



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 123 OF 2014

JOYCE NAFULA KISACHE (KISAJE).....PLAINTIFF

VERSUS

JAPHET KISAJE KHISA

ELIZABETH KISAJE.....DEFENDANTS

ISAIAH PILAKAN

R U L I N G

1. The applicant Joyce Nafula Kisaje is the first wife of the first respondent Japhet Kisaje Khisa. The applicant is also a co-wife to the second respondent Elizabeth Kisaje who is the second wife of the first respondent. The first respondent was the registered owner of two properties namely plot B 10 and B 11 situated within Makutano Township. The first respondent transferred Plot B 10 to the second respondent who in turn sold the same to the third respondent.
2. The applicant moved to court and filed a suit against all the three respondents. She then filed an application for injunction on 28/7/2014 in which she sought an injunction restraining the first and second respondents from selling Plot B 10 and at the same time restraining the Chief Land Registrar from issuing certificate of lease in favour of the third respondent. Before this application could be heard, the applicant was evicted from one of the rooms comprised in Plot B 10. Her belongings were taken to unknown place. The applicant then moved to court on 26/8/2014 and filed a notice of motion in which she seeks a mandatory injunction compelling the first and third respondents to reinstate her into one of the rooms of Plot B 10 and return her goods.
3. The applicant contends that Plot B 10 and B 11 were acquired during the subsistence of her marriage and the first respondent. That Plot B 10 has been sold by the second respondent who came into the marriage after the same had been acquired. The applicant also contends that she was evicted from the premises after the doors to the room she was residing in were removed and iron sheets removed as well rendering the premises uninhabitable.
4. The applicant contends that the eviction has rendered her homeless and that she is now residing on the streets of Makutano and her efforts to get assistance from the police have borne no fruits. She contends that she has nowhere to go to having been chased away from their matrimonial home at Kapsara in Cherangany in 1987 and that her only home is a room at Plot B 10 at Makutano where she has been staying since 2000 and from where she has now been evicted.

5. The applicant's application is opposed through a replying affidavit by the first respondent sworn on 1/9/2014. The first respondent contends that the applicant is being economical with the truth. He contends that Plot B 10 was transferred to the second respondent who in turn sold the same to the 3rd respondent. At the request of the 3rd respondent, the second respondent removed belongings of the applicant which he took to their matrimonial home at Kapsara in Cherangani. He contends that the applicant's claims that she is staying on the streets of Makutano is only meant to evoke sympathy and that actually the applicant is at their matrimonial home at Kapsara where she is working and earning a living from tea as shown by a KTDA advice slip for July, 2014.

6. I have carefully gone through the applicant's application as well as the replying affidavit by the first respondent and submissions by both counsel. The issue which arises for determination is whether the application has met the threshold for grant of a mandatory injunction. There are numerous authorities which have stated the conditions under which a mandatory injunction can be given. The Judges of the Court of *Appeal in Civil Appeal No. 121 of 2005 between Shariff Abdi Hassan and Nadhif Jama Adan* quoted from the decision in the *case of Locabail international Finance Ltd -Vs- Agro – Export and another (1986) I ALL ER 901* which set out the principles for grant of mandatory injunction as follows;-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”.

7. In the present case, the applicant in her plaint is seeking orders of court nullifying the agreement entered into between the second and third respondents on the ground that her consent and that of her children was not sought. She is also seeking an injunction restraining the first and second respondents from disposing of plot B 11 and the Chief Land Registrar from issuing certificate of Title in respect of Plot B 10.

8. There is no contention that Plot B 10 has already been sold to the third respondent. The third respondent has already taken possession as a purchaser. There is no evidence as to when the said property that is Plot B 10 and or even B 11 were acquired. There is no evidence as to when the second respondent came into the marriage of the first respondent. The applicant is contending that the second respondent had no power of sell Plot B 10 to the third respondent. The applicant has not demonstrated on what grounds she is contending so. The applicant seems to be invoking the provisions of the matrimonial property Act 2013. The issue in this case is not on division of property as the applicant and the first respondent have not divorced. If the applicant is hinging her claim on section 17 of the Matrimonial Property Act 2013, then this is not a simple matter where a mandatory injunction ought to be issued at interlocutory stage. Before a mandatory injunction can be given, the court has to get assurance that if the injunction is given, it will at the end of the trial be felt that it was properly granted. That assurance is lacking in the present application because the applicant has not offered any evidence which will persuade the court to give a mandatory injunction at this stage.

9. Contrary to the Applicant's contention that she is staying on the streets of Makutano, the first respondent has demonstrated that she is actually at their matrimonial home at Kapsara. The applicant's contention that she has never stepped at their matrimonial home since 1987 when she was allegedly chased is dispelled by the fact that she is cultivating and earning proceeds from her tea as evidenced by the KTDA advice slip of July, 2014 annexed to the first respondent's replying affidavit.

10. The person who caused her to be evicted is not her husband the first respondent. It was the third respondent who had become the owner of Plot B 10. Until and unless the contrary is proved, the third respondent had every right to remove all those who were not paying him rent. This is not a simple matter which can be remedied in a summary manner as to justify grant of a mandatory injunction. I find that in

the circumstances of this case, a mandatory injunction cannot be issued. 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 29th day of October, 2014.

E. OBAGA

JUDGE

In the presence of Mr Kiarie for respondents and Mr Kaosa for applicant. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

29/10/2014