



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 176 OF 2014

L CPLAINTIFF

VERSUS

S K N

R C..... DEFENDANTS

R U L I N G

1. The applicant is the first wife of the first respondent. The second respondent is also the second wife of the first respondent. The applicant brought a notice of motion dated 16/12/2014 in which she seeks a mandatory injunction seeking the first respondent to put her back into her matrimonial property lying on LR NO [*particulars withheld*] (Suit property). The applicant also seeks a temporary injunction restraining the second respondent from trespassing into the suit property.

2. The applicant contends that she has been married to the first respondent since 1972. She contends that she moved into the suit property in 1978 and has been living on the same until 12/9/2014 when the first respondent assaulted her after which he threw her out of the matrimonial home. The applicant contends that, the first respondent then brought in the second respondent who is his mistress and are living in the matrimonial home whereas she has no any other place to go to. She contends that she has been forced to seek refuge at her relatives places. She contends that the second respondent has no right to remain in her matrimonial property and that therefore she should be restrained from remaining in her matrimonial home.

3. The applicant's application is opposed by the first respondent through replying affidavit sworn on 13/1/2015. The first respondent contends that he did not chase away the applicant as alleged. That the applicant moved out of the matrimonial home out of her own volition after engaging in extra marital affairs. The first respondent contends that the second respondent is his second wife to whom he has been married for over 25 years.

4. The first respondent contends that the applicant is not being honest and that she has engaged herself in extra marital affairs before but he has always forgiven her. The first respondent prays that the applicant's application be dismissed as she has not come to court with clean hands.

5. I have considered the applicant's application as well as the opposition to the same by the first respondent. The principles for grant of a temporary injunction are now well settled. First an applicant must demonstrate that he has a prima facie case with probability of success. Secondly an injunction will not normally issue unless the applicant might otherwise suffer irreparable loss. Thirdly if the court is in

doubt, it will decide the application on a balance of convenience.

6. In the instant case, the applicant is seeking to restrain the second respondent from remaining on the suit property. The applicant calls the second respondent a trespasser with no capacity to remain on the land. The first respondent has stated in his affidavit that the second respondent is his second wife of over 25 years. This has not been challenged by the applicant. The applicant has instead called the second respondent a mistress of the first respondent. Contrary to her affidavit, the applicant has in fact in her statement filed in court stated that the first respondent has married the second respondent. She cannot again turn round and say that she is a mistress of the first respondent.

7. There is no contention by the applicant that the first respondent is prevented from marrying or having a second wife. A man is at liberty to retain his two wives on the same property. One of the wives cannot seek to eject the other. The case herein is not a case of division of matrimonial property. The issue of the first or second wife does not therefore come in. To this extent the applicant has failed to demonstrate that she has a prima facie case with probability of success. She (applicant) will not suffer any loss if the injunction is refused. I therefore find that prayer 3 of the notice of motion dated 16/12/2014 cannot be granted. The same is hereby rejected.

8. On the prayer for mandatory injunction, the first respondent has said in his affidavit that he did not chase away the applicant. It is the applicant who moved out of the matrimonial home on her own volition after committing acts of adultery. The applicant did not challenge these allegations. The first respondent has not stated that he does not want her back. The applicant herself has not given any evidence to show that the respondent assaulted her and chased her away. A mandatory injunction is granted at interlocutory stage if it is demonstrated that the respondent is trying to steal a match against the applicant. This is one among other grounds where a mandatory injunction can be granted. As the applicant has not demonstrated any of those factors, I find that it will be superfluous for the court to issue a mandatory injunction when there are no grounds for the same to issue. The applicant is at liberty to go back to her matrimonial home, the way she left. If there are any issues, they should sort them out. I therefore find that none of the prayers can be granted. The applicant's application is hereby dismissed with no order as to costs.

It is so ordered.

Dated, signed and delivered at Kitale on this 9th day of February, 2015.

E. OBAGA

JUDGE

In the presence of M/S Arunga for applicant. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

9/2/2015