



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 136 OF 2014**

**PSN.....PLAINTIFF**

**VERSUS**

**BNO)**

**RATILAL GOSAR DODHIA)**

**VIPUL RATILAL)..... DEFENDANTS**

**AVIR KANTI SHAH)**

**R U L I N G**

1. The applicant PSN filed a suit against four respondents seeking a declaratory order that the transfer of a lease in Kitale [Particulars Withheld] from the first respondent to the second, third and fourth respondents is unlawful. She also prayed that the lease in favour of the second, third and fourth respondents be cancelled and the same be reinstated in the name of the first respondent. She contemporaneously filed a notice of motion under sections 1A, 3, 3A and 63 of the Civil Procedure Act as well as order 51 Rule 1 of the Civil Procedure Rules seeking maintenance of the Status Quo prevailing at the filing of the suit in respect of [Particulars Withheld] (suit property).
2. The first respondent was the registered owner of the suit property which has since been transferred to the second, third and fourth respondents. The applicant contends that she is the wife of the first respondent having been married under Kisii customary law in 1990. That the said marriage had been blessed with one issue known as PBM. The applicant further contends that she jointly developed the suit property with the first respondent for purposes of a private hospital.
3. The applicant contends that the first respondent has since transferred the suit property to the second, third and fourth respondents without her consent and that the second, third and fourth respondents are in the process of transferring the suit property to the County Government of Trans-Nzoia. She contends that if the orders maintaining the status quo are not given, the second third and fourth respondents will transfer the suit property to the County Government of Trans-Nzoia which will defeat the purpose of the suit.
4. The applicant's application is opposed by the first respondent through a replying affidavit sworn on 22/10/2014 and filed in court on 23/10/2014. The second, third and fourth respondents have opposed the applicant's application through a replying affidavit of the third respondent sworn on 21/10/2010 and filed in court on the same day.
5. The first respondent contends that he has never married the applicant under any customary law. He concedes that he had an intimate relationship with the applicant which resulted in one issue but that he

never married the applicant. The first respondent contends that the applicant has been married to one GON since 1980 and has never remarried to either himself or any other man.

6. The first respondent contends that the applicant has no interest in the suit property and that he was under no obligation to seek consent of the applicant as she was not his spouse. The first respondent further contends that the applicant has failed to disclose material facts regarding the case and that she is out to enrich herself and is denying the purchasers of the property their enjoyment of the same.

7. On their part, the second, third and fourth respondents contend that the applicant's application is misconceived and is an abuse of the process of the court. They state that the suit property had been charged by the first respondent to the Housing Finance Company of Kenya Limited (HFCK). The property was advertised for sale by HFCK. The first respondent went to Kakamega and obtained temporary orders of stay. It is after this that the first respondent approached the second, third and fourth respondents to purchase the suit property instead of the same being auctioned by HFCK.

8. The second, third and fourth respondents contend that the filing of the suit herein as well as the present application is meant to frustrate them from selling the suit property to a third party.

9. I have carefully gone through the applicant's application as well as the supporting documents in both the application and supplementary affidavit. I have also gone through the replying affidavits by the respondents as well as the annexures thereto. The applicant herein has brought this application on the basis that she is the wife of the first respondent and that the first respondent should not have sold the suit property without her consent. Before I decide on whether to order maintenance of the status quo prevailing as at the time of filing this suit, I have to determine whether the applicant has demonstrated that she is the wife of the first respondent.

10. The counsel for applicant submitted that the applicant was married to the first respondent through Kisii customary law. The applicant annexed a letter dated 7/11/2014 from the Deputy county Commissioner Nyamache Sub-County which states that the applicant was married to the first respondent in 1990 and that the first respondent paid bride price on 23/4/1993 and that the marriage has one issue who is currently at Strathmore University College.

11. The first respondent annexed a further affidavit sworn by the applicant in Nairobi High Court Misc. Civil Suit No. 604 of 2009 (OS). This was a claim under section 17 of the Married Women's Property Act (1882). The applicant was seeking a stake in a property on [Particulars Withheld] from her husband GON. This suit was later compromised in a consent recorded on 11/7/2011 in which the applicant who was the plaintiff in that suit was given Kshs.4,000,000/= in exchange for removal of a caveat which she had caused to be registered against the title to the property. The case was fully settled in terms of the consent recorded therein.

12. At paragraph 13 of the further affidavit referred to hereinabove, the applicant averred that she has never remarried since her separation with GON. She further annexed a petition for divorce filed in Eldoret Principal Magistrate's Court in Divorce Cause No. 8 of 1990 between her and her husband GON. At paragraph 30 of the said further affidavit, the applicant deposed that the divorce cause she had filed against her husband GON was still pending and that she was still married to GON. This further affidavit was sworn on 16/7/2010. It is therefore clear that the applicant is still married to GON and it is therefore not possible that she could be married to the first respondent as she claims.

13. Section 17 of the married Women's Property Act (1882) which ceased to apply in Kenya on 16/1/2014 following the coming into force of the matrimonial property Act No 49 of 2013 gave married women the right to bring claims against their husbands in matrimonial property matters. An application under that section could only be made by a married woman. The applicant brought the originating summons under that act as wife of GON. In her own further affidavit, she stated that the divorce cause she had filed against GON was still pending, that is why she was able to file the originating summons in 2009. The applicant could not be married to two men at the same time.

14. If the first respondent has registered some properties in her name and that of his or some of his properties like vehicles are lying in the compound of the applicant that cannot be taken as evidence of marriage. The applicant has herself in her own documents stated that she is still married to GON whom she married under Luhya customary Law and that the divorce she filed in 1990 is still pending. In the absence of any decree dissolving her marriage to GON, I find that there is no basis upon which she can claim to be married to the first respondent. In the circumstances her application dated 25/8/2014 has no basis. The same is hereby dismissed with costs to the respondents.

It is so ordered.

**Dated, signed and delivered at Kitale on this 26th day of February, 2015.**

**E. OBAGA**

**JUDGE**

**In the presence of Mr Nyamu for applicant, Mr Ingosi for 1st respondent and Mr Kidiavai for 2nd, 3rd and 4th respondents. Court Clerk – Kassachoon.**

**E. OBAGA**

**JUDGE**

**26/2/2015**