



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. E20 OF 2021

ALICE NGENDO MURIUKIPLAINTIFF/APPLICANT

VERSUS

NANCY WANJIRU JOHNDEFENDANT/RESPONDENT

RULING

1. I have before me for determination a Notice of Motion dated and filed herein on 7th October 2021. By the said Motion, Alice Ngendo Muriuki (*the Plaintiff*) prays for an order of injunction restraining Nancy Wanjiru John (*the Defendant*) from denying the Plaintiff access to use, possession, occupation and collection of rent from the suit premises being Plot No. B 1/300 Karindundu pending the hearing and determination of this suit.

2. In addition the Plaintiff urges the Court to grant orders of status quo obtaining on occupation and use of the late John Gikandi Magondu's properties at Karindundu plot, Karatina Saw Mill and Giakama farm as at the time of his demise pending the filing, hearing and determination of a succession cause to his estate. It is further the Plaintiff's prayer that the said orders be enforced by the OCS, Karatina Police Station.

3. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds:

- (i) *That the Plaintiff and the Defendant are wives of the late John Gikandi Magondu who passed away on 31st April, 2021;*
- (ii) *That the Plaintiff is the second wife to the deceased with their matrimonial home at the said Plot No. B1/300 Karindundu and a shop therein since the year 2006;*
- (iii) *That the Defendant is the first wife of the deceased residing at the deceased's Giakanja farm and is hell bent on kicking out other family members and beneficiaries from the estate of the deceased;*
- (iv) *That the Defendant and her son went to the suit property severally after the demise of the deceased and have now threatened to lock out the Plaintiff, chase out all other tenants and to start renovating the same;*
- (v) *That the Defendant and her sons have asked the Plaintiff to pay rent and leave the premises peacefully or face eviction yet the Plaintiff was not a tenant of the deceased but his wife;*
- (vi) *That the Plaintiff has no other home to live in with her 2 children as they had exclusively settled on the suit property while the first wife settled on the Giakanja Farm.*

4. Nancy Wanjiru John (the Defendant) is opposed to the grant of the orders sought. In her Replying Affidavit sworn and filed herein on 25th October 2021, the Defendant avers that she is the wife of the deceased and that the Plaintiff has been a tenant at the suit premises wherein the Plaintiff operates a shop at the rent of Kshs.10,000/- per month and resides in the rental quarters hosting other tenants.

5. The Defendant avers that she got married to the deceased in 1970 before the said marriage was solemnized in 1980 in Church and that they have had three (3) children who are grown up and have been running businesses in the suit premises among other places. It is the Defendant's case that the Plaintiff is a stranger to the family and that she only started claiming to be the wife after the Defendant's husband passed away on 31st August, 2021.

6. I have carefully perused and considered the Plaintiff's application and the response thereto by the Defendant. I have similarly perused and

considered the submissions and authorities placed before me by the Learned Advocates for the parties.

7. The Plaintiff herein prays for a temporary order of injunction to issue restraining the Defendant from denying her access, use, possession, occupation and collection of rent from the suit premises described as Plot No. B 1/300 Karindundu located within Karatina Township. The Plaintiff also prays for an order of *status quo* in respect of all properties belonging to one John Gikandi Magondu who is said to have passed away on 31st August, 2021.

8. The conditions for consideration in granting an interlocutory injunction were long settled in the celebrated case of **Giella –vs- Cassman Brown & Company Limited (1973) EA 358** where the Court decreed as follows:

“Firstly, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

9. That being the case, the first task for this Court is to establish whether or not the Plaintiff herein has made out a *prima facie* case with a probability of success at the trial. As to what would amount to a *prima facie* case, in a case such as this, the Court of Appeal offered guidance in **Mrao Limited -vs- First American Bank of Kenya & 2 Others (2003) EKLK 125** as follows:

“A *prima facie* case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

10. From a perusal of her Plaint filed herein on 7th October 2021, the Plaintiff prays for orders listed as follows:

(a) A declaration that the Plaintiff as the widow of John Gikandi Magondu (deceased) is entitled to possess, occupy and use the deceased’s suit premises Plot B 1/300 Karindundu the marital house, the rental units and all the facilities therein;

(b) A perpetual injunction restraining the Defendant, her agents, servants or anyone acting under her from interfering with the Plaintiff’s possession, use and occupation of the suit property and the facilities therein; and

(c) Costs and interest at Court rates.

