



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MILIMANI

ELC CASE NO. 867 OF 2016

A N M.....PLAINTIFF/APPLICANT

VERSUS

ESTHER MUTHONI WAMBUGU...1ST DEFENDANT/RESPONDENT

J M M.....2ND DEFENDANT/RESPONDENT

RULING

1. The applicant *ANM* is the wife of the second Respondent *JMM*. The two were married under Kikuyu Customary Law in 1981. On 22nd November 1993, the second respondent was allocated a Commercial Plot being plot No. [Particulars Withheld] and D at [Particulars Withheld] (suitland). The second respondent built up the plot which he rented out and reserved some rooms which he set up as their matrimonial home.

2. On 13th February 2014, the second respondent gave a special power of attorney to the first Respondent to deal with the suitland as she wished including transferring it to herself. On the same date the second respondent sold the suitland to the first respondent at Kshs.800,000/= . The applicant was subsequently evicted from the suitland after her dwelling house was demolished. This is what prompted the applicant to move to court seeking a number of prayers in her application dated 26th July 2016.

3. The applicant contends that the second respondent abandoned her and their two children and went to live with another woman. The applicant heard rumours that the second respondent had sold the suitland and that on investigations it turned out that the applicant had sold the suitland to the first respondent with whom he had eloped. The respondents then evicted her from her only matrimonial home on the suit premises. The applicant contends that the second respondent does not have any matrimonial home to where they can relocate. That the second respondent has abandoned his family and that he does not pay any fees for the children. The applicant has been deprived of her only source of income which she used to get from the rental premises on the suitland.

4. The second respondent's has opposed the applicant application through a replying affidavit sworn on 12th April 2016. The second respondent contends that he disposed of the suitland to the first Respondent with the consent of the applicant. That he had borrowed **Kshs.900,000/=** from the first respondent which he was unable to refund . He agreed with the applicant that he was to sell the suitland to the first respondent to enable him raise money to go and buy land elsewhere. That he bought land at Loitoktok where he set up a home but that the applicant has refused to go there. That the applicant had demanded to have the cash out of the sale of the land to enable her start a business in Kayole and that was the source of

problems when the second respondent declined to accede to the demands of the applicant.

5. The second respondent further contends that he has land at his ancestral home in Nyeri where the applicant can relocate to but that she is unwilling to do so. The first respondent on her part opposed the applicant's application through a replying affidavit sworn on 12th April 2016. The first respondent contends that she purchased the suitland after the applicant was consulted. She denied that the applicant was staying in the suitland as her matrimonial home. The first respondent further contends that the applicant started doing business on the suitland after she purchased the same. That when she demanded rent from the applicant and other tenants they disappeared from the suitland. She went and filed a case at the Rent Restriction Tribunal where she obtained orders to break into the suitland. She contends that the structures on the suitland have already been demolished and therefore no injunction can be given.

6. I have carefully considered the applicant's application and the opposition thereto by the respondents. It is not contested that the applicant and the second respondent are still married. Though the first respondent is claiming that the applicant was not staying on the suitland as her matrimonial home, the second respondent has clearly stated in his affidavit that he reserved some rooms on the suitland where his family was staying.

7. The second respondent did not produce any evidence that he purchased land at Loitokitok or that he has any ancestral land in Nyeri. What emerges from the documents presented in Court is that the respondents conspired to remove the applicants from the suitland. A specific power of attorney was given to the first respondent by the second respondent. Before the same could be registered in order to have force of law, the two entered into a sale agreement. The applicant was subsequently evicted from the suitland. The law requires that there has to be spousal consent before a matrimonial property can be disposed of. Though there are claims that there was spousal consent, there is no evidence that that was the case.

8. It is clear that the applicant has already been evicted from the suitland. The structures which she had put up have been demolished. It is clear that the respondents are trying to steal a march on the applicant. The applicant is suffering. She does not have a place to live in. The applicant has made out a clear case for grant of some mandatory orders in her prayers. I allow the applicant's application to the following extent.

(1) An injunction is hereby given restraining the respondents from carrying on any further construction on the suit land until hearing and determination of this suit.

(2) The applicant is hereby allowed to put up temporary structures on the suitland to accommodate her and her family.

(3) The OCS Kayole police Station and the Deputy County Commissioner Embakasi are hereby directed to ensure compliance of the court's orders.

(4) The costs of this application shall be paid by the respondents.

Dated, Signed and delivered at **Nairobi** on this **3rd** day of **October, 2017**.

E.O.OBAGA

JUDGE

In the presence of :

M/s Mungai for M/s Nyang for applicant

Court Assistant: Hilda

E.O.OBAGA

JUDGE