



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC CIVIL SUIT NO. 157 OF 2012

PATRICK OTIENO NYAKANDO.....PLAINTIFF

VERSUS

PAMELA ANYANGO OGUTU.....DEFENDANT

RULING

The application for this courts consideration is the Notice of Motion dated **26th March 2012**, brought under **order 40 Rule 2 (1) and Order 51 Rule 1 of the Civil Procedure Rules and sections 3A and 63 (e) of the Civil Procedure Act**, seeking for orders that a temporary injunction be granted to the plaintiff against the defendant restraining the defendant ,her servants and or agents and or any other person acting in her names from evicting the plaintiff from house and **Plot No 437**, Obama Estate ,Nairobi or selling the said house or plot until the full hearing and determination of this suit.

This application is based on the grounds stated on the face of the application and the supporting affidavit of the plaintiff. He averred that the two parties herein are husband and wife with one issue who is now in the plaintiff's custody after the defendant deserted the home in 2010.He stated that the house built on the suit plot was purchased and built with his own savings in **2007**, without any monetary contribution by the defendant but the said house is now matrimonial property. That while purchasing the suit property based on the harmony that then existed between them he caused the property to be registered in the defendant's names indicating that the her registration was in trust for the whole family members and particularly the two parties herein as long as the marriage subsisted. He averred that he was served by the defendant's advocate a notice dated **8th March 2012** wherein the defendant is seeking his eviction of the suit premises. He believes that as long as the marriage subsists the defendant cannot in law evict him. He claims that should the unlawful act of eviction occurs, he would be subjected to irreparable injury and loss therefore he seeks the injunction to protect his rights.

This application is opposed by the defendant .In her Replying Affidavit filed in court on **11th April 2012**, she confirmed that she separated from the plaintiff in 2010.She denied that the suit property belonged to the plaintiff adding that she purchased the same using her own money from her business from one Monica Wangui Maina on **4th September 2007**, who was the original member of Omega Jua Kali Association. That after purchase of the plot she constructed a three bed roomed house without the assistance of the plaintiff. That since the separation with the plaintiff the defendant, has no intention of living with him; she demanded that the plaintiff should vacate the said property. She believes that the plaintiff is not entitled to the orders of the injunction he is seeking since the suit property wholly and solely belongs to the defendant.

Parties canvassed this application by written submissions. The plaintiff submitted that he has established the the principles in laid down in the case of ; **Giela –vs- Cassman Brown Limited 1973 of**

358. On whether the plaintiff had a prima facie case he submitted that property acquired by married couples during the subsistence of their marriage is presumed as joint property under the law and therefore none can purport to own it and purport to evict the other. He relied on the case of C.Y.O.Owayo vs. George H.Z. Aduda & Another CA No 2 of 2003.

On irreparable loss and injury, he submitted that the court should grant the injunction to protect his right of occupation as joint owner. If the court were to find this application on a balance of convenience, he submitted that the balance of convenience tilts in his favour because the defendant admitted that she moved out of the suit property on her own volition.

The Defendant in her written submissions stated that the plaintiff had not established a prima facie case with a probability of success. That the plaintiff only made a sweeping statement that he purchased and developed the suit property from his personal savings in 2007 which was far from the truth because she stated that she purchased the undeveloped plot and developed it until December 2009 when it ready for occupation. That the plaintiff has not shown by evidence how he purchased and developed the suit property and on the contrary the defendant has shown that she was the owner of the suit property and it would be tragic if the defendant as the true owner of the suit property is restrained from taking the possession of her house.

I have considered carefully the submissions by the parties as well as the facts as detailed in the affidavits sworn in support of and in opposition to the application. I must first point out that at this stage of the proceedings and faced with an interlocutory application for an injunction, my duty is limited to ascertaining whether the Plaintiff has established a prima facie case with chances of success for the Plaintiff to be entitled to an injunction. I must also determine, in the event the Plaintiff establishes a prima facie case, whether in the absence of an injunction the Plaintiff stands to suffer irreparably and beyond compensation through an award of damages. Finally, if in doubt I must weigh the balance of convenience in granting or denying the injunctive orders sought.

The plaintiff has explained to this court vide his supporting affidavit that he purchased the suit property and had it registered in the defendant's name and that he used his finances to construct the house he is currently residing in and referred to it as matrimonial home. He however did not have any documents to prove that he actually purchased the said property. Even if he purchased the suit property in the name of the defendant who was at that time his wife, the court expects that he shows documentary evidence of the purchase of the suit property.

On the other hand, the defendant has refuted the plaintiff's claim that he purchased the suit property and alleged that she purchased the suit property using her business savings. She had a sale agreement to show that she purchased the suit property from a member of Jua Kali Association. The Court therefore finds that the plaintiff has not shown a prima facie case to warrant the injunction he has sought from this court.

However, having evaluated this evidence, it is clear that the plaintiff is in occupation of the suit property. Further there is an issue that the court will need to make a determination on whether the said property was matrimonial or not, which will be done after parties have been given their day in court in the main hearing. If an order of injunction is not granted, the defendant shall interfere with the *status quo* that is existing now to the detriment of the plaintiff. The Plaintiff herein should continue residing on the said parcel of land pending the hearing and determination of the suit that he has filed herein.

The upshot of the foregoing therefore, is that the application by the applicant for injunction dated the **26th March 2012**, is hereby allowed entirely. Consequently, the defendant is restrained from interfering with the plaintiff's possession and occupation of the house and **Plot number 437, Obama Estate** pending the hearing and determination of the suit filed. Costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered this **15th** day of **May, 2015**

L.GACHERU

JUDGE

In the Presence of:-

..... Plaintiff/Applicant

.....for the Defendant/Respondent.

Court Clerk: Hilda

L.GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of the above stated Counsel.

L GACHERU

JUDGE