



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL CASE NO. 12 OF 2016

M C L.....PLAINTIFF

VERSUS

W K L.....DEFENDANT

RULING

1. M C L (hereafter *the plaintiff*) claims to be the second wife of W L (hereafter *the defendant*). She alleges that the defendant ejected her from their *matrimonial home*. On 17th August 2016 she lodged a plaint at the High Court challenging the eviction; and, praying to be reinstated into the premises. By a statement of defence dated 4th October 2016, the defendant denied the claim *in toto*.

2. Contemporaneously with the plaint, the plaintiff filed a notice of motion dated 15th August 2016. It is expressed to be brought under Order 40 of the Civil Procedure Rules; sections 12 and 17 of the Matrimonial Property Act 2013; and, section 28 of the Land Registration Act. The action is three-pronged: First, to compel the defendant to permit her entry into *Nandi/Kipsigak/[particulars withheld]* (hereafter *the matrimonial home*). Secondly, she prays for an order to access her personal affects; and, thirdly, to restrain the defendant or his agents from dislodging her from the matrimonial home until the hearing and determination of the suit.

3. The plaintiff has sworn two depositions dated 15th August 2016; and, 9th September 2016. Their substance is that she married the defendant under *Nandi* custom. The ceremony was held at her parent's home at Kamonnjil village in Nandi on 10th January 2000. She avers that the defendant paid dowry of *four* cows and goats converted into the cash equivalent of Kshs. 100,000. The defendant utterly denies those assertions.

4. In the affidavit sworn on 15th August 2016, the plaintiff avers that the defendant persuaded her to resign from her job as a secretary at Eastern Produce Kenya Limited. By then, the defendant had a bungalow; and, another maisonette under construction. She says that she contributed her savings and terminal benefits towards the construction. The photographs are annexed marked *MCK1A*.

5. She also claims that she cleared 6 acres of fallow land and planted tea. She avers that she has been managing the crop. She avers that she sold her plot in Chebarus. The proceeds went into the construction. She says that she and her child lived in the maisonette from the year 2008 until 2nd August 2016. She averred that the title to the property is held by Barclays Bank.

6. The plaintiff states that in June 2016, she developed a health complication. The defendant insisted that she should be treated at home by a clinical officer. She did not respond well to the treatment. She was bleeding heavily. She decided to consult a specialist at Gynocare & Fistula Centre, Eldoret. She then

went to her mother's place for nursing care. That is when the defendant evicted her. She claims that her personal effects were ferried in a tractor and thrown into her mother's compound. However, the defendant retained custody of their child; a girl aged 12. The plaintiff states that she has been rendered destitute.

7. In the further affidavit of 9th September 2016, she claims that the defendant prompted her to change her surname to *Letting*; which change was made by the Registrar of Persons. She alleges further that the defendant and his first wife were embroiled in a domestic dispute in an Eldoret in *HCCC 5 of 2013*. She avers that in that suit, the defendant acknowledged that she was one of his wives. In that regard, a copy of an affidavit marked *MCK3* is attached.

8. The defendant retorts that he is married to one wife; and, that she is *not* the plaintiff. There are two depositions sworn by the defendant: a replying affidavit dated 8th September 2016; and, a further affidavit dated 27th September 2016. He acknowledges he had an extra marital affair with the plaintiff; and, that they have a child aged twelve. He has custody. He avers that the plaintiff has never been a permanent resident at his home.

9. The defendant alleges that the change of name by the plaintiff was done hurriedly or fraudulently to claim the status of a wife. He avers that he constructed his matrimonial home with help from his wife *E L*. Funding was solely from their farm produce; and, with no assistance from the plaintiff. He claims the illicit relationship with the plaintiff led to the matrimonial dispute with his wife, *E*. He averred that they have since resolved the matter.

10. On 7th December 2016, I heard submissions from learned counsel for all the parties. I have considered the notice of motion, the depositions and rival submissions.

11. The main petition remains unheard. It would thus be premature and prejudicial to make conclusive findings at this stage. That will be the true province of the trial court. At the core of this dispute is a tussle over *matrimonial property*. The plaintiff claims to have contributed to the development of the property. The defendant flatly denies it. It will be for the trial court to unmask the truth on tested evidence. Suffice to say that the plaintiff has not annexed *financial information* showing her *actual* contribution. All that the plaintiff states is that she used her savings and retirement benefits to fund the construction of the house. She also refers to non-monetary contribution through her farming activities.