11. By the application presently before me, the Plaintiff avers that she brings the claim as the 2nd wife of the said John Gikandi Magondu to safeguard her matrimonial property as well as other properties belonging to the deceased. It is the Plaintiff’s case that the Defendant herein as the 1st wife of the deceased lived at the deceased’s Giakanja farm and that the deceased had a timber saw mill in Karatina Town which was being managed by the Defendant herein.

12. According to the Plaintiff, the deceased had each of his wives residing in separate premises from where they would each derive their livelihoods. In that respect, the Plaintiff settled on the suit property situated within Karatina Township where she operated a shop, lived in one residential house and collected rent from the other tenants for the family’s use.

13. In support of that position, the Plaintiff has attached various annexures both to her supporting and supplementary affidavit. These include receipts and M-pesa transactions which according to the Plaintiff show that rent was paid to her by M-pesa and that money was sent and received as between her and the deceased. In addition, the Plaintiff has annexed a copy of a Birth Certificate for her last born son, who according to her, was named after the deceased’s father in accordance with the Kikuyu Customary Law.

14. As it were, there was no dispute that the suit premises were registered in the name of the late John Gikandi Magondu who passed away on 31st August, 2021. It was also clear from the material placed before me that the disputed property comprises of a residential cum commercial building in Karatina Town. While the Plaintiff asserts that she has since 2006 been residing in the suit premises with the deceased as a husband and a wife, she has not produced anything to show her presence in the said premises prior to the year 2017.

15. The Single Business permit on which she relies was issued to her by the County Government of Nyeri to run a Retail Shop on the premises on 26th June, 2020. The M-pesa Statement attached to her Supplementary Affidavit equally runs from April, 2017 to August, 2021. The rent receipts issued in the name of the deceased’s company – Najoma Investments also run for the period 2017 to 2021. The same applies to the Birth Certificate issued in the name of her son Levis Magondu who is shown thereon to have been born on 16th March, 2017.

16. Those annexures appear to me to lend credence to the Defendant’s position that the Plaintiff did not reside in the suit premises from the year 2006 as she claims. Indeed, the Defendant has produced at annexure NWJ-3 of the Replying Affidavit a Notice dated 1st May, 2015 apparently issued to the Plaintiff by the deceased in which the deceased ordered the Plaintiff to vacate the suit premises for non-payment of rent. From a perusal of that notice, it would appear that the Plaintiff had first entered the suit premises and occupied Room 16 thereof as a tenant in the year 2015.

17. While it was possible that the deceased later on entrusted the Plaintiff with certain roles in regard to the suit premises, I was not persuaded that by being given such roles, she had become entitled to rent for the suit premises or to ownership of the building thereon.

18. I say so because while the Plaintiff purports to have become the 2nd wife to the deceased, it was apparent that it is only the Defendant who is in possession of a Marriage Certificate declaring that she was duly married to the deceased under the Marriage Act. The Plaintiff has not demonstrated how she came to be married as a second wife to the deceased. I was unable to find any demonstration of any customary law rites the Plaintiff did undergo with the deceased to entitles her to be considered the deceased's wife at this stage.

19. As things stand, the Plaintiff is not the registered owner of the suit properties and she has not taken out letters of administration for the estate of the registered owner of the properties. That being the case I was not persuaded that the Plaintiff had made out a *prima facie* case with a probability of success at the trial.

20. Indeed unlike the Defendant who deposes to have contributed to the acquisition and development of the suit premises, the Plaintiff had no such claim other than her association with the deceased. It was accordingly clear to me that on the question of loss and damages, it is the Defendant who stands to suffer loss and damage if the orders herein were to be granted.

21. The upshot is that I did not any merit in the Plaintiff's Motion dated 7th October, 2021. The same is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 10TH DAY OF MARCH, 2022.

IN THE PRESENCE OF:

MR. KABUTHU FOR THE DEFENDANT

NO APPEARANCE FOR THE PLAINTIFF

COURT ASSISTANT - KENDI

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J. O. OLOLA

JUDGE