all the spouses—

(a) there shall be a presumption that the spouses shall hold the land as joint tenants unless—

(i) a provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in, his or her own name only, or that the spouses are taking the land as joint tenants; or

(ii) the presumption is rebutted in the manner stated in this subsection; and

(b) the Registrar shall register the spouses as joint tenants.

(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 a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have 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.

(4) 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. The position of the plaintiff is that the disputed property is matrimonial property. She has contended that her consent and that of the rest of the family needed to be obtained before the 1st defendant could sell any portion of it. It will be observed that Section 93 of the Land Registration Act, especially Section 93(3), requires an assignee/transferee to inquire whether the spouse of the transferor/assignee has consented to the transaction. If the spouse undertaking the disposition deliberately misleads the assignee/transferee, then the transaction would be void at the option of the spouse who has not given consent.

12. The 1st defendant's argument is partly that they had agreed that either party could sell the property and he has referred me to minutes of a meeting held. This suit will probably be determined on the question whether or not consent was given by the plaintiff as alleged by the defendants. The plaintiff is of the view that she did not give consent whereas the defendants argue that she did give consent. I do not think that it will be wise for me to try and resolve that factual contest in this ruling. That is best left after hearing the parties.

13. I do believe that this application is best decided by use of the balance of convenience test. It is my opinion that the balance of convenience tilts in maintaining the status quo that was prevailing before the land was sold to the 2nd defendant. The plaintiff no doubt had access to the whole of the suit land prior to the sale. I do direct and order that this status that was prevailing be maintained until the suit is heard and determined and there be no dealings over the suit land. The costs of the application shall be in the cause.

14. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 22nd day of February 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :

Nancy Njoroge for the applicant

Mrs. Mukira for the respondent

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU