



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 9 OF 2012

GRACE MUENI KIMANZIPLAINTIFF

VERSUS

DANIEL MUTWIWA MATINGO

BERNARD ACHOKI MAKAMARADEFENDANTS

RULING

Before the court are two applications as follows:-

- i. **Notice of Motion dated 13-1-2014**
- ii. **Notice of Motion dated 27-5-2014.**

By the **Notice of Motion dated 13-1-2014**, the Applicant seeks inter alia the following orders:-

*“3. Pending the inter-partes hearing and determination of this Suit, the 2nd Defendant, his agents, servants or(sic) in any manner howsoever be restrained from interfering with the Tenants, evicting the tenants, harassing the tenants and/or collecting rent from all the tenants on the premises erected on **Plot No. 855 at Ziwa La Ngombe Squatter Settlement Scheme Mombasa District.**”*

4. The cost of this application be paid by the 2nd Defendant”.

By the **Notice of Motion dated 27-5-2014** the 2nd Defendant prays;-

*“**THAT** the ex-parte orders of 12th May, 2014 issued by Hon. Justice Muya extending orders that had long lapsed be set aside ‘ex-dibitio justitiae’”*

By directions given by the court on 16/6/2014 both applications were to be heard and determined together. The court further directed that both applications be disposed of by way of written submissions. In compliance thereto both parties duly filed in court their written submissions. A brief history of the case is as follows;-

The plaintiff **GRACE MUENI KIMANZI** and the 1st Defendant **DANIEL MUTWIWA MATINGO** are a couple who got married under Kamba customary law in 1999. They later solemnized their union on 17th December 2001. The couple were blessed with four children who are still minors. The Plaintiff in

her documents claims that the family inherited three pieces of land from the mother of the 1st defendant who passed away in 2003. All the property was registered in the name of the 1st defendant and the plaintiff claims that he was merely holding the same in trust for the family.

On 5/7/2014, the 2nd defendant **BERNARD A MAKALA** relying on his claim to have purchased the matrimonial home on **PLOT NO. 855/ZIWA LA NGOMBE** from the 1st defendant, served the Plaintiff with notice to vacate the same. The plaintiff on her part claims to have had no knowledge of the sale of the matrimonial home. She claims that such sale was unilateral and amounted to a breach of her constitutional and spousal right to family property. This led the plaintiff to file the present suit through a Plaint dated 16-7-2012. Simultaneously with the said Plaint, Plaintiff also filed a Notice of Motion application seeking inter alia

iii) Temporary injunction restraining the defendants from interfering with the Plaintiffs engagement/rights over **Ziwa La Ngombe Plot [855]** pending hearing and determination of the suit.

On her part the 2nd defendant denies all the allegations made by the Plaintiff. He insists that the Plaintiff was an active participant in the sale of Plot 855 to himself by her husband the 1st defendant given that she appended her signature to the sale agreement. The 2nd defendant goes on to allege that he paid to the 1st defendant the purchase price of Kshs. 1.8 million in the presence of and with the acquiescence of the Plaintiff. The 2nd defendant further claim that the complainant sought time to vacate and the parties agreed that they stay in the plot as rent-paying tenants together with the other tenants in the plot. The couple were to pay Kshs. 7,000/- per month. The 2nd defendant opines that this Suit is a ploy by the plaintiff and the 1st defendant to deny him property which he has bought and paid for. Thus the 2nd defendant filed a defence and counter-claim on 2-8-2012 by which he sought specific performance of the Sale Agreement dated 13-12-2011 as well as mesne profits from July 2012. The 2nd defendant also filed an application dated 2-8-2012 seeking to reverse the injunction obtained by the Plaintiff stopping him (the 2nd defendant) from collecting rents from the plot. The 2nd defendant argues that these rents are his only source of livelihood.

The 1st defendant (who is the husband to the Plaintiff) filed on 19-11-2012 a defence in which he initially claimed to have been unaware that consent from his spouse was required in order to sell the property. He later claimed that the 2nd defendant had acted fraudulently and had tricked him into selling the property. The 1st defendant offered to refund the purchase price to the 2nd defendant by way of installments. On 29-8-2012 the parties agreed that the two pending applications be heard and determined together while the interim orders obtained on 16-7-2012 remain in force.

I have carefully considered the submissions filed by the Plaintiff and the 2nd Defendant as well as the annexures thereto. On the one hand the Plaintiff submits that she has established a '*prima facie*' case warranting the grant of the injunction orders prayed for. She has denied any and all knowledge of the alleged sale of the Plot to the 2nd defendant and argues that she will suffer irreparable harm (being her exclusion from her matrimonial home) if the orders sought are not granted.

On the other hand, the 2nd defendant submits that the failure by the Plaintiff to reveal to the court that **Plot 855 Ziwa La Ngombe** consists of rental properties is a material non-disclosure aimed to portray the Suit Property purely as a residential property. He argues further that the plaintiff's husband (the 1st defendant) has been paying rent for his own room at 7,000/= to the 2nd defendant from February to July 2012. In addition the 1st defendant has also been collecting rent from the other tenants and forwarding the same to the 1st defendant with the full knowledge of the Plaintiff herself. What exists here in other words is a very complicated state of affairs. Most of the allegation and counter allegations made by the parties can only be proved and determined following a full hearing at which the parties would adduce evidence to substantiate their claims.

The principles governing the grant of injunctions are well established in the Case of **GIELLA –VS-**

CASMAN BROWN LTD (1973) A 358. It is well settled that in applications for injunctions where there exist serious conflict of facts (such as in the present case) the golden rule would be to maintain the status quo pending a full hearing. Further in cases where the subject matter in dispute in family land or indeed a family home, courts have tended towards granting injunction taking judicial notice that loss of a family property with its attendant sentimental value can often not be adequately compensated by way of damages.

All parties in this matter seek to have the Suit Plot preserved. Both Plaintiff and the 2nd defendant seek to control the rental incomes payable by the tenants in occupation of the Plot. It is not in dispute that the 2nd defendant has been collecting rents at least from February to July 2012. It is also not in serious dispute that the 2nd defendant paid a sum of kshs. 1.8 million to the 1st defendant given that the 1st defendant has sought to refund this money by way of installments. The question of whether or not the alleged sale ought to be nullified for fraud and/or misrepresentation is a matter for trial. It is only when the Plaintiff instituted this Suit that injunctive orders were made barring the 2nd defendant from continuing to collect the rents. On the whole, this is a border line case and the court has to walk a tight rope to ensure that the interests of all parties are well protected without unfavourably prejudicing any party. The balance of convenience will have to prevail. It is in my view that the status quo pertaining **before** this Suit was instituted should be maintained pending a full hearing and determination thereof.

In this regard, I make the following orders;-

1. The 2nd defendant and/or his agents are hereby restrained from selling, transferring, leasing, mortgaging or in any other way disposing of **Plot No. 855 Ziwa La Ngombe.**
2. The 2nd defendant may continue to collect rents from the said Plot **EXCEPT** from the Plaintiff and the 2nd Defendant shall keep account of all such rents collected.
3. Rents collected from the houses from August 2012 to date must be accounted for.

It is so ordered.

Finally this being a land/property dispute the same is hereby referred to the Environment & Land Court for final determination as the same falls within the jurisdiction of that court. Cost in the cause.

Dated and Delivered in Mombasa this **17th** day of **October, 2014.**

M. ODERO

JUDGE

In the presence of:

Mrs. Mutiso holding brief Mr. Kalwa for Petitioner

No appearance for the Respondent.

M. ODERO

JUDGE

17/10/2014