



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL SUIT NO. 20 OF 2017 (O.S)

IN THE MATTER OF ORDER 37 RULES 8 AND 14, ORDER 40 RULES 1 AND 2 AND ORDER 51 RULE 10F OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF SECTIONS 6, 9, 12 AND 14 OF THE MATRIMONIAL PROPERTY ACT 2013

AND

IN THE MATTER OF SECTIONS 66, 93 AND 107 OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF LAND PARCEL L.R NUMBER KERICHO/KAPSAOS/175

BETWEEN

LUCY JEBET KIPTOO.....PLAINTIFF

VERSUS

KIPTOO KIRUI.....DEFENDANT

RULING.

Introduction

1. What is coming up for determination is the Plaintiff's application dated 18th February, 2017. The said application which was filed under certificate of urgency is brought pursuant to Order 40 Rules 1 and 2 and Order 51 Rule 10F seeks the following main prayers:

a. That the Defendant/Respondent by himself, his servants, agents or otherwise be restrained by this honourable court from evicting the Plaintiff, her son, or family from the parcel of land known as L.R. KERICHO/KAPSAOS/175 or in any way apportioning, surveying, alienating, demarcating, selling, transferring, assigning and/or leasing the said parcel of land pending the hearing and determination of the suit herein.

2. The application is predicated upon the grounds stated in the Notice of Motion and the Applicant's

Supporting Affidavit together with her Further Affidavit sworn on the 23rd May, 2017. In the Supporting Affidavit the Applicant depones that the Respondent was under the influence of his second wife Josephine Chepkoech Yegon who demolished the Applicant's house and of her son Wilson Kipkoech Rotich with a view to evicting them from the suit property. She further depones that the Respondent intends to sub-divide, demarcate and sell the suit property to third parties.

3. The application is opposed by the Respondent through his Replying Affidavit sworn on the 3rd March, 2017 in which he depones that he has settled the Applicant on his other parcel of land known as Kondoo Farm No. 582 measuring 6.8 acres. He accuses the Applicant of having demolished his house on L.R No. Olainguse/Olainguse Block 1 (Olainguse) 18 and trying to murder him.

4. He further depones that his son Wilson Rotich occupies a portion of the Olainguse parcel of land measuring 3 acres and he is merely being incited by the Applicant.

5. The parties opted to canvass the application by way of written submissions and their respective counsels filed their submissions

Applicant's submissions

6. In his submissions learned counsel for the Applicant argues that the Applicant is lawfully married to the Respondent and therefore has a lien over his properties, whether purchased or inherited. He submits that the suit property is matrimonial property within the meaning of Section 6 (erroneously stated as section 4) of the Matrimonial Property Act as it comprises their matrimonial home. He further argues that Section 12 (3) of the Matrimonial Property Act 2013, forbids a spouse from being evicted from their matrimonial home except by order of the court. For these reasons he argues that the Applicant has established a *prima facie* case with a probability of success.

Respondent's Submissions

7. On his part learned counsel for the Respondent submits that the Respondent has no proprietary interest in the suit property as it is still registered in his late father's name. As such the Applicant cannot claim any overriding interest in the same.

8. court the she is in exclusive occupation of the Respondent's parcels of land known as L.R No Olainguse/Olainguse Block 1 Olainguse/18 and Kondoo Farm No. 582.

9. He further submits that the Respondent is unable to sell the suit property until the succession process is completed and an injunctive order would thus be ineffectual under the circumstances.

Issues for Determination

10. The following issues emerge for determination:

- i. Whether the Defendant/ Respondent has a proprietary interest in the suit property
- ii. Whether the suit property constitutes matrimonial property
- iii. Whether the Applicant is entitled to the orders sought

Analysis and Determination

11. Regarding the first issue, the Applicant acknowledges in her supporting affidavit that the Respondent inherited land parcel L.R No Kericho/Kapsaos/175 from his late father Kipsoi Kirui and to the best of her knowledge the Respondent has not taken out letters of administration in respect of the said Kipsoi Kirui's estate. Among her list of documents is a caution which clearly indicates that the suit property is still registered in the name of Kipsoi Kirui. Consequently, it is my finding that even though the Respondent

has beneficial interest in the suit property by virtue of the fact that he is the heir to his father's estate, he does not as yet have title to the said property.

12. On the second issue, it is common ground that the Respondent established his matrimonial home with the Applicant on the suit property. Both the applicant and the Respondent have attached copies of photographs of houses on the suit property with each of them accusing the other of having demolished the houses. It is therefore not in dispute that despite the fact the property is not registered in the respondent's name they have been living on it as a family.

13. Lastly, in view of the above findings, can the court grant an injunction to restrain the Respondent from evicting the applicant from the suit property? There are both legal and practical challenges to the granting of the orders sought by the applicant. First, from a legal point of view the court cannot issue an injunction against a party who is not the registered proprietor of the suit property as the court does not issue orders in vain. Secondly, the applicant has in her own affidavit stated that her house and her son's house have been demolished which means she is no longer living on the suit property so the issue of her eviction does not arise. Her other complaints about alienating or selling the suit property face the same challenge alluded to above as the Respondent cannot be restrained from selling, alienating or transferring that which he does not legally own.

14. In the view of the foregoing, it is my finding that the application lacks merit and it is hereby dismissed.

15. This being a matter involving a couple, each party shall bear their own to costs.

Dated, signed and delivered at Kericho this 9th day of February, 2018.

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J. M ONYANGO

JUDGE

In the presence of:

1. Mr. Nyadimo for Chemoiyai for the Applicant

2. No appearance for the Respondent

3. Court assistant - Rotich