



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC CIVIL CASE NO. 207 OF 2015**

**THERESA MUTHONI GITONGA**

**QUINCY FRANKLIN GITONGA.....PLAINTIFFS**

**-VERSUS-**

**ALDO PASIN.....DEFENDANT**

**RULING**

1. The notice of motion dated 4<sup>th</sup> September 2015 is brought under the provisions of Order 40 Rule 1 and 2 of the Civil Procedure Rules and section 1A, 1B and 3A of the Civil Procedure Act and article 40 of the Constitution and Section 4 of the Children's Act. The motion seeks for orders ;

**i) Spent**

**ii) Spent**

**iii) That pending the hearing and determination of this suit, a temporary injunction do issue restraining the Defendant, his agents, servants and/or employees from interfering with the Plaintiffs use and enjoyment of all that property known as Number CR 40958/7 sub-division 17235 (Original No. 1324/4 of Section 1 Mainland North) measuring 0.0330 hectares or thereabouts situated in Shanzu Serena within the Republic of Kenya.**

**iv) Costs of this application be provided for.**

2. The application is premised on the grounds on the face of it and on the supporting and further affidavit sworn by the 1<sup>st</sup> plaintiff. Inter alia that the Defendant and Plaintiffs have been living together as a family at the matrimonial property and now the defendant wants to sell the said house to the detriment of the plaintiffs.

3. The application is opposed by the Respondent vide his replying and further affidavits filed. The Respondent denies this property is their matrimonial home. He deposes that there was never a marriage between them and that from the commencement of this development the Application knew the property was being developed for sale.

4. On the basis of the issues raised by the application and the reply thereto together with the contents of the plaint, the gist of the dispute revolves around two issues for determination ;

**i) Whether there is a marriage between the Plaintiff and the Defendant**

**ii) If the suit property constitutes matrimonial home so that the plaintiff is entitled to a share.**

5. This can be deduced from paragraph 5 and 12 of the plaint where it is pleaded thus ;

**“5. The Plaintiff states that the Defendant and 1st Plaintiff were living together as man and wife at their matrimonial home situated on all that property known as number CR 40958/7 subdivision 17235”.**

**“12. The 1st Plaintiff states that the suit property is a matrimonial home. As a common law wife, she has a valid right to live and enjoy the use of the aforesaid property without threats of eviction from the defendant”.**

6. This Court is of the view that it does not have jurisdiction to determine what constitutes matrimonial property or to declare whether there exists a marriage between the plaintiff and the defendant. It is my finding therefore that this dispute as set out in the pleadings was wrongly commenced in the environment and land Court. The parties are hereby directed to have the dispute determined by the family Court. To this end, I hereby transfer this matter to the High Court, family Division for hearing and determination.

7. In the intervening period, I make an order that the status quo be maintained pending directions and or further orders to be given by the High Court, family division.

**Ruling dated and delivered in Mombasa this 22<sup>nd</sup> day of April 2016**

**A. OMOLLO**

**JUDGE**