



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

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

L J K.....PLAINTIFF

VERSUS

K K.....DEFENDANT

RULING.

By an Originating Summons dated 18th February, 2017 the Plaintiff filed suit seeking a determination of the following questions:

- 1. Whether or not the Defendant can apportion, sub-divide and/or sell land parcel no. Kericho/Kapsaos/175 without consulting the Plaintiff.*
- 2. Whether or not the Defendant being the sole heir to the estate of the late KIPSOI KIRUI is in a position to dispose apportion and/or subdivide LR No. KERICHO/KAPSAOS/175 without following the succession process.*
- 3. Whether the Defendant can allocate or apportion land in LR No. KERICHO/KAPSAOS/175 to one JOSEPHINE CHEPKOECH SOY YEGON without the consent of the Plaintiff.*
- 4. Whether JOSEPHINE CHEPKOECH SOY YEGON should be evicted from the portion of land allocated to her by the Defendant in LR No. KERICHO/KAPSAOS/175 and the Defendant and her children and more especially her son WILSON KIPKOECH ROTICH be compelled to source for her alternative accommodation.*
- 5. Whether LR No. KERICHO/KAPSAOS/175 can be declared to be owned jointly between the Plaintiff and the Defendant upon completion of the succession process.*
- 6. Whether LR KERICHO/KAPSAOS/175 can be declared to be matrimonial property.*
- 7. Whether all such purchasers of various portions of LR No. KERICHO/KAPSAOS/175 purchased without the plaintiffs consent and after issuance of the caution on the 25th July, 2016 should be annulled and/or revoked and an order of eviction issued as against the said purchasers.*
- 8. Whether this Honourable Court will compel the Land Registrar of Kericho County or the District Land Adjudication and Settlement office upon completion of the succession process to register the parcels LR No. KERICHO/KAPSAOS/175 jointly in the name of the plaintiff and the*

defendant.

9. Whether the plaintiff is entitled to the costs of this suit.

After filing his Memorandum of Appearance the Defendant filed a Replying Affidavit and Notice of Preliminary Objection raising the grounds that:

1. This Honourable Court has no jurisdiction to hear and determine this matter as the issues raised can only be determined by a Family Court pursuant to a succession process.

2. The Plaintiff's claim discloses no reasonable cause of action against the Defendant.

3. The reliefs sought in the Originating Summons cannot issue in law.

4. The Plaintiff's suit is sub-judice.

5. The Plaintiff's suit is bad in law, incompetent fatally defective and an abuse of the court process.

It is this Preliminary Objection, that is the subject of this Ruling. The Parties' advocates filed written submissions on the Preliminary Objection and cited a number of authorities which I have looked at. The issue that I must decide before I can delve into the merits of this suit is whether this court has jurisdiction to hear and determine this matter.

The Plaintiff who is the Plaintiff's wife claims that the suit land which is registered in the name of Defendant's father is matrimonial property and therefore the Defendant cannot purport to dispose of it or otherwise deal with it without the Plaintiff's consent. It is for this reason that she has contemporaneously with the Originating Summons, filed an application for injunction to restrain the Defendant from evicting the Plaintiff his son and/or family from land parcel No. KERICHO/KAPSAOS/175 or in any way apportioning, surveying, alienating or leasing the said property or parcel of land pending the hearing and determination of the suit herein.

The Defendant has filed a Replying Affidavit in which he deposes that the prayers sought by the Plaintiff can only be granted by a Family Court as he further deposes that an injunction cannot be issued against him as he is not the registered owner of the suit property since he has not gone through the process of succession in order to have the land transferred to him through transmission.

He further deposes that he has settled the Plaintiff and her children on his other parcel of land known as **Kondoo Farm No. 582** measuring 6.8 acres while he lives with his second wife Josephine Chepkoech on the suit land.

The Defendant maintains that the suit filed by the Plaintiff has no basis as he has now reasonably fulfilled his duty to provide for his family by ensuring that both his two wives and all his children are properly accommodated.

I have carefully considered the submissions filed by both sides together with the authorities cited to me. The issue of this court's jurisdiction is well captured by the case of **John Kimani Njenga Vs. Margaret Wanjiru Kanyiri and 2 Others 2015 KLR**. The Court held that the Environment and Land Court has a very wide discretion whose boundaries in relation to land matters are almost limitless.

The Environment and Land Court is anchored in Article 162 of the Constitution which provides for the creation of the Environment and Land Court as one of the superior courts in Kenya. The provision is drawn as follows;

Article 162

(1) The Superior Courts are the Supreme Court, the Court of Appeal, the High Court and the

Courts mentioned in Clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to;

a) employment and labour relations and

b) the environment and use and occupation of and title to land.

(3) Parliament shall determine the jurisdiction and functions of the Court's contemplated in Clause (2).

