

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

HCC.(O.S.) NO.1 OF 2013

IN THE MATTER OF THE MARRIED WOMEN'S PROPERTY ACT (1882)

R M N.....PLAINTIFF

VERSUS

J N K.....DEFENDANT

R U L I N G

The Plaintiff filed suit against Defendant by way of Originating Summons seeking orders from this court to declare that the parcel of land known as LR.No. **[Particulars withheld]** (herein after referred to as the suit property) is the matrimonial property of the Plaintiff and Defendant in their respective capacity as husband and wife. The Originating Summons is supported by the annexed affidavit of the Plaintiff. Contemporaneous with filing suit, the Plaintiff filed an application pursuant to the provisions of **Order 40 Rules 1, 2 & 3** of the **Civil Procedure Rules** seeking orders of this court to restrain the Defendant, either by himself or through his agents, by means of a temporary injunction, from encroaching, entering or interfering with the Plaintiff's possession of the suit property pending the hearing and determination of the suit. The application is supported by the grounds stated on the face of the application and by the supporting the affidavit of the Plaintiff. The application is opposed. The Defendant filed a replying affidavit in opposition to the application.

During the hearing of the application, this court heard oral rival submission made by Miss Kinyanjui for the Plaintiff and by the Defendant who was acting in person. Miss Kinyanjui submitted that the Plaintiff and the Defendant were married under Kikuyu Customary Law in 1959. They moved into the suit parcel of land in 1962. The land was later subdivided into three (3) portions out of which the Plaintiff sold two (2) portions leaving a portion of land measuring two (2) acres for the occupation of Plaintiff. She explained that the portion of land that was sold was where the Plaintiff lived with her children. After the said sale, she was forced to relocate to the portion of land that was still registered in the name of the Defendant. She reiterates that the Plaintiff contributed to the purchase of the land. She submitted that the Plaintiff and her children are currently occupying the suit parcel of land. She argued that the Defendant had sold two other parcels of land at a purchase consideration of Kshs.5 Million. The Plaintiff did not benefit at all from this sale. Miss Kinyanjui submitted that the Defendant should be restrained from taking occupation of the suit parcel of land because he had another parcel of land where he is currently residing at a place called Fly Over. She was of the view that if the Defendant is allowed to sell the suit parcel of land, the Plaintiff and her children will have nowhere to live.

In response, the Defendant submitted that he had been separated from the Plaintiff since 1973. In fact, he stated that he was divorced from the Plaintiff under Kikuyu Customary Law. He told the court that he was the one who took care of the six (6) children that were born of the marriage. He conceded that he had caused the suit parcel of land to be subdivided into two portions, one to be occupied by the Plaintiff and her children and the other to be occupied by his second wife J W together with her ten (10) children. He submitted that since being separated from the Plaintiff, the Plaintiff had born three other children out of other relationships. He stated that he was constrained to subdivide the land when he was evicted from a parcel of land that he had purchased in Maasai land. He told the court that he was currently residing with his second wife and her children in Forest Land at **[particulars withheld]**. He admitted that he owned two shares in a company called **[particulars withheld]**. However, he stated that he had not been allocated land

by the said company. He denied the assertion by the Plaintiff that he had sold the said shares. He told the court that he was only interested in settling the members of his family in the suit parcel of land. He asked the court to appreciate the situation that his second family were residing in a leased parcel of land owned by the Kenya Forest Service. He urged the court to disallow the application.

This court has carefully considered the rival submission made on behalf of the Plaintiff and by the Defendant. This court has also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the Plaintiff established a case to enable this court to grant her application for temporary injunction pending the hearing and determination of the suit. The principles to be considered by this court in determining such an application were well settled in the case of **Giella –Vs- Cassman Brown [1973] EA 358**. To succeed in her application, the Plaintiff must establish that she has a prima facie case with a high probability of success. She must also establish that she would suffer irreparable loss that will not be compensated by an award of damage. If the court shall still be in doubt, it shall determine the case on a balance of convenience. In the present application, the facts are more or less not in dispute: The Plaintiff and the Defendant were once husband and wife but have been separated for a long time. During their cohabitation, the marriage was blessed with six (6) children. The Defendant acknowledges this fact.

It is not disputed that since the Plaintiff and the Defendant were married, and even after their separation, the Plaintiff and her children have been residing and have continued to reside on the suit parcel of land. The Defendant married another wife and has sired with her ten (10) children. It is the Defendant's case that his second wife and her children are currently residing in a leased parcel of land owned by the Kenya Forest Service at a place called Fly Over. He therefore wants to settle his second family on the suit parcel of land. The Plaintiff and her children are resisting this move. The Plaintiff claims that, although the suit parcel of land is registered in the name of the Defendant, she contributed towards the purchase of the same. This court has so far not seen any evidence to support this claim. However, this court is cognisant of the fact that in such cases involving division of matrimonial property, more often than not, it is oral evidence that will be used by either party, apart from documentary evidence, to establish such claim on the matrimonial property. This court is of the view that the fact that the Plaintiff and her children have been residing on the suit parcel of land for a period of more than forty (40) years is prima facie evidence that the Plaintiff has some claim of ownership over the suit parcel of land. I think it would unconscionable to disturb the *status quo* before the hearing and determination of the suit filed by the Plaintiff.

In the premises therefore, this court holds that the Plaintiff established a prima facie case to entitle this court grant her application for interlocutory injunction. She has established that she would suffer irreparable damage that will unlikely be compensated by an award of damages if the Defendant proceeds with his scheme to subdivide the suit parcel of land before the Plaintiff's claim on the same is determined in a full hearing by this court. The Defendant is therefore restrained in terms of Prayer I of the application dated 22nd October 2012 pending the hearing and determination of the suit. Costs shall be in the cause.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED ON 27TH DAY OF JUNE 2013.

W. MUSYOKA

JUDGE