



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**  
**ELC SUIT NO. 751 OF 2012**

**M W G.....PLAINTIFF**

**VERSUS**

**G E M.....DEFENDANT**

**RULING**

The Plaintiff has filed an application by way of Notice of Motion dated 24<sup>th</sup> October 2012, seeking an injunction against the Defendant to restrain him from interfering, alienating, erecting structures or remaining on the suit premises herein namely Plot No.[particulars withheld] Utawala Embakasi, and for an order compelling the Defendant to put the Plaintiff into quiet, exclusive and peaceful possession of the suit premises until the suit is heard and determined. The Plaintiff in her supporting affidavit sworn on 4<sup>th</sup> October 2012 claims she bought the suit premises from a company by the name of Omega Commercial Services Ltd, and paid for the plot in full, and that as at the time she was cohabiting with the Defendant she asked the sellers to issue the necessary documents in their joint names.

She produced as evidence a sale agreement dated 5<sup>th</sup> October 2007, a Land share certificate for the suit premises and receipt for Kshs 95,000/= issued by Omega Commercial Services Ltd on 5<sup>th</sup> October 2007 all in the joint names of the Plaintiff and Defendant. She also stated that she then developed the plot using funds she borrowed from the bank, and resided thereon until January 2012 the Defendant evicted her and her children without cause. She attached copies of various bank statements and receipts in support of her claim.

The Defendant in his Replying affidavit and a supplementary affidavit sworn on 6<sup>th</sup> November 2012 and 29<sup>th</sup> April 2013 respectively claims that the Plaintiff is his wife, and that they married each other in 1997 and have two children. He claimed that the Plaintiff left the matrimonial home on 6<sup>th</sup> January 2012 after dismantling fixtures in the house and taking all the household goods. He also claimed that he is the one who bought the suit premises using a loan, and added the Plaintiff's name to the land documents because the seller's agent said he should do so as she was his wife.

Further, that the Plaintiff's averments as to having bought the suit premises and having taken loans to build thereon were not true. He also stated that the bank statements attached by the Plaintiff were with regard to a family business, and the receipts she produced were forgeries. He brought evidence of a loan payment and withdrawal from his bank as evidence of purchase, and affidavit by one George Onchonga Omariba, the agent who he claims introduced him to Omega Commercial Services Ltd, the seller of the

suit property.

The Plaintiff in a supplementary affidavit sworn on 28<sup>th</sup> January 2013 denied ever being legally married to the Defendant or dismantling fixtures in the suit premises. She gave the details of her businesses and loans taken, and reiterated that she is the one who bought the suit properties.

The parties were directed to file and serve written submissions in which they reiterated the arguments made in their pleadings. The Plaintiff's counsel in submissions dated 27<sup>th</sup> May 2013 relied on the decision in **Locbail International Finance Ltd vs Agroexport & Others (1986) All E.R. 901** to argue that the Plaintiff had met the requirements for a mandatory injunction, as the Defendant was attempting to steal a march by wanting to benefit from what the Plaintiff had worked hard for. The counsel also urged the court to give such orders as may be appropriate in the circumstances.

The Defendant's counsel in submissions dated 10<sup>th</sup> June 2013 argued that the Defendant had equal rights to own property and to shelter, and that the Plaintiff had not come to court with clean hands, and had failed to give full disclosure of all facts. Further, that the balance of convenience was against the granting an injunction. He relied on a ruling given in **Sports Car Limited vs Trust Bank Ltd, Nrb HCCC No. 754 of 1999** in this respect.

I have read and carefully considered the pleadings, annexed evidence and submissions made. The issue arising herein is whether the Plaintiff has met the requirements for a mandatory injunction to issue against the Defendant for eviction and for vacant possession of the suit property. This is because it is not disputed that the Defendant is in possession of the suit premises, and the orders sought as couched will result in his eviction. The Plaintiff is also in her prayers seeking an order to be put into exclusive possession of the suit premises.

It was held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, in this regard that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

It is evident from the pleadings filed herein that the parties are in a relationship that has gone sour, and they have traded accusations and counter-accusations in this regard which are not in the province of this court. It is also not disputed that the Plaintiff has gone to court and been granted orders of maintenance for her children with the Defendant. However the Plaintiff alleges that she is not the wife of the Defendant, and that the suit premises are not their matrimonial home but her property. In addition, both parties have produced as evidence of their entitlement to the suit premises a land share certificate which is issued in their joint names. Both parties also claim to have paid the purchase price for the suit premises.

To this extent I find that the Plaintiff has not established a *prima facie* case. This is also not a clear case for a mandatory injunction to issue as there are the outstanding issues as to which party paid for the suit premises and the nature of ownership of the suit premises that still need to be resolved. I however note that the Defendant does not appear averse to the Plaintiff being put in possession of the suit premises as he has stated that it is their matrimonial home, and he has denied evicting her from the premises. It is for this reason that I will partially allow the Plaintiff's prayer to be put into possession of the suit premises pursuant to the provisions of section 3A and 63(e) of the Civil Procedure Act, however such possession cannot be exclusive for the reasons stated in the foregoing.

I accordingly order the Defendant to put the Plaintiff into quiet and peaceful possession of the suit premises until the suit herein is heard and determined. The other prayers in the Plaintiff's Notice of Motion dated 24<sup>th</sup> October 2012 are denied and the costs of the said Notice of Motion shall be in the cause.

Parties are at liberty to apply.

Orders accordingly.

**Dated, signed and delivered in open court at Nairobi this \_\_\_\_14<sup>th</sup>\_\_ day of \_\_\_\_November\_\_\_\_, 2013.**

**P. NYAMWEYA**

**JUDGE**