



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 13 OF 2016

BERNADETTE K. NELIMA.....PLAINTIFF

VERSUS

PAULO LOKIRA LOMERIMUK.....DEFENDANT

RULING

1. The Applicant Bernadete K. Nelima filed a suit against the Respondent Paul Lokira Lomerimuk seeking a permanent injunction against the Respondent or his servants from evicting her from a plot measuring 100 x 100 ft comprised in **Title No. West Pokot/Siyoi”A”/2423** (Suitland). She also sought a declaration that the suitland is matrimonial property which is jointly owned by her and the Respondent.
2. The Applicant at the same time filed a Notice of Motion in which she seeks a temporary injunction against the Respondent and or servants from evicting her from the suit land or selling or leasing the same until the hearing and determination of the suit. The Applicant contends that she was married to the Respondent in early 2007 under Pokot customary Law. That on 27/7/2007 of the same year, the Respondent bought the suitland which they established as their matrimonial home. The union was blessed with a baby boy who was born in 2009.
3. In 2014, the Respondent's attitude towards the Applicant changed. The Respondent later moved out of the matrimonial home leaving behind the Applicant and the child. The Applicant sought the intervention of the area chief and various other offices in vain. On 17/1/2016, the Respondent threw her out of the house and said that he was going to sell the same. That she has since been living in a friend's house in the neighbourhood as she has nowhere to go to.
4. The Respondent has opposed the Applicant's application based on a replying affidavit sworn on 9/2/2016 and filed in court on the same date. The Respondent contends that the Applicant is not his wife as she alleges. That he bought the suitland on 27/7/2007 well before he knew the Applicant who was then in college. That he knew the Applicant in 2008 and became intimate resulting in the birth of a baby boy in 2009. Their relationship ended in 2009 and that he has never married her under Pokot customary law as she alleges.
5. The advocates for the parties agreed to dispose of the Application by way of written submissions. I have carefully gone through the Applicant's application, the further affidavit and supplementary affidavits as well as the replying affidavit by the Respondent. I have also gone through the cases cited by the advocates for the parties. The Applicant is seeking a temporary injunction and the principles for grant of temporary injunction are now well set out in the case of ***Giella -Vs- Cassman Brown Co. Ltd [1973] EA 358***. First an Applicant must show a prima facie case with probability of success. Secondly, an

interlocutory injunction will normally not be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

6. In trying to determine whether the Applicant has met the threshold for grant of injunction, I will go through the Principles vis-a vis the facts as presented in the supporting affidavits. On whether the Applicant has established a prima facie case with probability of success, a look at her affidavits is necessary. In her supporting affidavit, she had stated that she married the Respondent in year 2007 under Pokot customary Law. That the suitland was soon thereafter purchased on 27/7/2007.

7. The Applicant later filed a further affidavit in which she states that the property was bought when she was in college but that since the same was going to be their matrimonial home, she was called by the Respondent to come and view it. The Applicant also filed a supplementary affidavit of one Maurice Mutembete Samita who is her father. In the supplementary affidavit, the Applicant's father states that sometimes in July 2007, the Applicant, the Respondent and one Johnstone Tukei visited him at his home in Webuye and the Respondent asked him if he would marry his daughter. When they were leaving, the Respondent gave him Kshs 500/-. In 2013 the Respondent asked him to go and visit his parents but he declined to do so.

8. It is clear from the affidavit of the Applicant and that of his father that there was no marriage under Pokot customs. The Applicant cannot therefore claim to have been married in early 2007 under Pokot Customary Law. The Applicant's father has confirmed that the Applicant was in college when she gave birth. There is no contention that the two had a baby together. The contention is that they never married. The basis of the Applicant's case is that she is a married wife to the Respondent. She has not demonstrated that she was married to the Respondent.

9. The documents she has annexed to the supporting affidavits all relate to the child of the union. It is one thing to get a child with someone and quite a complete thing to get married. The Applicant's claim is based on the matrimonial property Act of 2013. The Land Act and the matrimonial property Act gives protection to persons who are married. Prima facie the Applicant has not shown that she is married to the Respondent. I therefore find that there is no basis upon which I can make a finding that she has demonstrated that she has a prima facie case with probability of success. Her own father had stated that he refused to go and visit the parents of the Respondent. That the only amount he received is Ksh 500/- from the Respondent when they visited his home in Webuye. This cannot be dowry.

10. The Applicant concedes that she is not on the suitland. She is staying elsewhere. The Respondent is providing for the child of the union which the respondent says was not a marriage. The respondent left his M-pesa business which had a float of Kshs 100,000/- to the Applicant. There were new phones worth Kshs 80,000/- and other income generating business like mobile phone charging. The Applicant has not denied this. The issue of the child of the union was discussed by the children's Department who found that the Respondent was providing for the minor and that the Applicant was too expected to chip in.

11. There is no loss which she will suffer which will not be compensated in damages. What the Applicant is seeking at the moment is a mandatory injunction. This is because she is already out of the suitland. If she wants to get back, then that will amount to granting a mandatory injunction. There are no special grounds shown for the grant of the same. The issues involved in this case are not simple matters which can be solved in a summary manner. This is a matter which has to be determined in a full trial. The child of the Union is well catered for at least from the report of the children's department. This is not denied by the Applicant.

12. There is no threat of sale of the suitland. Taking all factors into account, the balance of convenience tilts against grant of the injunction. I therefore find that the Applicant's application cannot be granted in the circumstances. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated , signed and delivered at Kitale on this 26th day of May 2016.

E. OBAGA

JUDGE

In the presence of Mr Bororio for Applicant.

Court Assistant – Isabellah

E. OBAGA

JUDGE

26/5/16