



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 75 OF 2016

HANNELORE MWANDOGO.....PLAINTIFF/APPLICANT

=VERSUS=

SULEIMAN SALIM MWANDOGO.....DEFENDANT/RESPONDENT

R U L I N G

1. In the Application dated 30th March, 2016, the Plaintiff is seeking for the following orders:

(a) THAT a mandatory injunction do issue compelling the Defendant and any other person claiming possession under him to vacate from the suit premises, being sub-division no's 2331(orig. No. 1878/29) & 1878 (orig No. 937/13) Section III MN;

(b) THAT the OCS Mtwapa Police Station be directed to assist by providing security to the Court bailiff;

(c) THAT the costs of this application be provided for.

2. In his Affidavit, the Plaintiff has deponed that herself and the Defendant were registered as joint proprietors of land known as sub-division number 2331 section III/MN (the suit property); that during the pendency of their marriage they had jointly purchased and developed the suit property where they cohabited and that they had agreed that in the event of a divorce, the house was to pass to her.

3. It is the Plaintiff's case that the Defendant is a trespasser in the suit premises.

4. In her Replying Affidavit, Rachel Luvuno Mweni, the holder of a general power of Attorney deponed that it is true the Plaintiff and the Defendant divorced in the year 2009; that Article 45 of the Constitution vests matrimonial property to the spouses in equal shares and that the Plaintiff stays in Germany where she works and the Defendant is staying in the suit property awaiting the sale and distribution of the same.

5. According to the Defendant's Attorney, the Agreement that the Plaintiff is relying on should be disregarded because it is not supported by any consideration.

6. The advocates for the Plaintiff and the Defendant filed their respective submissions and authorities. I have considered those submissions and authorities.

7. It is not in dispute that the Plaintiff and the Defendant cohabited as wife and husband. It is also not in

dispute that the suit property was registered in their joint names.

8. The Defendant has not denied that after jointly purchasing the suit property, he entered into an agreement with the Plaintiff and agreed as follows:-

“4. In the event of both parties to this agreement divorcing the shares of Suleiman Salim Mwandogo in both properties shall pass to HANNELORE RANK MWANDOGO.”

9. The Defendant's Attorney has admitted that indeed the Plaintiff and the Defendant divorced in the year 2009.

10. It is not clear why the Defendant entered into the agreement of 19th January 1995 in which he agreed to relinquish his share to the Plaintiff in the event they divorced.

11. Having not denied that he voluntarily entered into the said agreement, he cannot turn around and state that he is entitled to half a share of the suit property.

12. It is trite that this court can only interpret an agreement between the parties. The court is not supposed to re-write agreements for parties.

13. It is true, as submitted by the Defendant's advocate, that a mandatory injunction can only issue at an interlocutory stage in special circumstances, and if the case is clear and which the court thinks it ought to be decided at once (**see Locabail International Finance Limited vs Agro Export & Others (1986) 1 ALLER 901**).

14. In view of the terms of the agreement of 19th January, 1995, and considering that this court ought not to interfere on equitable grounds with ordinary contracts freely entered into by persons under no duress or mistake merely because it turns out to be harsh on one of the parties, I find and hold that this is a proper case for a mandatory injunction to issue at an interlocutory stage.

15. For those reasons, I allow the Application dated 30th March, 2016 as prayed.

Dated, signed and delivered in Malindi this 3rd day of **February**, 2017.

O. A. Angote

Judge