

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 42 OF 2009

S.W.M.....PLAINTIFF

VS

P.M.K.....DEFENDANT

RULING

The plaintiff and the defendant are husband and wife. They were married on 14th August, 1999 under the **African Christian Marriage and Divorce Act**. They have been blessed with one child. The plaintiff and defendant are however estranged. The plaintiff has filed suit to be judicially separated from the defendant. The suit is pending hearing before the subordinate court. The plaintiff moved this court by originating summons under the provisions of **Section 17** of the **Married Women's Property Act, 1882** seeking to be declared the owner of a leasehold in a property known as House No[...] Estate, Nairobi (hereinafter referred to as the suit property). The plaintiff claimed that she was the sole proprietor of the leasehold and therefore entitled to occupy the suit property. She urged the court to grant her permanent injunction to restrain the defendant from interfering with her exclusive possession of the suit property.

Contemporaneous with filing suit, the plaintiff filed an application pursuant to the then **Order XXXIX (now Order 40) Rules 1, 2, 3 and 9** of the **Civil Procedure Rules** seeking orders of this court to restrain the defendant either by himself, his servants and or agents from living, entering, trespassing or in any manner whatsoever from interfering with the suit property pending the hearing and determination of this suit. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the plaintiff. The plaintiff filed an affidavit in further support of the application. The application is opposed. The defendant filed a replying affidavit in opposition to the application.

At the hearing of the application, this court heard oral rival submissions made by Mrs. Ngugi for the plaintiff and by Mr. P.M. Kamau for the defendant. This court has carefully considered the said submissions. It has also considered 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 entitle this court grant the order that she seeks in her application. The principles to be considered by this court in determining such applications are well settled. In **Giella vs Cassman Brown [1973] EA 358**, it was held that for the court to grant an order of interlocutory injunction, it must be satisfied that the applicant has a *prima facie* case with a likelihood of success. The applicant must further establish that he would suffer irreparable damage that will not likely be compensated by an award of damages if the injunction sought is not granted. If the court shall be in doubt, it shall determine the application on a balance of convenience.

In the present case, the plaintiff claims that she is the owner of the leasehold in the suit property having purchased the same for a purchase consideration of Kshs.750,000/= from the previous lessee. The plaintiff annexed a copy of the agreement she entered with one Caroline Nyambura Maina whereby she is said to have purchased the leasehold in respect of the suit property. She further annexed copies of two bankers cheques equivalent to Kshs.750,000/= paid to the said Caroline Nyambura Maina. Although the defendant deponed that he had contributed to the payment of the purchase consideration for the said leasehold, there is no evidence on record that he made such contribution. What is clear is that, *prima facie*, the plaintiff established that she solely contributed the purchase consideration for the

leasehold. This is the reason why the lease is registered in her name. Legally therefore, the plaintiff is entitled to exclusive possession of the said lease, unless otherwise she grants licence to other persons to enjoy the same.

In the present application, the plaintiff alleged that she was constantly assaulted by the defendant to the extent that she no longer wishes to live together with the defendant. The plaintiff has even filed a suit to be judicially separated from the defendant. In his replying affidavit, the defendant denied being violent to the plaintiff. It was the defendant's case that the plaintiff was not entitled to the prayer sought in the application because there was no justification for such orders to be issued. As stated earlier in this ruling, it was clear that the leasehold is registered in the name of the plaintiff. The plaintiff is therefore entitled to occupy the suit property. The defendant did not displace the case put forward by the plaintiff that she is entitled to exclusive possession of the suit property by virtue of the fact that she was the owner of the leasehold. The defendant resided in the suit property as a licensee of the plaintiff. It appears that, by the present application, the plaintiff is withdrawing the licence that allowed the defendant to reside on the suit property.

In the premises therefore, this court holds that the plaintiff established a prima facie case to entitle this court grant the orders sought of interlocutory injunction. As the owner of the leasehold, the plaintiff is entitled to exclusive enjoyment of the same. The defendant is therefore restrained by means of a temporary injunction in terms of prayer C of the application i.e. from living, entering, trespassing or in any manner whatsoever from interfering with the plaintiff's exclusive possession and occupation of the suit property pending the hearing and determination of the suit. If the defendant is still in occupation of the suit property, he is hereby ordered to give vacant possession of the same to the plaintiff. The plaintiff shall have the costs of this application.

DATED AT NAIROBI THIS 1ST DAY OF SEPTEMBER, 2011.

**L. KIMARU
JUDGE**