



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL SUIT NO.7 OF 2016 (O.S)

IN THE MATTER OF AN APPLICATION UNDER THE MATRIMONIAL PROPERTY ACT

2013

BETWEEN

M N M.....PLAINTIFF/APPLICANT

AND

D M N...DEFENDANT/RESPONDENT

RULING

1. The plaintiff and the defendant got married on 3rd November 1994 and were divorced following proceedings filed at Milimani Commercial Courts in Cause No. 168 of 2003. *Decree nisi* was issued in 2006. *Decree absolute* has not been issued. On 1st March 2013 the plaintiff filed this originating summons under **section 17** of the **Matrimonial Property Act No. 49 of 2013** seeking the court to determine the extent of her interest in $\frac{1}{4}$ of an acre of land parcel Kabete/Kanyariri/[particulars withheld] which is registered in the name of Paul Muite. Her case is that the defendant's residence is on this $\frac{1}{4}$ of an acre, but that she is the one who solely bought it from one Francis Njonjo Muite who was the beneficial owner of the portion. This was in 2006. She then developed and improved it. All this happened during the period of coverture; that, although they had divorced, they had reconciled and continued to stay together until 2008 when she finally left. She stated that she produced the money but the land was bought in the name of the defendant.
2. In the instant application the plaintiff sought an interlocutory injunction to restrain the defendant from selling, charging, parting with possession, alienating or in any other way dealing with the portion of the land which she paid for but was purchased in the name of the defendant.
3. The defendant swore a replying affidavit to deny that the plaintiff was the one who bought the portion of land. His case was that he was the one who bought the land, and that was done after the divorce and the plaintiff had left. He denied that there was any reconciliation after the divorce. In fact, he stated, the parties begun living apart in 2004 when the plaintiff deserted the matrimonial home. He then bought the land following agreement on 17th August 2006 between him and Francis Njonjo Muite. The purchase price was Kshs.400,000/= . He paid a deposit of

Kshs.250,000/=, leaving balance of Kshs.150,000/=. On 29th August 2007 he paid Ksh.120,000/= and on 29th July 2007 he paid Kshs.30,000/=.

4. The plaintiff swore that she is an employee of the [particulars withheld] in Nairobi and a member of Chuna Sacco Society Ltd. On 17th July 2006 she got a loan from the Sacco. In 2008 she transferred the money to Barclays Bank Ltd where she had an account. She paid Kshs.370,000/= towards the purchase and later gave the defendant Kshs.30,000/= to pay the last instalment. She also gave Kshs.1,000/= to the advocate who drew the sale agreement. She annexed copy of the sale agreement (“MNM5”) acknowledging the payment of Kshs.250,000/=, leaving a balance of Kshs.150,000/=. She produced an acknowledgement of Ksh.120,000/= by Francis Njonjo Mutie on 29th August 2007 (“MNM6”) and payment of Kshs.1,000/= to the advocate who drew the agreement. It is dated 17th August 2006. In all these documents the buyer indicated was the defendant. It is notable that although the defendant says he was the one who produced the money he did not annex any of these agreements/acknowledgments. My preliminary view is that the plaintiff paid the money for the land.
5. The question for determination is whether she has demonstrated that she is entitled to an interlocutory injunction pending the hearing and determination of the summons. In dealing with the issue, I am mindful of the decision in **Giella –v- Cassman Brown and Co. Ltd [1973]EA 358** which provides that the applicant must show a *prima facie* case with a probability of success; he has to demonstrate that he will suffer irreparable damage if the injunction is not granted; and, if the court is in doubt, it will consider the balance of convenience. It is also trite that an injunction may not be granted if the remedy of damages is adequate.
6. The plaintiff and the defendant presently stay separately following their divorce. The defendant stays on the said parcel with his new family. The plaintiff wants to restrain him from selling, charging or otherwise alienating the parcel. The portion was bought on 17th August 2006. It has not been sold since. According to the plaintiff, the parties went apart in 2008. The defendant has not sold, or charged, the land since. There was no basis or reason given to cause the plaintiff to fear that the land is in any danger of disposal.
7. Secondly, even if the defendant wanted to sell the land he cannot legally do so as he does not have title to it which he can pass. The land is still registered in the name of Paul Muite (“MNM4’). If the injunction is issued it will encumber Paul Muite’s title. He was not made a party to these proceedings, and he cannot suffer this encumbrance to his title without being afforded a hearing.
8. Lastly, the parcel of land was bought for Kshs.400,00/=. Whatever improvements the plaintiff may have done on it is calculable. Damages would therefore provide adequate compensation in the event that the plaintiff ultimately succeeds.
9. The result is that the application dated 25th February 2016 (and filed on 1st March 2016) for injunction lacks merits and is dismissed with costs.

DATED and SIGNED at NAIROBI this 23RD day of JUNE 2016.

A.O. MUCHELULE

JUDGE

DELIVERED AND SIGNED this 27TH day of JUNE 2016.

W. MUSYOKA

JUDGE