



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO. 7 OF 2016

C C JPLAINTIFF

-VERSUS-

E M MDEFENDANT

RULING

Matrimonial Property

[1] The dispute in this case is over ‘matrimonial property’ i.e. Abothuguchi/Kariene/[particulars withheld] between the plaintiff and the defendant who are wife and husband, respectively. The two were joined in holy matrimony according to the rites of the [particulars withheld] Church at Nkubu on 14th day of November 2001. See Certificate of Marriage marked as CC1 and annexed to the affidavit of the plaintiff. The couple was blessed with three (3) children living namely (a) K M (over 18 years); (b) G G (15 years; and L M (9 years). G G is at [particulars withheld] High School. All the foregoing facts are not in dispute and have been adverted to by both parties.

[2] But, trouble started on 18th April 2016 when, according to the plaintiff the defendant, while the plaintiff was at work went to their matrimonial home, loaded all the belongings of the plaintiff into a lorry and dumped them at the plaintiff’s mother’s house at Chuka. The plaintiff averred that the defendant immediately thereafter called the plaintiff and warned her never to set foot on the matrimonial home lest he shall kill her. The plaintiff reported these threats to her life to Nkubu Police Station vide OB No. [particulars withheld] but was referred to Kariene Police Station where she reported vide OB/NO/[particulars withheld]. The plaintiff described the defendants as a very dangerous person and for that reason she has never set foot on the matrimonial property.

[3] The plaintiff contended that the suit property herein was purchased by the two of them vide the agreement dated 17th October 2007. The agreement is annexed to her affidavit and is marked CC2. The suit property was to be excised from ABOTHUGUCHI/KARIENE/[particulars withheld]. But, upon subdivision of the parent property, the suit property was assigned LR.NO. ABOTHUGUCHI/KARIENE [particulars withheld] and was registered to the defendant in his sole name. A certificate of official search marked CC3 confirms that fact as well as the fact that the defendant charged this land to TIMES U SACCO for a sum of Kshs. 1,000,000 on 23rd January 2015. The plaintiff claims that they have built their matrimonial home on the said land and they all lived there as a family until 18th April, 2016 when she was forcefully evicted from her matrimonial home into a rental two-roomed house. She now applies for an inhibition on the suit property and an injunction restraining the defendant from evicting her and the children, or in any manner whatsoever from interfering with her quiet possession of the suit land until this

suit is heard.

Defendant opposed application.

[4] The defendant vehemently opposed the application dated 2nd May, 2016 and filed a replying affidavit and submissions to reinforce his position. In his affidavit at paragraph 9 he claimed that he substantially contributed towards the acquisition of the suit land and so it was registered in his sole name. His argument was that the plaintiff did not object to the said registration. He also claims that it is the plaintiff who voluntarily left their home on 18th April 2016 and moved into a rented house within Nkubu. He accused her of taking their last born from school to go and live with her. He said he reported the matter to the police vide OB. No. [particulars withheld]. He also denied having ever chased her away or threatened her with death. He says that between December 2015 and March 2016 the plaintiff was receiving phone calls at night details of which she refused to disclose to him. He says that counsel advised him that these orders cannot be granted as they are not sought under the Matrimonial Properties Act. She should not, therefore, be allowed to evict him from the Matrimonial home.

DETERMINATION

[5] At this stage I should only determine the request for inhibition and injunction without compromising the suit. As far as inhibition is concerned, I say this; on prima facie basis the suit property was purchased by the two parties except that the defendant registered it in his sole name. He has admitted these facts in paragraph 9 and 10 of his replying affidavit. The property was also purchased during the subsistence of their marriage. Therefore, on prima facie evidence it is their home. In addition to these facts, it is admitted by the defendant that the suit property is their home where they have lived with the plaintiff and the entire family until 18th April, 2016 when the plaintiff left the home. I note also that the plaintiff has specifically pleaded in the plaint that the suit land is their matrimonial home. On this, see paragraphs 5, 7, 8, 9, 10 and 14 as well as prayer (a) of the plaint; it seeks for a declaration that the suit land is their matrimonial home. Therefore, the averment and submission by the defendant that the orders sought in the application herein cannot be given, and that her remedy lies in Matrimonial Properties Act under which law she must apply for his eviction is not tenable. There is no peremptory requirement that a party must plead the statute under which the remedy being claimed falls, except, where a defence of limitation is being taken the relevant statute of limitation should be pleaded under Order 2 rule 4 of the Civil Procedure Rules. Accordingly, on the basis of what the plaintiff has adduced before this court, there is prima facie necessity to inhibit the land in question.