12. The plaintiff has elected to approach the court by way of a *plaint*. There are *no* proceedings for separation or divorce. There is *no* originating summons founded on the Matrimonial Property Act 2013 (which repealed The Married Women Property Act of England as applied in Kenya). The court has to tread carefully at this stage. It is not lost on me that the title to the property does *not* disclose the plaintiff's interest. But I remain alive that the plaintiff may finally prove a *resulting trust*.

13. There is then the key question whether the plaintiff is *married* to the defendant under *Nandi* custom. The defendant denies it. Again, that is the province of the trial court. But I have seen the joint affidavit (exhibit *MCK1*) sworn by the plaintiff and defendant stating they are married. There is then the other affidavit sworn by the plaintiff on 8th march 2012 (*MCK3*) to the Registrar of Persons stating that she is the defendant's wife. The defendant's rejoinder is that the change of name was fraudulent. I am alive that an affidavit is *not* proof of marriage. The defendant acknowledges an affair with the plaintiff; and, that there is a love child aged twelve. He says they share custody of the child.

14. I have no doubt that the plaintiff is suffering from a debilitating illness; and, that she is desperate. The defendant on the other hand is not entirely candid. The plaintiff may not have been a *permanent* resident in the matrimonial home. But they had a *relationship* and a *child* to prove it. I doubt very much that the plaintiff just woke up one morning to claim an interest in the house. I think both parties are not entirely honest about their nature of cohabitation; and, the true reasons for their ugly break-up. The bitter truth will perhaps emerge at the trial.

15. The *relationship* between the plaintiff and the defendant raises a legal conundrum. First, there is an

earlier marriage between the defendant and his other wife, *E*, contracted under the African Christian Marriage and Divorce Act (now repealed). I am alive that the statutory marriage was *monogamous*. There is *no* allegation that the marriage has been terminated by divorce or operation of the law. It is thus doubtful that the plaintiff and defendant had *capacity* to contract another marriage under *Nandi* custom on 10th January 2000. I say that very carefully as the main suit is pending. But it is a pointer that the cohabitation between the plaintiff and the defendant is not a *legally* recognized marriage. It must follow that the plaintiff has not established a strong *prima facie* case on marriage.

16. The motion is partly predicated upon Order 40 of the Civil Procedure Rules. There are twin prayers for interlocutory *prohibitive* injunction; and, a *mandatory* injunction. The principles governing the grant of prohibitive injunctions are well settled. See *Giella v Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. I have found that the plaintiff has not established a *prima facie* case with a probability of success.

17. The plaintiff also craves an *interlocutory* mandatory injunction to reinstate her to the property. To succeed, the court must have a high sense of assurance that the plaintiff would be entitled to the *same* relief at the *trial*. See *Shepherd Homes v Sandham* [1970] 3 ALL ER 402, *Locabail International v Agro Export* [1986]1 ALL ER 901, *Mucuha vs Ripples Limited* [1990-1994] E.A. 388, *Kenya Breweries Limited and another v Washington Okeyo* [2002] 1 EA 109, *Rafique Ebrahim v Ochanda & Company Advocates* Nairobi, High Court case 293 of 2013 [2013] eKLR. I think the common thread in all these cases is that the court will *only* issue a mandatory order in the clearest of cases. I empathize with the desperate condition of the plaintiff. But I am afraid that, at this *stage*, it is *not* such a *clear* case.

18. In the end, I am not satisfied that the petitioner has made out a *prima facie* case for grant of an interlocutory *prohibitive* injunction; or, a *mandatory* injunction. I am *disinclined* to grant any of the prayers in the motion.

19. The upshot is that the notice of motion dated 15th August 2016 is devoid of merit. It is *dismissed*. In the interests of justice; and, considering the plight of the petitioner, I make *no* order on costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 15th day of December 2016.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Mr. Kapele for Mr. Mwetich for the plaintiff instructed by Manani, Lilan, Mwetich & Company Advocates.

Ms. Matoke for the defendant instructed by Tom Mutei & Company Advocates.

Mr. J. Kemboi, Court Clerk.