

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 23 OF 2010

HANNAH WANGUI KAMAU.....APPLICANT/PLAINTIFF

VERSUS

EDWARD MUGANE NJONJO.....1ST RESPONDENT/DEFENDANT

KAMAU KIMANI PETER.....2ND RESPONDENT/DEFENDANT

RULING

The applicant, Hannah Wangui Kamau, has sued her husband the 2nd respondent, Kamau Kimani Peter and an erstwhile family friend, 1st respondent, Edward Mugane Njonjo seeking an order of permanent injunction to restrain the latter two from evicting the applicant and her children from Plot No.121 T.O.L. KABATI and a declaration that the 2nd defendant/respondent's affidavit sworn on 1st October, 2009 is null and void.

In the meantime, the applicant has brought the instant application for temporary orders of injunction as sought in the suit pending the hearing and determination of the suit herein. It is the applicant's contention that the 2nd respondent purchased the suit property from one Lucy Muthoni Muthee in 2005; that subsequently, with her contribution, the 2nd respondent constructed their family house on the suit property; that to her utter surprise, the 1st respondent, in 2009, began to lay a claim over the suit property on the basis of an affidavit dated 1st October, 2009 allegedly signed by the 2nd respondent to the effect that the suit property had been transferred to the 1st respondent. The 1st respondent in reply has given an account of how the applicant and her (the applicant's) husband, the 2nd respondent have all along been aware of the transactions leading to the affidavit in question, where the 2nd respondent acknowledged the 1st respondent's ownership of the suit property; that the said affidavit was preceded by a written agreement between the 1st and the 2nd respondents; that the applicant cannot turn around and claim that she is not aware of how the property was transferred. The 2nd respondent has by and large confirmed the applicant's contention and averments.

I have considered the application and these arguments. I have also considered all the pleadings, annexures and written submissions as well as the single authority, **Giella Vs. Cassman Brown & Company Limited** (1973) E.A. 358 cited by counsel for the applicant. For the applicant to succeed in this application, she must demonstrate that she has a *prima facie* case with a probability of success at the trial and that damages will not be adequate compensation if the orders sought are not granted. But if the court is in doubt, it will decide the dispute on a balance of convenience.

At the trial, the applicant will be expected to prove that the suit property is jointly owned by her and her husband, the 2nd respondent; and that the 1st respondent has no claim whatsoever over the property. She has based her claim on an agreement dated 27th January, 2005 between her husband, the 2nd respondent as the purchaser and one Lucy Muthoni Muthee as the vendor. But that agreement appears to have been overtaken by four events, namely, a transfer dated 15th May, 2008 from Lucy Muthoni Muthee directly to the 1st respondent; an agreement dated 1st October, 2009 between the 1st and the 2nd respondents in which the latter acknowledged that the former is the house owner of the suit property while he (the latter) is the occupant. The latter, i.e the applicant's husband, in that agreement further undertook to vacate the suit property for the 1st respondent on or before the 25th January, 2010. He confirmed that he has no interest, actual, legal or constructive in the suit property. The agreement was

drawn by and executed in the presence of Gachiengo Gitau and Company Advocates who witnessed the two signatures. The third event is an affidavit sworn by the applicant's husband, the 2nd respondent on 18th April, 2008 acknowledging a debt of Kshs.3,750,000/= owing and due to the 1st respondent. He has stated under oath that he has surrendered all his documents of ownership of the suit property to the 1st respondent to be held by the latter or the latter's advocate as security for the debt; that he would settle the debt in full on or before 31st March, 2009, failing which the 1st respondent would be at liberty to take any legal remedy and the Executive Officer of the court would also be at liberty to transfer the property to the 1st respondent and; that Lucy Muthoni Muthee was authorized to transfer the applicant's husband's interest in the suit property to the 1st respondent after 31st March, 2009 or the court would accordingly transfer the property to the 1st respondent. The fourth and final event is the court order issued in the S.P.M. Court Civil Case No.843 of 2009 on 3rd December, 2009 in which the applicant's husband, 2nd respondent, his servants and family were ordered to vacate the suit property within 21 days from that date.

Although the applicant and her husband, the 2nd respondent are aware of this order, the same has not been set aside, stayed or challenged on appeal. Without going into the merit of the suit herein or this application and in view of the foregoing, I am not persuaded that the applicant has a *prima facie* case with a probability of success. The purpose of this suit will of course become clearer at the trial but *prima facie* it is an attempt to show how the applicant's husband was unfairly deprived of the suit property. That explains why the 2nd respondent's depositions are in support of the applicant's contention, even though he has been sued along with the 1st respondent.

The 2nd respondent has argued that he has fully settled the debt of Kshs.3,700,000/= yet the copies of bank statements annexed to his affidavit relate to Pekaki Construction and Works Services Limited (No.1) without drawing any nexus with the 2nd respondent. The 2nd respondent has also admitted signing the affidavit of 18th April, 2008 but complained that he did so through intimidation and threats.

This application must fail for the reason that there is no *prima facie* case.

It is dismissed with costs.

Dated, Delivered and Signed at Nakuru this 18th day of March, 2011.

**W. OUKO
JUDGE**