



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC NO. 521 OF 2017

(FORMERLY NAIROBI ELC NO. 1272 OF 2016)

A N SPLAINTIFF

VERSUS

W M.....1ST DEFENDANT

THE LANDS REGISTRAR, KAJIADO NORTH SUB COUNTY.....2ND DEFENDANT

PAUL SOKOTO MATHIAINTERESTED PARTY

RULING

The application before this court is a notice of motion dated the 14th October, 2016 brought pursuant to Orders 1 Rules 1&13 of the Civil Procedure Rules; Sections 1, 1A, 3, 3A and 63 (e) of the Civil Procedure Act, Article 45 (1) & (2) of the Constitution of Kenya 2010, Sections 6, 7, 8, 9 & 12(1) of the Matrimonial Act 2013, Sections 3 (2) & 6(1) of the Marriage Act 2014 and all the other enabling provisions of the law. The Plaintiff is seeking for the following prayers:

1. Spent

2. THAT this Honourable Court be pleased to issue temporary injunction orders against one Mr. W S M by himself, his agents, servants and person assigns RESTRAINING him and/or them from further interfering, entering, alienating, wasting, transferring, subdividing and/or dealing with the land known as all that parcel of land formally known as NGONG/NGONG/[particulars withheld] and/or any resultant subdivisions being NGONG/NGONG/ [particulars withheld] thereof (hereinafter referred to as the 'suit land') situated in Kajiado County pending the hearing and determination of this application.

3. THAT this Honourable Court be pleased to issue mandatory orders against one Mr. W S M by himself, his agents, servants and persons assigns RESTRAINING him and /or them from further interfering, entering, alienating, wasting, transferring, subdividing and/or dealings with the land known as all that parcel of land formally known as NGONG/NGONG/[particulars withheld] and/or any resultant subdivisions thereof (hereafter referred to as the 'suit land') situated in Kajiado County pending the hearing and final determination of this suit.

4.THAT this Honourable Court do issue witness summons to Land Registrar, Kajiado County to immediately appear to explain the intricacies surrounding the purported illegal subdivision of all that parcel of land known as Land Reference Number NGONG/NGONG/[particulars withheld].

5. AN order compelling the officer commanding the Police Division (OCPD) Ngong Division and the

officer in charge of a Police Station (OCS) Kiserian to ensure that Court Orders are fully complied with.

6. THAT the costs of this application be in the cause.

The application is premised on the grounds that the 1st Defendant/Respondent was customarily married to the Plaintiff/Applicant and they have five children. The 1st Defendant/Respondent is the original registered owner of land parcel number NGONG/NGONG/ [particulars withheld]. Further that the 1st Defendant/Respondent deserted the matrimonial home in 2000 and resurfaced in 2015 when he commenced subdividing and made attempts to sell the suit land without the spousal consent from the Plaintiff/Applicant. As a result of the sub division, the following new parcels were created NGONG/NGONG/[particulars withheld]. The Plaintiff/Applicant states that the 1st Defendant/Respondent has sold off some of the resultant portions to third parties. The application is supported by the affidavit of the Plaintiff/Applicant A N S where she avers that she was customarily married to the 1st Defendant/Respondent who is the original proprietor of land formally known as NGONG/NGONG/[particulars withheld]. She states that the 1st Defendant/Respondent has interfered with the said parcel of land and that the fraudulent and illegal transactions which is subject of the suit land is prejudicial to her and her family. She states that sometime in the year 2000, the 1st Defendant/Respondent deserted the matrimonial home and went to live with another woman, leaving behind the Plaintiff/Applicant and their five children. She avers that in the year 2015, the 1st Defendant/Respondent resurfaced and misled them that he was subdividing the suit land for their benefit, and after subdivision, he subsequently disposed of some resulting portions of land to a third party. She further states that she had developed the suit property in the absence of the 1st Defendant/ Respondent by planting trees, putting up structures, fencing the property with barbed wire, installing electrical power supply and connecting piped water thereon. She avers that together with her children, she has enjoyed peaceful and quiet possession for the past sixteen 16 years without any intrusion or interruption from the 1st Defendant/Respondent. She states that the 1st Defendant/Respondent has threatened to use police to cause them to vacate the suit land since the land NGONG/NGONG/[particulars withheld] has been sold. She insists no spousal consent was sought from her to sub divide the suit land but the same was obtained from the 1st Defendant/Respondent's second wife. She alleges she had placed cautions on land reference numbers NGONG/NGONG/ [particulars withheld] which were illegally and fraudulently removed.

