



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL SUIT NO.12 OF 2015**

**D C S .....PLAINTIFF**

**VERSUS**

**E A P M .....DEFENDANT**

**RULING**

1. The application for determination herein is in the Notice of Motion dated 9/06/2015 which was certified urgent on the 11/06/2015. It is brought pursuant to Order 40 Rules 1 and 2 of the Civil Procedure Rules, Sections 3,3A and 63 (e) of the Civil Procedure Act. The applicant seeks for ORDERS:-

1. ....spent

2. ....spent

3. THAT pending the hearing of this suit there be a temporary order of injunction restraining the defendant from interfering with Plaintiffs possession of Kakamega/Town/Block [particulars withheld]

4. THAT pending the hearing of this suit the Defendant be ordered to provide maintenance to the Plaintiff.

5. ....spent

6. THAT costs of the application be provided for.

2. The application is premised on the grounds set out on the face of the application and supported by the affidavit of the applicant D C S. She claims to have been staying on the suit land herein Kakamega/Town/Block [particulars withheld] since 2011 after she allegedly got married to the defendant under Luhya customary law. She explains that she first stayed with the Defendant at Makunga and then Kakamega Town. She also claims to have lived with him in the United Kingdom for six (6) months in 2011 – 2012. She states that at the request of the Defendant she was forced to abandon her job in order to take care of family business such as rental houses on plot [particulars withheld]/Kakamega Town some residential and houses at Shianda Market.

3. She also claims to have dedicated her life to being a good wife to the Defendant and ensuring family business is taken good care of. She explained that on the 08/06/2015 the Defendant in company of

strangers moved to the matrimonial house and locked her out without allowing her to take her belongings which remained locked in the house. She claims that she is now destitute because of the Defendants actions and says she is entitled to stay in the said house because she abandoned her own house to get married to the Defendant. She also claims that she is not aware of any divorce proceedings against her and that she has an equal right over the suit property by virtue of being the Defendant's wife. She claims to have been assaulted by the persons who forced her out of her house as shown on the copy of the treatment notes marked "DCS – 1".

4. The applicant says she is worried that her certificates and those of her relatives may be destroyed and that the proceeds she was depending on from the rental houses at jua kali have been taken away from her thereby leaving her with no other source of income. She claims that since the Defendant requested her to give up her livelihood then he ought to support her as he has been maintaining her. She wants the order granted and time to re-settle before re-organizing herself. She claims to have reported the matter at Kakamega Police Station but was informed to file a suit which she now has filed.

5. The application is opposed vide grounds of opposition dated 25/06/2015 and a replying affidavit sworn by the Defendant on the same date.

6. In his affidavit the Defendant explains that he lived and worked in the United Kingdom as shown in annexure "EARM – 1a, 1b, 1c and 1d and that he is married to one P A O a dentist who lives in the city of York in U.K see annexure "EAPM – 2". He explains how he met the Plaintiff herein in August 2011 and how she assisted him to hire the services of [particulars withheld] Agencies Ltd to manage his property including Kakamega/Block [particulars withheld]. See annexure "EAPM – 3" the estate management agreement dated 01/10/2011.

7. He further explains that when he came back to Kenya in February 2012, he met one Simon Juma of [particulars withheld] Agencies Limited who told him that he had found a tenant for the Milimani house at L.R. No.Kakamega Town Block/[particulars withheld] but he did not have access to the property because he had not left the keys with him. Since he had left the keys with the Plaintiff, he requested her to take them to him.

8. However the Plaintiff did not give the keys to Simon as instructed and that it was his gardener who informed him that the Plaintiff had moved into the house and was now staying there and when he requested her (Plaintiff) to move out she ignored the same. He explains that when all this was happening he was in the process of transferring the said parcel i.e. L.R No.Kakamega Town/Block/[particulars withheld] to his son, EMM which process was finalized in April 2013 and the lease transferred accordingly. See annexures marked "EAPM – 4" and "EAPM – 5"

9. He further explains that since EMM lives and works in the United Kingdom it was agreed between the two of them that he (defendant) should manage the said property see annexure "EAPM – 6." The defendant claims that when he visited the said property on 5/06/2015, the Plaintiff who was in the house on that date left when she saw him inspecting the said house and he later learnt that she went to the Police. He explains that he got some casual labourers to help him clear the compound and clean the houses and he asked them to put the Plaintiffs things outside the house in a safe compartment. He claims to have left the house and locked the gate.

10. That on 08/06/2015 when he returned to the house to continue the cleaning he found the Plaintiff had broken the gate and door locks forcing him again to buy new locks and even Station guards on the said premises. He claims that he has not seen her (Plaintiff) since. He denies the allegations that he got married to the Plaintiff under Luhya customary law and explains that he is married and also says that under Luhya customary law he cannot marry the plaintiff her as she is his blood cousin.

11. He denies ever staying with the plaintiff at Makunga and Kakamega town or living with her anywhere in any house as a wife. He denies that L.R. No.Kakamega Town/Block/[particulars withheld] is the Plaintiffs matrimonial home and explains that she moved into the said property without his consent or permission because she was only supposed to take the keys to the said house to the property manager. He

denies the allegations that he forced the plaintiff to leave any job and take care of any of his family business anywhere as she was not married to him at all. He denies the allegations that he locked the Plaintiff out of any matrimonial house as she is not his wife and also that he prevented her from taking her belongings on the 5/06/2015.

