REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL SUIT NO. 350 OF 2010

ALICE WANJA MUNJI……...……..…… PLAINTIFF

VERSUS

SAMUEL MUNJI KIHANYA …..……...……1ST DEFENDANT

NELSON GATHOGO KIBAGU……..….. 2ND DEFENDANT

JOSEPH MUNJI …….. 3RD DEFENDANT

RULING

The Plaintiff has two pending applications for injunction in this matter. The chamber summons application dated 13th July 2010 seeking an order of injunction to restrain the Defendants from interfering with the plaintiffs quiet possession, use and enjoyment of land parcel **Lari/Kirenga/2123**. The Chamber Summons application dated 5th June 2012 seeks a similar order of injunction and additionally seeks that the application dated 13th July 2010 be granted an interpartes hearing date on priority basis.

The Plaintiff premises the application dated 5th June 2012 the subject of this ruling on the fact that she is the wife of the 1st Defendant who is the registered owner and on the fact that the property has been their matrimonial home and ancestral land inherited by the 1st Defendant from his father. The plaintiff/applicant also contends the 1st Defendant intends to subdivide and sell the property which would dispossess her and the children. The plaintiff has sworn a supporting affidavit dated 5th June 2012 in which she avers she had not been able to prosecute the earlier application because the court file had been unavailable for some time and also because she had been taken ill and was bed ridden for a long time. The plaintiff in the supporting affidavit claimed that she had become aware that the 1st Defendant intended to subdivide the suit land and sell to the other defendants and had sought the consent of the Land Control Board to sub-divide the land. The plaintiff contends that she stands to suffer great loss if an injunction is not granted against the Defendants.

The 1st Defendant filed a responding affidavit dated 28th August 2012 to the plaintiff's affidavit and reiterated the contents of the replying affidavit sworn on 30th September 2010. The 1st Defendant averred that the plaintiff does not have a prima facie case with any probability of success and neither can she demonstrate that she stands to suffer irreparable harm/loss that cannot be compensated in damages if the injunction is not granted. The 1st defendant contends that the plaintiff has been indolent in prosecuting this matter since even a similar application for injunction dated 13th July 2010 is yet to be prosecuted and

that the reason advanced by the plaintiff that the reason for non prosecution was because of the unavailability of the court file lacks any substantiation. The other reason that the plaintiff was ill and/or unwell is equally unsubstantiated in the absence of any medical records.

The Defendant contends that he is the registered owner of the suit property having inherited the same from his father and that it is not true that the plaintiff contributed to its acquisition. The 1st Defendant states that the subject parcel of land has not at any time been charged to HFCK and it is not true that the plaintiff repaid any loan on the subject property as alleged.

The 1st Defendant states that he separated with the plaintiff in 1991 and that they have not lived together since then. The 1st Defendant lives at Mombasa where he states he resides with another wife having remarried and he states that the plaintiff and her children do not reside in the suit premises but reside in Ongata Rongai and they cannot thus claim to be dispossessed of the suit premises since they are and have not been in possession. The 1st defendant thus contends the plaintiff has not established she has a prima facie case with a probability of success and is therefore underserving of the order of injunction sought.

The plaintiff in further affidavit sworn on 24th October 2012, accuses the 1st Defendant of misrepresenting facts to the court and on this account states that the 1st Defendant had sold a part of the land inspite of the fact that the plaintiff had placed a caution against the title. The plaintiff accuses the 1st Defendant of fraudulently removing the caution on the land and selling a portion of the land. Though the plaintiff alleges a portion of the land has been sold by the 1st Defendant no evidence of such sale has been tendered as the official search annexed to the plaintiff's further affidavit still shows the parcel of land to be **L.R. NO**. **Lari/Kirenga/2123** and measuring 0.485 Hectares to be intact and the same as at 3/4/2001 when the land was first registered in the 1st Defendant's name Equally although the plaintiff alleges the plaintiff has sought the consent of the Land Control Board to subdivide and sell a portion no evidence of this has been tendered.

The parties in their filed submissions have reiterated the facts as set out in their respective affidavits and the issue for the court to determine is whether the plaintiff has in this case met the thresh hold an applicant in an application for injunction needs to satisfy before the grant of an injunction. The **GIELLA – VS- CASSMAN BROWN & CO. LTD (1973) EA 358** case enunciated the conditions necessary to be satisfied before an injunction can be granted. An applicant has firstly to establish they have a prima facie case with a probability of success, secondly that they stand to suffer irreparable harm/damage in the event the injunction is not granted and they are successful at the trial and finally in case the court has any doubt in regard to the first two conditions the court can consider the balance of convenience in determining whether or not to grant the injunction.

As I understand the plaintiff's case she premises her application on the fact that she claims to be the wife of the 1st Defendant and in the affidavit in support of her initial application the plaintiff states to have married the defendant in 1983 though it is not stated whether this was a customary or statutory marriage. The 1st Defendant states that he and plaintiff parted and/or separated in 1991 and they have not since then lived as husband and wife and that neither the plaintiff nor the 1st Defendant reside on the suit property. The 1st Defendant resides in Mombasa with another wife while the plaintiff resides at Ongata Rongai.