[6] More support for inhibition of the land is found in the fact that the defendant has already charged the matrimonial home; a charge the plaintiff stated was created without her consent. This is a substantial question of law in the creation of charges under the land laws in Kenya and for which preservation of the property in issue should be preserved. In fact the Matrimonial Properties Act in Section 12 prohibits any form of alienation of Matrimonial Property during the subsistence of a monogamous marriage without the consent of both spouses. The same law expressly prohibits charging or mortgaging of matrimonial property without written and informed consent of both spouses. These protections have been offered by the law because each spouse in a marriage has an interest in the matrimonial property capable of protection; and such protection may be by caveat, caution or otherwise under any law in force relating to registration of title to land or of deeds. Our land laws provide for inhibition of land. Thus, inhibition should be given to preserve the property from dissipation while proceedings are pending in court. See the case of **James Rioba Sereria vs Simon Mosrange Boroye [2014] eKLR**. Accordingly, I issue an inhibition on the suit land. But, in view of this order the chargee shall also be served with this order and the pleadings in the suit.

[7] I now move to the request for injunction. I see the injunction being sought is a mandatory one as well as interlocutory as it seeks return to the suit land of the plaintiff, and eviction of the defendant. First, a mandatory injunction is issued at interlocutory stage only in exceptional cases which are clear and which should be decided at once. It is also issued where the defendant intends to steal a match from the plaintiff. See the case of **KENYA BREWERIES LIMITED & ANO vs. WASHINGTON O. OKEYO CIVIL APPEAL NO. 332 OF 2000 [2002]1 EA 109** where the Court held that:

A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application.

See also the passage in “*Halsbury’s Laws of England*,” Volume 24, at paragraph 948 to the effect that:

“A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff ... a mandatory injunction will be granted on an interlocutory application.”

I will not forget to cite Ringera J (as he then was) in the case of **Showind Industries Ltd vs. Guardian Bank Ltd & Another [2002] 1 EA 284 (CCK)** which also gave a good rendition on the test in the grant of mandatory injunction that:

“As I understand the law, an interlocutory mandatory injunction is granted very sparingly and only in exceptional circumstances such as where the applicant’s case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the applicant’s conduct does not meet the approval of a court of equity or his equity has been defeated by laches”.

Applying the above test, this case is a clear one that the suit land is the home for this family. It is also not in dispute that the plaintiff and her children are living in a rented house and not in their house which is in the suit land. The reason why the plaintiff moved out does not matter now; will be determined at the trial. At the moment there is no justification for her to remain outside the home. There was no order of eviction of the plaintiff from the home i.e. suit land. My view is that the continued stay of the plaintiff and her children away from their home is injurious to all legal protections they have in law. That state of affairs will only aid the defendant to steal a march on the plaintiff. Accordingly, I order that the plaintiff and the children of the marriage shall all return and reside in their home on the suit land immediately. But in making this order I am aware of the hostilities which exist between these two disputants. Towards that end, I will issue an injunction to restrain the defendant from harming the plaintiff and or any of his children or from preventing them from returning to the suit land or from evicting them from the suit land, or interfering with their quiet occupation of the suit land until this suit is heard. To attain practical enforcement of this order the relevant OCS at Nkubu shall oversee execution of this order. All ingredients in **Giella vs Cassman Brown** have been fulfilled and so I issued the above orders. It is so ordered.

Dated, delivered and signed at Meru this 18th day of August, 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Mutuma advocate for the plaintiff

M/s. Wanjohi advocae for defendant.

F. GIKONYO

JUDGE