12. The defendant states that the Plaintiff is not entitled to stay on the said suit property as she is not married to him and the said property is lawfully owned by EMM and she has no rights at all over the same property. He claims that there are no divorce proceedings between him and the Plaintiff and there is no need for such because they are not man and wife. He denies the Plaintiffs claim that she was assaulted and he claims to have no knowledge of even providing her with money for her upkeep. He maintains that the Plaintiffs actions are fraudulent and meant to deprive the lawful owner of use and enjoyment of the said property. He maintains that the applicants application contains matters which are untrue and does not give any or any sufficient ground upon which the orders sought can be granted. He wants the application dismissed.

13. The application herein was canvassed by way of written submissions which the parties filed and exchanged. This Court has had the opportunity of reading through the application and the response together with the submission. What is for determination is prayer (3) (4) and (6). Since the application has been heard prayer (2) and (5) are spent.

14. Together with his application, the plaintiff filed a plaint dated 09/06/2015. In the said plaint, whose basis is found at paragraph 7 thereof, she prays for the following reliefs:-

- a. A declaration that she is entitled to stay on Kakamega/Town/Block [particulars withheld] during subsistence of the marriage herein and even after the marriage.
- b. Maintenance of kshs.50,000/= per month.
- c. Costs of the suit.

15. In determining whether to grant or deny an application for a temporary injunction, a Court considers the following factors:-

1. Has the applicant made a strong case showing that she is likely to prevail on the merits at the trial of the suit itself?
2. Has the applicant shown that without a temporary injunction she will be irreparably injured?
3. Has the applicant shown that taking into consideration the comparative mischief of inconvenience to the parties, the balance of convenience is in his favour?
4. Would the issuance of the injunction substantially harm other parties interested in the proceedings, but not brought before Court?
5. Where does public interest lie?
6. Would the withholding of the temporary injunction be in the interest of conserving judicial time?
7. Is there a clear necessity for affording immediate protection to the applicant's alleged right or interest which would otherwise be seriously injured or impaired?

16. In short the applicant must show that she has a legal right and it must also show a fair prima facie case in support of the right or interest claimed which means that at this stage her case should not appear frivolous. She must show an actual or threatened violation of that right, the injury must be imminent and the risk a real one. The violation must be that it will give rise to irreparable or at least grave damage unless it is prevented. This means that in the event of withholding the relief the applicant will suffer

irremediable injury. In other words, if the remedy is not granted and the case succeeds the applicant will not have a proper remedy in being awarded adequate damages or some other remedy.

17. The applicant herein claims to have been living on the suit land L.R. Kakamega/Block [particulars withheld]. It is now admitted she is no longer living in the said house. What has come out from the respondents response is that the suit land L.R. Kakamega/Block [particulars withheld] belongs to a 3<sup>rd</sup> party, one EMM as evidenced by annexures “EAPM -4” and EAPM 5”. This means that the applicant has been trespassing on somebody else’s property because she has not produced any documentary evidence to prove otherwise such as an affidavit of marriage or certificate to that effect. It also means that the 3<sup>rd</sup> party herein E MM who has not been included as a party to these proceedings will end up suffering harm if the orders sought herein are granted.

18. The applicant on the other hand has not shown what prejudice she will suffer if the temporary injunction sought by her is not granted. She has not told this Court where she lives at the moment and whether or not she has collected her belongings from the compound of the suit premises. She has not shown this Court how the property in dispute is in danger of being wasted, damaged, or alienated as provided under Order 40 Rule 1 of the Civil Procedure Rules.

19. The award or withholding of the injunction is a matter of sound judicial discretion in the exercise of which the Court balances the conveniences of the parties and possible injuries to them and those of third parties, according as they may be affected by the granting or withholding of the injunction. There must be greater convenience in granting than refusing the injunction and equally efficacious relief must not be obtainable by any other usual mode of proceeding.

20. The award of a temporary injunction should not be regarded strictly as a matter of right even though irreparable injury may otherwise result to the applicant. The circumstances of this case are such that even if the orders sought are granted enforcing them can be practically impossible. As already stated the applicant does not stay on the suit premises, in addition to the fact that the suit land belongs to another person and it will be difficult to enforce the same as it will be tantamount to encouraging a crime.

21. An order of injunction also cannot also be issued to the applicant since she is not in occupation of the said property. The instant application/suit is not a divorce case between the Plaintiff/Applicant and the respondent and since the marriage has been denied and has not been established it will be unsafe to grant an interim order for maintenance. That issue has to await the outcome of the full hearing of the case.

22. Finally, the order of injunction sought by the plaintiff herein cannot be granted because the same is not anchored in her plaint. Clearly, the applicant in her plant only prays for a declaration that she is entitled to stay on Kakamega/Town/Block [particulars withheld] during the subsistence of the marriage herein and even after the marriage. She also prays for maintenance of kshs.50,000/= per month. Whether there is a marriage between the plaintiff and the defendant is an issue for determination at the hearing of the suit, but what is clear is that there is no prayer for an order of injunction in the plaint as would make this Court consider the instant application in favour of the applicant.

23. In the premises, the plaintiff’s application dated 09/06/2015 lacks merit and the same be and is hereby dismissed with costs to the defendant.

24. Order accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 21<sup>ST</sup> day of October 2015.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mr. Anziya (absent) for Applicant/Plaintiff

Mr. Kweyu (present) For Respondent/Defendant

M/s Lagat & Okoit - Court Assistants