



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 215 of 2011

PATRICK MWENDA MARANGU PLAINTIFF/APPLICANT

VERSUS

1. MARY NKATHA MARANGU

2. HABADASSO GUFU OBA DEFENDANTS/RESPONDENTS

RULING

The application dated 19th August 2011 is premised on **Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 1A, 1B, 3A and 63 (c) to (e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** and all other enabling provisions of the law.

The application seeks an order of temporary injunction against the Defendants by themselves, their servants, agent, employees and or any other person authorized by them from wasting, alienating, evicting and or threatening to remove the Plaintiff/Applicant from the suit parcel the land known as Title Number **Kajiado/Kaputiei-North/22458** pending hearing and determination of this suit.

The gist of the Plaintiff/Applicant's case is that he solemnized a marriage with the 1st Defendant/Respondent in the year 2005. That they acquired the property the subject matter of this suit in the year 2007 through the 1st Defendant's employer, the **Consolidated Bank of Kenya Ltd** and the property was registered in the 1st Defendant's name in order to obtain the favourable mortgage terms that the bank was giving to its employees. That Plaintiff contributed substantial amounts of money towards the purchase of the property by giving the 1st Defendant the Kshs.400,000/= deposit required and meeting other family expenses.

The marriage broke down in the year 2010 and the 1st Defendant deserted their matrimonial home which they had established at the suit premises but she continued servicing the mortgage payments. In the month of March 2010, the Plaintiff discovered that the 1st Defendant had sold the suit premises to the 2nd Defendant.

In August 2011 the Plaintiff received a notice from the 1st Defendant's Advocates asking him to vacate the house. That is what prompted the Plaintiff to file this suit to protect his interests.

The 1st Defendant, **Mary Nkatha Marangu** in opposition to the application swore a replying affidavit on 7/9/2011. According to the 1st Respondent, the application is designed to obstruct and/or delay the 2nd Defendant from taking possession of the suit premises. The 1st Respondent admitted that she got married to the Plaintiff in the year 2005 but averred that they separated in the year 2009 when the Plaintiff kicked her out of the suit premises. The 1st Defendant's position is that she solely purchased the suit premises through her employer's mortgage scheme which was 100% financed by her employer the **Consolidated Bank of Kenya Ltd.** and that there was no contribution from the Plaintiff. The 1st Respondent's contention is that she serviced the mortgage through salary deductions by her employer. The 1st Respondent acknowledged Kshs.310,000/= which "passed" through her account and was transferred to the Appellant who utilized the same to purchase a motor vehicle. The 1st Respondent also acknowledged being lent by the Applicant Kshs.45,000/= for valuation and stamp duty payment and other transfer expenses which she repaid. The 1st Respondent stated that they have no children together and that the Applicant took care of himself and left her to take care of herself.

The 1st Respondent stated that she was servicing the mortgage, paying rent, servicing a car loan and another Sacco loan and was strained both financially and emotionally and decided to sell the suit premises. The 1st Respondent described the sale transaction to the 2nd Respondent as legal and devoid of any fraud.

According to the 1st Respondent the Plaintiff/Applicant refused to move out of the house. The 1st Respondent stated that the house would have fetched 18,000/= rent per month with effect from 1st June 2009 when she was forced out of the house.

The 2nd Respondent, **Habadasso Gufu Oba** filed a replying affidavit sworn on 7/9/2011. The 2nd Respondent exhibited a title deed which shows that she is the registered owner of the suit premises. The 2nd Respondent contended that the Applicant's claim through the wife became extinguished upon the transfer of the suit premises. The 2nd Respondent contended that her proprietorship of suit property is not contested and that the Plaintiff's refusal to vacate the premises is occasioning her loss and damage as the premises would have yielded Kshs.20,000/= rent per month. According to the 2nd Respondent, the application is meant to delay the cause of justice while the Plaintiff continues being a squatter to her property.

Kang'oli & Company Advocates appeared for the Applicant while **Mutethia Kibira Advocates** appeared for the Respondents. The application was canvassed by way of written submissions which I have duly considered.

The following are not in dispute:-

üThat the Plaintiff and the first Respondent are husband and wife though separated.

üThat there is no suit that has been instituted in respect of their matrimonial status.

üThat the suit premises was bought during the period the Plaintiff and the 1st Respondent lived together as a couple and the suit premises was their matrimonial home.

üThat the suit premises was purchased through the 1st Respondent's employers mortgage scheme.

üThat the 1st Respondent was the one servicing the mortgage through salary deductions.

üThat the property was registered in the 1st Respondent's name.

üThat the 1st Respondent has since sold and transferred the suit premises to the 2nd Respondent.

üThat the title to the property is now registered in the name of the second Respondent.

üThat the Plaintiff has been given notice to vacate the suit premises but has failed to do so and continues to occupy the suit property.

üThat the 1st Respondent moved out of the suit premises and lives in a rented house in another town.

The Applicant's contention is that he made substantial contribution towards the purchase of the property. The Applicant has averred that he paid Kshs.400,000/= being the 20% deposit for the house. The Applicant has further stated that their arrangement was that the 1st Respondent would service the mortgage while the Applicant would cater for other family expenses including several investments and assets that they acquired over the years.

The Applicant has however not stated what the other investments and neither gave any details of the

family expenses. The 1st Respondent has disputed that the Applicant took care of her. According to the 1st Respondent they have no children together and each of them took care for themselves. It is also noteworthy that this is not a matrimonial dispute involving the distribution of matrimonial property.

The 1st Respondent has exhibited copies of the agreement and the letter of offer (Exh 1 & 2). These documents show that the house was purchased at Kshs.2,200,000/= and was financed 100% by the 1st Respondent's employer. The 1st Respondent has also demonstrated through the loan statements (Exh.6) that the mortgage was solely serviced through monthly deductions of her salary.

The 1st Respondent has quantified the Applicants contribution as Kshs.45,000/= which was utilized to pay valuation, stamp duty and other expenses. The Applicant has quantified his contribution as Kshs.400,000/= direct cash payment towards the deposit for the house. The Applicant has however not exhibited any documents in support of that assertion.

All the same the plaintiff's claim is quantified. Infact one of the Applicant's prayers in the plaint is that he is entitled to a share of the proceeds obtained from the sale of the suit premises. The Applicant will therefore not suffer any irreparable harm or loss that cannot be compensated by way of damages. The Applicant's case does not therefore meet the threshold for the grant of an order of injunction. **(See Giella vs Cassman Brown (1973) EA 358.)**

The suit premises is now registered in the name of the 2nd Respondent. The title of the property was transferred from the registered owner to the 2nd Respondent. The Applicant has not even applied for a cancellation of the title.

In the upshot, the application has no merits and fails with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of April 2013.

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JUDGE