



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 2 OF 2017

M B.....PLAINTIFF

VERSUS

P M W.....DEFENDANT

RULING

1. The plaintiff's application is dated 5/1/2017. It seeks the following orders:-

(1)spent

(2) That this Honourable Court be pleased to issue a temporary injunction restraining the defendant/respondent from selling. Leasing and/or in any other way disposing off one hundred and thirty (130) acres of land being part of LR. No. 6417, Trans-Nzoia County pending hearing and determination of this suit.

(3) That pending *interpartes* hearing, prayer No. 2 be granted in the interim.

2. It is premised on the following grounds:-

(a) That the land comprises matrimonial property.

(b) That the parties have since separated and the plaintiff/applicant resides with the children.

(c) That the defendant/respondent intends to waste the property to the detriment of the plaintiff and the children.

(d) That the defendant/respondent intends to squander the money realized from the intended sale and leave out the plaintiff and the children.

3. The plaintiff case is that she and the defendant are husband and wife, and are blessed with one child though the defendant has one child born out of wedlock though they are separated.

4. The plaintiff's husband obtained **130 acres** out of his late father's Estate when the same was being distributed in ***Succession Cause No. 17 of 1997***. The plaintiff alleges that the defendant has embarked on disposing of the land and the plaintiff is apprehensive that the whole land may be disposed of without her knowledge.

5. This disposal of the land would according to the plaintiff, be detrimental to the children. She avers that it is the only matrimonial property that the couple has.

6. She therefore prays this court to intervene and grant a preservative order barring the defendant from selling the remaining portion. She avers that the defendant is not gainfully employed and is only selling the land for the purpose of financing what she calls “*his extravagant life*”.

7. In the plaint, the following prayers are sought:-

(a) A declaration that one hundred & thirty (130) acres of land comprised in LR. No. 6417, Trans-Nzoia County is a matrimonial property.

(b) A permanent injunction restraining the defendant, his servants and/or agents from disposing of, leasing and/or in any other way interfering with the one hundred & thirty (130) acres out of LR. No.[particulars withheld], Trans-Nzoia County.

(c) Costs to the suit.

(d) Any other relief the court deems fit and just to grant.

8. The plaintiff has responded vide a sworn affidavit dated **6/2/2017**. He states that the applicant relinquished her citizenship and became a Norwegian citizen; that the Law of Norway does not allow for dual citizenship; that he never had any issue with the plaintiff during the marriage; that the plaintiff is now married to another man after their separation and that the defendant will presently be filing for divorce.

9. The defendant further states that the suitland was acquired by way of transmission and the plaintiff is not entitled to any part of it; that the manner of acquisition of the suitland renders it to be not matrimonial property and that there is no evidence by the plaintiff of any proprietary interests in the land; that the defendant would be harmed by any preservative orders while the plaintiff does not stand to suffer any irreparable damage if orders sought are not granted and that the granting of the orders would be tantamount to determining the suit when the defendant has not been heard.

10. In summary the defendant states that the plaintiff has not made out a *prima facie* case with probability of success and she has not demonstrated what substantial or irreparable damage she would suffer and she has also not given any undertaking as to compensation.

11. However this being an interlocutory application for an order of temporary injunction pending the hearing and determination of the suit, the main issues arising in this application are as follows:-

a. Has the plaintiff demonstrated that she has a prima facie case with a probability of success?

b. Would there be a risk of the plaintiff suffering irreparable damage if the orders sought are not granted?

c. Where does the balance of convenience lie?

12. It is the defendant’s contention that there is no evidence that the Land Reference Number 6417 Trans Nzoia County has been subdivided by the administrators of the estate of the late Wafula Wabuge and the defendant’s portion identified. Consequently it is not possible to identify which portion of land belongs to the defendant.

13. However the fact that the defendant is entitled to some 130 acres out of that estate has not been seriously disputed. The Certificate of Confirmation of Grant exhibited by the plaintiff which shows that the defendant is entitled to 130 acres from his father’s Estate is not disputed. In any event, if the defendant were to sell, he would already be having knowledge of which parcel has been allocated to him, hence any orders that may be issued, if the court is hereafter convinced that a prima facie case has been made out, would relate to that portion. In the case of ***I.J.K. –vs- K.K. Kericho ELC. Civil Suit No. 20 of***

2017 (O.S) the court stated as follows:-

“The second limb of the Preliminary Objection touches on whether the plaintiff's claim discloses a reasonable cause of action. It has been submitted on behalf of the defendant that the plaintiff has no cause of action against him since he is not the registered owner of the suit land. The Defendant does not dispute that he is the sole heir to his late father's estate and that he is in occupation of the suit parcel of land by virtue of having inherited it from his late father. He cannot therefore claim that he cannot be sued in respect of the said parcel merely because he has not had the title transferred to him through the process of succession. I take judicial notice that succession proceedings take time and in some instances parties elect not to file succession proceedings in order to evade litigation but this does not mean that they cannot be sued in respect of the property they have inherited. The court must look at all the circumstances of the case in order to meet the ends of justice.

