



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 176 OF 2014

LYDIA CHEMNG'ETICH:.....PLAINTIFF

VERSUS

STEPHEN KIPLANGAT NG'ENY.....DEFENDANT'S

REBECCA CHEPKORIR

J U D G E M E N T

INTRODUCTION

1. The first defendant is the husband of the plaintiff and the second defendant. The plaintiff brought this suit against the defendants seeking the following reliefs:-

(a) An order that the plaintiff is entitled to reside on and remain in her matrimonial home and utilize parcel No. Kaplamai/Sirende block 3/Kaplamai/101 and that the second defendant has no capacity whatsoever to be on the land.

(b) A permanent injunction restraining both defendants from interfering with the plaintiff's peaceful use, stay and possession of the land.

(c) Costs of the suit.

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

PLAINTIFF'S CASE:

2. The plaintiff testified that she was married to the first defendant on 2.10.1972 in a Civil marriage. She jointly bought land at Kaplamai with the first defendant. The land is the one now known as Kaplamai/Sirende Block 3/Kaplamai/101 (suitland). She testified that the first defendant has another parcel of land elsewhere which is six acres. Between 1972 and 1975 she was with her husband who was working with what is now known as Telecom Kenya.

3. Her husband put up a permanent house on the suit land which is now her matrimonial home. They had been living happily with her husband until the year 2011 when her husband came home and beat her. She reported the incident to the area chief after which she left for Nairobi. The husband then brought in the second defendant into the matrimonial home. She reported this to the local chief who ordered the second defendant out of the matrimonial home. Her brothers removed the second defendant from her matrimonial home. She came back to the house where she stayed until 12.9.2014 when the first defendant ejected her from the house. She went back to Nairobi. The second defendant then went back to the plaintiff's house. She again went to the chief and reported

- the incident. The chief advised her to file a suit in court.
4. The plaintiff testified that she has always wanted to go back to her matrimonial house but that the first defendant has been threatening to kill her if she does so. She is now residing in her son's house which is on the suit land.

FIRST DEFENDANTS' CASE

5. The first defendant testified that he married the plaintiff in 1972. He later married the second defendant in 1986 but they formalized the marriage with second defendant in 2014. He contends that he has never chased away the plaintiff. That it is the plaintiff who went away after he caught her having sex with their farm worker. He stated that the plaintiff stays in her son's house which is 70 metres away from the matrimonial house.

SECOND DEFENDANT'S CASE

The second defendant stated that she used to work with Kenya Post & Telecommunications which was split and part of it became Tellcom Kenya. She knew the first defendant in 1983 while she was working in Kisumu. They started cohabiting with him. She got a baby with the first defendant in 1987. A second baby came in 1989. The first defendant was transferred to Nairobi whereas she was transferred to Sotik. The first defendant later invited her to join him at Kitale. She came and occupied a house which belonged to the plaintiff. She was later forcefully ejected from the house. Her union with the first defendant was formalised in December 2014.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION:

7. The defendants had conceded in their defence that this court has jurisdiction to entertain this suit but in submissions prepared by their counsel, the issue of jurisdiction is contested. The defendants argue that this dispute ought to have been filed in the family division in a matrimonial cause and not in the Environment and Land court. The first issue which then arises for determination is whether this court has jurisdiction to entertain this suit.
8. The main contention of the plaintiff is that she has been chased away from her matrimonial home. She wants an order to the effect that she is entitled to remain in her matrimonial home and utilize the land on which the home stands and further she wants a declaration that the second defendant has no capacity to remain on the suit land. She further wants the two defendants restrained from interfering with her use occupation and stay on the suit land. It is clear that the reliefs which the plaintiff is seeking cut across the jurisdiction of the High Court and the Environment and Land Court. For the High Court, there is the issue of matrimonial property and the issue of marital status. For the Environment and Land Court, there is the issue of occupation and use of land. In my humble opinion, where a claim filed by a party is a mixed one as in this case, either court can hear and determine it. This is one way of saving the court's time and to avoid filing of a multiplicity of cases. I therefore find that I have jurisdiction to entertain this suit.
9. There is no contention that the house standing on the suit land is matrimonial property. The house was specifically built for the plaintiff. The first defendant during cross-examination stated that he does not want the plaintiff back into the house. The issue which then arises for determination is whether the plaintiff is entitled to stay in the matrimonial house. The matrimonial property Act of 2013 in section 6 defines matrimonial property to mean among others, the matrimonial home or homes Section 12 (3) of the matrimonial property Act provides as follows:-

“ A spouse shall not during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court”.

10. The first defendant stated that when he found the plaintiff having sex with their farm worker, he beat her and that she ran away. There is evidence that when the plaintiff reported that she had been evicted from her matrimonial house, the first defendant allowed her back only to evict her again. The first defendant himself has vowed not to let the plaintiff back to the matrimonial

house. He infact during the hearing stated that the plaintiff can take away the house but leave his land. This is a clear indication that he does not want her back. This is wrong and contrary to the matrimonial property Act of 2013. The allegations of infidelity notwithstanding, no court order has been issued asking the plaintiff to stay away from her matrimonial house. The marriage between the two is still subsisting. I therefore find that the plaintiff is entitled to remain in her matrimonial house.

11. The other issue for determination is whether the second defendant has capacity to remain on the suit land. The plaintiff had contended in her pleadings and evidence that the second defendant is not a wife of the first defendant. There is evidence from DW3 Joel Kipkurui Ng'eny an elder brother of the first defendant. He testified that he knows that his brother has two wives; that is the plaintiff and second defendant. The first defendant and second defendant had been cohabiting while in Kisumu working together. Their union was later formalised according to traditions in 2014. The plaintiff herself conceded that the defendants hurriedly formalised their marriage in 2014. This is confirmed by the second defendant who stated in her evidence that her marriage to the first defendant was formalised in December 2014. I therefore find that the second defendant is a lawful wife of the first defendant and therefore has capacity to remain on the suit land.
12. The last issue for determination is whether the defendants should be barred by injunction from interfering with the plaintiff's peaceful use, stay and possession of the suit land. There is no evidence of any interference by the defendants in as far as the use and occupation of the suit land is concerned. The plaintiff herself testified that her husband is the one who cultivates the suit land for the benefit of the family. She did not say that she has been prevented from cultivating the land. The problem was access to the matrimonial home. This court is not dealing with division of property as the marriage between the plaintiff and the first defendant has not been dissolved. The plaintiff cannot therefore purport to have the second defendant barred by injunction more especially when it is clear that she has not interfered with her use of the land in any manner. The second defendant stays in Sotik. She does not stay at Kaplamai where the suit land is situated.

I therefore do not find any basis upon which an order of injunction can be issued.

DECISION

13. All in all I find that the plaintiff has proved that she is entitled to remain in her matrimonial house. There should be no interference with her quiet enjoyment of the same. Her claim therefore succeeds to this extent. I do not make any order as to costs. Each party to bear their own costs.

Dated, signed, and delivered at Kitale on this 3rd day of February, 2016.

E. OBAGA

JUDGE

In the presence of Mr. Tigogo for defendants. Court Assistant Winnie.

E. OBAGA

JUDGE

3/2/2016