The 1st Defendant/Respondent opposed the application and filed a replying affidavit sworn by himself (W S M) where he stated that he was previously married through association to the Plaintiff/Applicant and they were blessed with three children namely M M S, Lo W S and J S S and not five children. He avers that in 1995, he obtained registration to land title number NGONG/NGONG/[particulars withheld] which he had inherited from his late father. He said because they had difference between himself and Plaintiff/Applicant, he was compelled to marry a second wife under Maasai Customary Law. He avers that he visits his house and regularly advises on land keeping and related issues. He states that the Plaintiff/Applicant was a teacher and he was a driver and that she had a higher salary than his. He says he inherited land from his father measuring about one (1) acre and after a lengthy family meeting they agreed to subdivide and distribute the said land amongst all his children, the Plaintiff/ Applicant and himself. He said a surveyor was assigned the work but since they did not have money to pay him, the works the surveyor undertook was compensated by giving him an ? of an acre of the resultant parcels. He annexed a letter from Kituo Cha Sheria marked exhibit 'WS 1' to prove this. He states that the differences in their marriage had been deliberated upon by the elders and that he has not disposed of any land except the portion given to the surveyor, and it is the surveyor who disposed of land parcel number NGONG/NGONG/[particulars withheld] after this was agreed upon between himself, the applicant and their children. He insists the suit property was exclusively developed by himself and that he has not threatened or used the police to harass or intimidate anybody solely the Plaintiff/Applicant. He avers that he built a timber house on the suit land while the Plaintiff/Applicant who was a teacher was staying in school where she was teacher. Further that the suit land was subdivided by the family's appointed surveyor as per the mutation which is marked as exhibit 'WS II' and that each portion is distinct from the other with independent access. He states that LR No. NGONG/NGONG/[particulars withheld] is no longer in existence as it had been subdivided and he has a right to gift a portion of his land as he pleases. He states that he has not committed any fraud as he inherited the suit land from his father and he is desirous of proceeding to transfer the resultant parcels which are in his name to the Plaintiff/ Applicant,

himself and all the children he sired.

Both parties filed their written submissions which were highlighted on 10th April, 2017.

Ms. Obel who is counsel for the Plaintiff/Applicant stated that it is not in dispute that the Plaintiff/Applicant and the 1st Defendant/Respondent were customarily married and they got three children but the Plaintiff also had two other children who were not sired by the 1st Defendant. Further that the 1st Defendant is the original proprietor of Land Reference Number NGONG/NGONG/[particulars withheld]. Further that the 1st Defendant had deserted the matrimonial home in 2000 and married a second wife. That subdivisions to the suit land commenced in 2015 and the resultant parcels are land reference numbers NGONG/NGONG/ [particulars withheld]. She argued that the 1st Defendant and one P S M have threatened to take possession of the suit land. The Plaintiff/Applicant fears she will suffer irreparable loss and damage if the 1st Defendant is allowed to deal with the resultant parcels of land without her providing spousal consent.

Ms. Obel relied on several authorities including the Constitution, The Marriage Act and the Matrimonial Property Act to prove her argument that the Plaintiff had contributed to the improvement of the matrimonial property and has established a prima facie case to warrant the injunction sought.

Mr. Omani for the 1st Defendant, 2nd Defendant and Interested Party argued that the Plaintiff and the 1st Defendant had a protracted matrimonial dispute and held several meetings with the elders and at Kituo Cha Sheria to deliberate on the same. As a result of the deliberations, the 1st Defendant was allowed to sub divide the original parcel of land NGONG/NGONG/ [particulars withheld]. Further that the Plaintiff had entered a caution on the suit lands but the removal of said cautions was done in accordance with section 73 (2) of the Land Registration Act, with the Plaintiff/Applicant being notified. He admitted that the 1st Defendant only disposed of ? of the resultant parcel of land to defray expenses emanating from the survey. He relied on the contents of the letter from Kituo Cha Sheria dated 16th September, 2016 in which the Plaintiff/Applicant and the 1st Defendant had agreed on the process of subdivision and distribution of the suit land. He further stated that the Interested Party had bought the ? acre for value from the Surveyor and he produced a sale agreement between the said Surveyor Evans Njoroge Njuguna and the Interested Party.

Issues and determination

The Court finds that the only issue for determination in the instant application is the preservation of the resultant parcels of land NGONG/NGONG/ [particulars withheld] which were derived from the subdivision of NGONG/NGONG/ [particulars withheld].

The Court opines that since this is an interlocutory application , it would be premature to make a finding through affidavit evidence on contributions the Plaintiff made in the improvement of the suit land as matrimonial property. Further that the Matrimonial Property Act has explicit provisions at section 7 which stipulates that

'Subject to [section 6\(3\)](#), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.'

The Court notes that in the instant case, the Plaintiff/Applicant and the 1st Defendant have not declared whether their marriage is dissolved and in this regard it is presumed that the same is still subsisting, hence will not delve into the merits of dividing the matrimonial properties or not.

As per the Plaintiff's arguments she states that the said parcels of land in which her matrimonial home stands are all registered in the name of the 1st Defendant/Respondent. An issue which the 1st Defendant/Respondent does not oppose. Further the 1st Defendant/Respondent averred that he inherited the original suit land from his father and he intended to transfer some of the resultant parcels to the Plaintiff/Applicant, his children from the marriage and retain one for himself and his second wife. He

further stated that after the meeting at Kituo Cha Sheria (a nongovernmental organization providing legal aid) it was agreed between the Plaintiff and himself that he commences subdivision and pays the surveyor with one of the resultant parcel No. NGONG/NGONG/ [particulars withheld] which has already been disposed of and sold to a third party. It was further agreed that the Plaintiff would then get three ?s of the resultant subdivisions while the 1st Defendant and his second wife would retain each two ?s of the resultant subdivisions. It is not the Court's duty to reverse legal transactions that were undertaken in the open but to ensure the doctrine of *lis pendens* is adhered to. However, the Court will not issue a mandatory order as sought by the Plaintiff but allow status quo to be maintained pending the hearing and determination of the suit. The Court further urges the parties to adhere to Order 11 and set down the suit for hearing and final determination of the matter at hand.

The costs will be in the cause

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 13TH JUNE, 2017

CHRISTINE OCHIENG

JUDGE