



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIVASHA

MATRIMONIAL CAUSE NO. 2 OF 2015 (OS)

M N M.....PLAINTIFF

-VERSUS-

P M K.....DEFENDANT

R U L I N G

1. The Applicant and the Respondent are wife and husband respectively, albeit estranged since 2006. Therebefore the couple, who have two adult children, cohabited at their home on parcel **NAIVASHA/MARAIGUSHU BLOCK 1/675** measuring 1.78 hectares, registered in the name of the Respondent.

2. This property is at the heart of the originating summons filed by the Applicant herein which seeks a declaration that the same is jointly owned by the couple in equal shares. Thus prayer (c) of the Notice of Motion filed by the Applicant seeks an order to the effect that:

(c) THAT pending hearing and determination of the Originating Summons the Defendant/Respondent be restrained by way of an injunction by himself, his agents and or servants from selling, disposing off and/or in any other way adversely dealing with all that parcel of land known as NAIVASHA/MARAIGUSHU BLOCK 1/675 approximately 1.78 Ha.

3. In support of the Notice of Motion the Applicant swore an affidavit. The gist thereof is that the suit property, acquired by the Respondent as a gift, was subsequently developed through the couple's joint efforts. However in 2006 the Respondent, claiming that the land parcel was property belonging to his mother, evicted the Applicant who promptly filed a caution at the Lands office. She details efforts by the Respondent to have said the caution removed. She asserts that she is apprehensive that the removal of the caution will enable the Respondent to deal adversely with the property.

4. The Respondent admits in his Replying affidavit that he has indeed embarked on the process of having the caution lifted, for purposes of distribution of the property among family members. He claims that he holds the land parcel in trust for his family, and in particular his two brothers who, together with him allegedly purchased the land from a land buying company. He denies that the same was a gift from his father to the couple.

5. During oral arguments, the parties' respective advocates canvassed the application along the principles laid out in **Giella –Vs- Cassman Brown & Co. Limited [1973] EA 358** and reiterated the respective positions taken by the parties.

6. I have considered all the material placed before me with regard to the application and I am satisfied that it ought to be granted for the following reasons.

7. The suit property is admittedly registered in the name of the Respondent who has by sworn affidavit confirmed that it was used as the matrimonial home. He has stated and that he desires to have the caution on the land parcel lifted in order to share it out between himself and several alleged beneficiaries. Although it would be premature to make a definite finding on the veracity of that allegation, I think the annexures provided in proof thereof – namely – share certificates appear to have no relationship to the property in question.

8. The question whether the entire parcel and developments thereon constitute matrimonial property must await the hearing of the originating summons. Equally, the true extent of the actual share due to the Respondent upon the proposed purported distribution is not a matter that can be determined at this stage. And yet, if the property is subdivided and shared out among third parties, the Applicant may well end up the loser if she eventually proves her present claim against the Respondent.

9. The application is premised on an originating summons brought under the Matrimonial Property Act. There was an oblique statement by the Respondent that the originating summons is somehow incompetent and cannot form the basis of the application, presumably because no divorce proceedings are in existence.

10. Section 17 of the Matrimonial Property Act states:

“(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)—

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

11. In my considered view, the viability of the originating summons can only be determined during the hearing, but clearly subsection (c) above allows the filing of the declaratory originating summons even where no matrimonial petition has been filed. The Respondent did not deem it fit to raise any preliminary objection as to its competence, at any rate.

12. In the case of **Mrao Ltd -Vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR** a *prima facie* case was described as follows:-

“The power of the Court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence.....

So what is a prima facie case? I would say in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

13. The Respondent’s counsel emphasised that the beneficiaries will be inconvenienced if the court grants the orders sought. I note however that the Respondent has by his own admission held title to the property since 1986, seemingly with the concurrence of the alleged beneficiaries. There is no evidence whatsoever that the said “family” resides on the property as alleged or that any of them will be unduly prejudiced. Costs will be in the cause.

Delivered and signed at Naivasha this 30th day of June, 2015

In the presence of:-

Mr. Mburu holding brief for Ms Mukuria for Applicant

Mr. Mburu holding brief for Mr. Wahome for Respondent

Court Assistant Stephen

C. W. MEOLI

JUDGE