14. The main interest of this interlocutory application is to preserve the subject matter till the end of the trial. Therefore it has to be some identifiable property or interest. I find that it has been established beyond reasonable doubt that the land is bound to devolve to the defendant. He has some interest in it, whether it has been subdivided or not. It is an interest that is capable of disposition. The court may therefore consider if there is a prima facie case with probability of success or risk of irreparable damage.

15. The defendant raised the issue as to whether or not the acquisition of the 130 acres by the defendant was through the effort of the defendant for it to be said that the plaintiff being the wife, could have contributed to its acquisition in one way or another.

16. The defendant also stated that the plaintiff's affidavit has demonstrated her lack of candour which should in this case deny her equitable relief. However, issues relating to the possible breakdown of the marriage should be reserved until later in the proceedings. What matters for now is that there is a subsisting marriage.

17. The defendant has gone to great length to demonstrate in his submissions that the suit land is not matrimonial property. In my view at this stage it would not be necessary for the court to pronounce itself on the issue of whether the suitland is matrimonial property or not as that is the issue to be determined at the end of this suit.

18. Regarding the issue as to whether there is established a prima facie case based on the material before the court, the court begins with the observation that the marriage between the parties is conceded by both the plaintiff and the defendant. The defendant has annexed their Certificate of Marriage Number 966303 to his defence.

19. The application lodged by the plaintiff must therefore be viewed as against a backdrop of the Constitution and the various Provisions of the Law touching on property within a matrimonial set up. **Article 68 (iii) of the Constitution** states that:-

“Parliament shall—

(c) enact legislation—

(i);

(ii);

(iii) to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage;

20. Protection of matrimonial property rights is therefore entrenched in the Constitution of Kenya which mandates parliament to enact legislation to effect that protection.

21. The **Matrimonial Property Act 2013** is an Act of Parliament made in line with the Constitution to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. A look at **Section 6(1) of the Matrimonial Property Act** shows that it provides as follows:-

“For the purpose of this Act, matrimonial property means:-

(a) Matrimonial home or homes;

(b) Household goods and effects in the matrimonial home; or

(c) Any other immovable and movable property jointly owned acquired during the subsistence of the marriage.”

22. **Section 93(1) of the Land Registration Act** provides as follows:-

“93 (1) Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.

23. Though the defendant sweeps aside by stating expressly at **paragraph 6** of the replying affidavit that *“there is no intention that the applicant should have part ownership or acquire title to the same....”*, the issue as to whether the land was obtained by the defendant for the purposes of co-ownership and use of both spouses in the marriage is an issue to be determined at the main trial. In this particular case where property acquisition is by way of transmission, the defendant’s expressed intention above is subsidiary to the existing law on matrimonial relations. This is the law that the court has to examine in detail in its judgment in this matter. The vital point here is that the property was acquired during the subsistence of the marriage.

24. **Section 12(1) of the Matrimonial Property Act** provides as follows:-

“An estate or interest in any matrimonial property shall not during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease or mortgage or otherwise.”

(2) A spouse in a monogamous marriage or in the case of a polygamous marriage, the man and any of the man's wives have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

25. There is therefore a legal bar to disposal of matrimonial property under the above provisions of the Act unless certain conditions are met. Under those provisions, the plaintiff, having demonstrated that there is a marriage, may therefore probably have a right to protect what she deems to be her right to property acquired during the subsistence of the marriage which has not been dissolved.

26. On the issue of irreparable damage, it has been pleaded though denied, that the plaintiff and the defendant do not have any other land and that the land is required to generate income for the family and the school going children; perchance the court’s judgment finds the land to be Matrimonial Property, the plaintiff and the issue or issues of the marriage may suffer irreparable damage if the said land is wholly or substantially disposed of before the conclusion of the suit.

27. Though the defendant has pleaded at **paragraph 8** of his defence that he has taken care of his child and that the plaintiff’s children have no interest or claim in the land, these are matters of evidence to be canvassed at the main trial.

28. Consequently I find that the plaintiff has established a prima facie case with probabilities of success

as against the defendant and the likelihood of irreparable damage and hence the application for injunction is merited.

29. A temporary injunction shall issue restraining the defendant from selling leasing and/or in any other way disposing off one hundred and thirty (130) acres of land being part of LR. No.[particulars withheld], Trans-Nzoia County pending hearing and determination of this suit.

The costs of this application shall be borne by the defendant.

It is so ordered.

Dated, signed and delivered at Kitale on this 31st day of July, 2017.

MWANGI NJOROGE

JUDGE

Ruling read in open court in the presence of:-

Ms. Arunga for Applicant

Mr. Ingosi for Respondent

Court Assistant – Isabellah.

MWANGI NJOROGE

JUDGE

31/07/2017.