



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 123 OF 2015

FRANCESCA A. MOMANYI PLAINTIFF/APPLICANT

VERSUS

DAVID P. SANGANYI1ST DEFENDANT/RESPONDENT

RICHARD MOMANYI OSORO2ST DEFENDANT/RESPONDENT

R U L I N G

1. The plaintiff/applicant is the wife of the second defendant/respondent. The second respondent was the registered owner of **LR. No. Waitaluk/Mabonde Block 13/Bikeke/105** which he later sub-divided into five portions namely **Waitaluk/Mabonde Block 13/Bikeke/1129, 1130, 1131, 1132** and **1133**. Prior to the subdivision, the second respondent had sold portions of the land to the first respondent.
2. There was protest from the applicant at the manner the second respondent was selling the family land. The applicant later consented to the sale of three portions to the first respondent by the second respondent. The first respondent respondent then had three portions registered in his name that is **LR. No. Waitaluk/Mabonde Block 13/Bikeke/1131, 1132** and **1133**. **LR.No. Waitaluk/Mabonde Block 13/Bikeke 1129** and **1130** are in the name of the second respondent.
3. In or around 13/9/2015, the first respondent came in with hired goons and started cutting down the live fence securing the applicant's matrimonial home situated on **LR. No. Waitaluk/Mabonde Block 13/Bikeke/1130** and started fencing it off on allegation that he had bought part of it from the second respondent. This is what triggered the present application.
4. The applicant contends that the portion which the first respondent wanted to fence off is part of the matrimonial home and that the same was sold by the second respondent without her consent. The applicant had initially been opposed to any sale to the first respondent but after a meeting she agreed that three portions can be transferred to the first respondent. The three portions were subsequently transferred to the first respondent and have been registered in his name.
5. The applicant's application is opposed by the first respondent through a replying affidavit sworn on 1/10/2015 as well as a further affidavit sworn on 13/11/2015 and another affidavit sworn by one **Isaac Wafula Lusweti** on 4/11/2015. The first respondent contends that he bought land from the second respondent in bits with effect from **31/7/2003** upto **6/6/2010**. He further contends that the applicant and the second respondent have conspired to deny him what he lawfully bought and that the applicant's matrimonial home does not lie on **Plot No. 1130** and that he bought part of **Plot 1130** and has been in possession for over six years. He further states that the matrimonial home of the applicant is on **Plot No. 1129**.

6. The first respondent contends that all agreements between him and the second respondent were witnessed by the applicant who appended her signature on the same except on some others which were signed by the second respondent on her behalf as she was suffering from stroke and unable to sign the same.
7. In response to the first respondent's affidavit in reply, the applicant contends that **Plot No. 1129** was long sold out and it is occupied by 10 families. That the area being claimed by the first respondent is part of her matrimonial home and that two signatures on two different agreements for sale which purported to be hers were actually forgeries which were made by the second respondent.
8. I have considered the applicant's application as well as the opposition to the same by the first respondent. There is no doubt that the first respondent bought portions of the second respondent's land in bits. The first respondent has annexed five agreements between him and the second respondent. These agreements were made on various dates between 31/7/2003 and 6/6/2010. There is no contention that the first respondent has obtained three separate titles for the plots he bought from the second respondent. The only contention is that the first respondent attempted to fence off part of the matrimonial property lying on **Plot 1130** on allegations that he had bought part of it. The issue for determination in this application is whether **Plot No. Waitaluk/Mbonde Block 13/Bikeke/1130** is matrimonial property which should not be sold without the consent of a spouse.
9. The applicant had been opposed to the first respondent's registration of the plots he bought from the second respondent. A meeting was held which reached a settlement that the first respondent was to have three plots registered in his name. Subdivisions were done in 2015 and he was given three plots which were all registered in his name. Despite this agreement he went ahead to claim part of **Plot 1130**. **Plot No. 1130** is where the matrimonial home of the applicant stands. **Section 6 (1) of the Matrimonial Property Act of 2013** defines matrimonial property to include among others the matrimonial home or homes. The term matrimonial home is defined in the Act as any property that is owned or leased by one or both spouses and occupied or utilised by the spouses as their family home and includes any other attached property.
10. The applicant has exhibited photographs which show where the matrimonial home is. What the first respondent wanted to carve out is land attached to the matrimonial home which is covered under matrimonial home. There was therefore need for consent of the applicant before the second respondent could purport to sell the land to the first respondent. **Section 93(4) of the Land Registration Act** is clear that any purported sale without spousal consent is null and void.
11. The respondent through affidavit of Isaac Wafula Lusweti has conceded that some agreements were signed on behalf of the applicant by the second respondent. Indeed the applicant in her further affidavit confirms this when she contends that in two agreements, the second respondent forged her signature. If the applicant was unable to sign and had consented to the sale, then this should have been stated so but not purporting to append a signature which is similar to hers. This was pure forgery.
12. I find that the applicant has demonstrated that she has a *prima facie* case with probability of success. The injunction orders which were granted on **22/9/2015** and subsequently extended are hereby confirmed. They shall remain in force until hearing and determination of this suit. The applicant shall have costs of this application.

It is so ordered.

Dated, signed and delivered at Kitale on this **22nd** day of **February, 2016**.

E. OBAGA

JUDGE

In the presence of second defendant

Court Assistant – Isabellah.

E. OBAGA

JUDGE

22/2/2016