Parliament did create the Environment and Land Court through the **Environment and Land Court Act No. 19 of 2011**. The jurisdiction of the Court is elaborated in **Section 13** of the Act which provides as follows;

13

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162 (2) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.

(2) In exercise of its jurisdiction under Article 162 (2) of the Constitution, the Court shall have power to hear and determine disputes:

a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals, and other natural resources.

b) relating to land administration and management.

c) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land an

e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of or threat to rights or fundamental freedoms relating to a clean and healthy environment under Article 42, 69 and 70 of the Constitution.

7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just including;

a) Interim or permanent preservation orders including injunctions.

b) Prerogative orders

c) Award of damages

d) Compensation

e) Specific performance

f) Restitution

g) Declaration or

h) Costs

A clear reading of the above sections shows that the courts jurisdiction covers a wide range of issues touching on environment and land. The dispute before this court touches on the ownership, use, occupation and dealings in land parcel no. KERICHO/KAPSAOS/175, albeit against the background of a marriage. It has been argued by the Defendant's Counsel that this is a matter that should be handled by the Family Court after the succession process. Whereas I see where he is coming from, I do not agree that this court's jurisdiction is in any way ousted by the fact that the Plaintiff and Defendant are married to each other. (The Matrimonial Property Act, 2013).

The injunction that the Plaintiff is seeking is meant to restrain the Defendant from disposing of the suit land to third parties to the detriment of his family.

Section 6 (1) of the Matrimonial Property Act defines matrimonial property as follows:-

“For the purpose of this Act, matrimonial property means

a) Matrimonial home or homes

b) household goods and effects in the matrimonial home.

c) Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”

The suit land therefore falls within the description of the above-mentioned definition and is thus subject to **Section 93(1) of the Land Registration Act** which provides as follows:-

93 (1) Subject to the law on Matrimonial Property, if a spouse obtains land for the co-ownership and use of both spouses or all the spouses:

a) there shall be a presumption that the spouses shall hold the land as joint tenants unless

(i) a provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in his or her name only that the spouses are taking the land as joint tenants.

Section 93 (3) (b) further provides that where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house:-

b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor or whether the spouse or spouses have consented to that assignment.

Section 12 (1) of the Matrimonial Property Act further provides as follows:-

“An estate or interest in any matrimonial property shall not during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease or mortgage or otherwise.”

(2) A spouse in a monogamous marriage or in the case of a polygamous marriage, the man and any of the man's wives have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

It is clear from the above provisions that a spouse has a right to protect her or his right to property which she or he is entitled by virtue of the marriage regardless of whether a matrimonial matter has not been filed.

The Matrimonial Property Act, 2013 provides for the rights and responsibilities of spouses in relation to matrimonial property but does not vest exclusive jurisdiction for determining disputes relating to matrimonial property in the family division. Invariably disputes over property do arise in the context of a marriage without resulting in the breakdown or dissolution of the marriage and in my view where such disputes are likely to affect the rights of parties outside the marriage like in the instant case where the defendant is alleged to have sold a portion of the matrimonial property, the party who is aggrieved may elect to file their case in the Environment and Land Court. I therefore find and hold that this court has the jurisdiction to hear and determine this matter.

The second limb of the Preliminary Objection touches on whether the plaintiff's claim discloses a reasonable cause of action. It has been submitted on behalf of the defendant that the plaintiff has no cause of action against him since he is not the registered owner of the suit land. The Defendant does not dispute that he is the sole heir to his late father's estate and that he is in occupation of the suit parcel of land by virtue of having inherited it from his late father. He cannot therefore claim that he cannot be sued in respect of the said parcel merely because he has not had the title transferred to him through the process of succession. I take judicial notice that succession proceedings take time and in some instances parties elect not to file succession proceedings in order to evade litigation but this does not mean that they cannot be sued in respect of the property they have inherited. The court must look at all the circumstances of the case in order to meet the ends of justice.

The third limb of the Preliminary Objection is that the Plaintiff has filed a similar suit in Eldoret being Eldoret ELC No. 290 of 2016 raising substantially the same questions and seeking the same reliefs as the instant suit land that this suit is therefore sub judice.

A look at the pleadings filed in Eldoret ELC shows that even though the parties and the reliefs sought are the same, the suit parcels which are described as KONDOO FARM NO. 582 and OLAINGUSE/OLAINGUSE BLOCK 1 (OLAINGUSE) 18 are substantially different from land parcel no. KERICHO/KAPSAOS/175 which is the subject matter of this suit, the objection on this ground is therefore not founded.

The upshot of the above is that the Defendant's Preliminary Objection is dismissed. I direct that the application for injunction be fixed for hearing inter partes within the next 60 days.

It is so ordered.

Dated, signed and delivered at Kericho this 30th day of June, 2017.

.....

JANE M. ONYANGO

JUDGE

In the presence of;

1. Miss Kitur for Chemoiyai for the Applicant
2. N/A for the Respondent
3. Court assistant-Rotich