There is no dispute that the 1st Defendant is the registered owner of the suit property. Title **NO. Lari/Kirenga/2123** which was a subdivision of **L.R. NO. Lari/Kirenga/1490** as per the abstract of title**.** There is no evidence that Title NO. **Lari/Kirenga/2123** has ever been charged to any financial institution since being created in 2001. There is no evidence that the plaintiff has any intention of subdividing and/or selling any portion of the land claimed by the plaintiff. While the abstract of title shows the plaintiff had lodged a caution against the title in 2004 there is no evidence to show how the caution was removed and the allegation by the plaintiff that the caution was fraudulently removed by the 1st Defendant is not substantiated. The Registered Land Act Cap 300 Laws of Kenya provided a Procedure of a registered caution and here is no evidence that such procedure was not followed.

The 1st Defendant as the registered owner of the suit property enjoys the rights conferred upon a proprietor of land as under section 25 of the Land Registration Act NO. 3 of 2012 and provided the registered owner complies with the law his rights to deal with the property is unfettered. The plaintiff has registered a caution on 4/6/2012 restricting any dealings on the suit land and by virtue of section 72 of the Land Registration Act NO. 3 of 2012 no dealings can be effected on the said land without the consent of the plaintiff.

As the registered owner of the suit property the 1st Defendant cannot in the circumstances of this case be injuncted from dealing with the suit property as the land belongs to him. I have perused the prayers sought in the plaint and it is apparent the plaintiff is not claiming ownership of the suit property but merely seeks an injunction against the Defendants to restrain them from interfering with the plaintiff's and her children's quiet possession and use of the suit premises.

The 1st Defendant in response to the earlier application averred that he had leased the plot (suit premises) to the 2nd Defendant and 2 other persons who had taken possession. The 2nd Defendant **Nelson Gathongo Kiragu** in response to the initial application vide a replying affidavit sworn on 30th September 2010 confirmed that he and the other leasees had taken possession of the suit property and were cultivating the same and at the time of taking possession there was no existing house as claimed by the plaintiff. The 2nd Defendant claimed they were bonafide leasees for value of the suit premises who dealt with the registered owner and had no notice of the plaintiff's claim or interest. The 2nd Defendant contended that their interests as leases ought to be respected.

Whereas section 28 (a) of the Land Registration Act acknowledges spousal rights over matrimonial property as an overriding interest on registered land a property has to qualify as matrimonial property for spousal rights to be applicable. For property to qualify to be matrimonial property there has to be evidence that the parties to the marriage jointly contributed to the acquisition of the subject property. Property does not necessarily become matrimonial property merely owing to the act of marriage. There has to be demonstrable evidence that the parties jointly participated in the acquisition of the property. Property acquired by a spouse before the marriage cannot qualify as matrimonial property to which spousal rights would be applicable.

Hon. Justice Isaac Lenaola in the case of **SARAH AYITSO KURIA –VS- PETER ANDREW KURIA (HCCC NO. 7 of 2010** (unreported) considering a somewhat similar situation as in the present case had this to say:-

"Firstly, she ought to establish a prima facie level, that the properties were jointly acquired because the fact of marriage is not evidence that the properties were jointly acquired. I have seen the annextures to the applicant's affidavit and/see no such evidence and therefore I am unable to tell whether indeed the Applicant made any contribution to the purchase of the properties. In other instances, such an applicant would indicate her educational levels, her profession, income etc to show that she had the means and capacity to raise funds for the purchase of matrimonial property aside from evidence that in fact her or she actually made payments to that end. All that is missing in this case".

The test whether or not a property is matrimonial property thus is whether or not a party to marriage can demonstrate contribution towards the acquisition of the property.

In the present case it is admitted that the suit property was inherited by the 1st Defendant from his father and the same was therefore not acquired by the couple when they were married. Thus considering the totality of the evidence adduced in this matter I am not able to hold that the plaintiff has established a prima facie case with any probability of success. At any rate my view is any damage or loss she may suffer by reason of denial of injunction at this stage would be compensatable in damages. The plaintiff is not in possession of the suit property and the value of the subject parcel of land can be easily ascertained by way of valuation at the conclusion of the trial.

The upshot is that I find the plaintiff's applications dated 13th July 2010 and 5th June 2012 lack any merit and the same are ordered to be dismissed. I have considered that this is a family dispute/tussle and I accordingly make no order as to costs and direct that each party meets their own costs of the two applications.

Ruling dated signed and delivered at Nairobi this 14th day of March 2014.

J.M. MUTUNGI

JUDGE

In presence of:

……..for the Plaintiff

…… for the 1st Defendant

……for the 2nd Defendant

……. For the 3rd Defendant