



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Case 60 of 2010

P O C PLAINTIFF

-VERSUS-

J B.....1ST DEFENDANT

L M2ND DEFENDANT

RULING

The plaintiff/applicant moved the Court by Notice of Motion dated 5th February, 2010 and brought under Order XXXIX rules 1, 2, 3 and ss.1A, 1B and 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya). The outstanding prayers coming up for consideration were as follows:

- (i) *that pending the hearing and disposal of the suit, 1st defendant be restrained from alienating the house standing on plot No. 8713, English Point, Nyali, Mombasa;*
- (ii) *that pending the hearing and disposal of the suit, 1st defendant be restrained from disposing of motor vehicle, registration No. Kat 018W;*
- (iii) *that pending the hearing and disposal of the suit, 1st defendant be restrained from interfering with the custody of S B and M C B;*
- (iv) *that pending the hearing and disposal of the suit, 1st defendant be ordered to pay electricity and water bills as and when they fell due;*
- (v) *that pending the hearing of the suit, 1st defendant be ordered to pay Kshs. 1,500,000/- and Kshs. 100,000/- per month to cover family maintenance.*

The application is founded on several general grounds, and supported by factual statements contained in affidavits. The grounds are as follows:

- (a) *the plaintiff is the common law wife of 1st defendant and has given birth to two girls, S Br and M B;*
- (b) *from 1994 to 2004 1st defendant was duly providing for the needs of the family, but from 2004 1st defendant's provision to the family has been "totally inadequate",*
- (c) *the defendants have dispossessed the plaintiff of her motor vehicle, and 1st defendant is threatening to take into custody the children;*
- (d) *the forcible separation of the said children from their mother will not be in the best interests of the children;*
- (e) *the defendants have turned violent and have already physically injured the plaintiff; and the plaintiff urgently needs provisions to cover the daily needs of the family;*
- (f) *in all the circumstances, the interest of justice shall be well served if the orders prayed for are granted; if they are not granted, the plaintiff and her children will suffer irreparable losses that cannot be adequately compensated by an award of damages.*

The plaintiff/applicant depones that, by 1992 she was a qualified nurse working at Mkomani Clinic; and during that time, she met 1st defendant who courted her, fell in love with her, and promised her "a good marriage and a happy ever-after [married] life". In 1994 the

deponent moved in with 1st defendant, and thereafter gave birth to two girls – **S B** in 1994 and **M C B** in 2000; and before this union the deponent had given birth to a girl, **A A**, who 1st defendant agreed to adopt. The plaintiff deponed that 1st defendant had undertaken arrangements under the recognized social traditions, for completing the promised adoption.

The plaintiff deposes that, at 1st defendant's request, she resigned from her nursing job to help him with domestic chores, as well as with his vibrant business enterprises which included investment in hotel business and in residential houses. This is the time when "1st defendant purchased a house on plot No. 8713, English Point, Nyali, Mombasa", she and he moved into this house, and to-date, the plaintiff stays in that very house. The plaintiff deposes thus: "The 1st defendant assured me that the house will be mine for ever".

The plaintiff deposes that 1st defendant had been making a monthly payment of Kshs. 100,000/- for the maintenance of the family, in addition to paying school fees for the three children.

The plaintiff averred that, from the time she began living with 1st defendant, the two enjoyed a happy life, adequately evidenced by family photographs which she placed before the Court as exhibits; she deponed that she worked hard to create an uplifting environment to sustain 1st defendant in his business strategies, and that she was also personally involved in 1st defendant's business operations: and on that basis she was convinced that she had "a stake in what [1st defendant] has acquired from [the day they] met". The 1st defendant did appreciate the plaintiff's contribution, as she deposes, and even purchased for her "a motor vehicle, Reg. No. KAT 018W, Toyota L. Touring"; this car was "for the purposes of dropping off and picking up ... children from school and for running other errands".

The plaintiff deponed that the happy life she experienced with 1st defendant went through an upset in 2004, with 1st defendant defaulting in providing care, and his attitude becoming negative and difficult; she exemplifies her hardships as non-payment of electricity and water bills leading to the disconnection of these essential services.

The plaintiff deposes that 1st defendant is intending to sell of the house in which she lives, and has already brought prospective buyers to view the same; she avers: "If he sells the house, my children and I will be rendered homeless and [will] suffer irreparable losses".

The plaintiff's mother, **N G A**, in her supporting affidavit deposes that she was entitled to and had custody of the plaintiff's first child, **A A**, before 1st defendant acquired custody following due compliance with traditional requirements among members of the Luo community; and after custody was handed over to him, he had "maintained **A A** and even paid her primary and secondary school fees up to completion".

N G A deponed that 1st defendant has called her (on 24th February, 2010) asking her to take the plaintiff's two younger children (**S B** and **M B**) into her custody.

The 1st defendant swore a replying affidavit dated 17th March, 2010 in which he deposes that Plot No. 8713 at which the plaintiff resides, is not his property but the property of a company known as Paping Company Limited, of which he is a director and a shareholder alongside his wife, one **N K B**. The 1st defendant deposes that "at no time has any company resolutions ever been passed [whereby] the said legal entity's property ... was to be given to the plaintiff and/or her children"; and he deposes that the said company has resolved "to have the same disposed [of] to a willing buyer at the market rate and not otherwise".

As to the social bond between him and the plaintiff, 1st defendant deposes: "I aver and confirm that arising out of an intimate relationship with the plaintiff, two children **S A B** now aged 16 years and **M C B** now aged 10 were born".

The 1st defendant avers that he had not adopted the plaintiff's first child, **A A**, and all he had done was to provide her with basic necessities "on humanitarian grounds".

On the question whether a marriage had subsisted between 1st defendant and the plaintiff, he deposes: "I specifically deny allegations that the plaintiff is my wife and aver that I am legally married to **N K B**." The deponent denies "allegations that I requested the plaintiff to cease working and further deny that she ever participated in the management of companies / businesses in which I have an interest, in whatever manner".

The 1st defendant deposes that she has been visiting the house where the plaintiff lives, for the purpose of seeing his children, **S A B** and **M C B**; and he avers that he is a "responsible parent who has been and is ready to continue providing for the necessities of [his] children which includes shelter in a manner and [at] places convenient and suitable to their welfare as school-going children".

The 1st defendant deposes that he has done to the plaintiff certain acts of generosity, such as developing two family residential units in her name in Bamburi, and from which she receives rental income.

The deponent denies that the monthly upkeep and maintenance for the children costs as much as Kshs. 100,000/-, and avers that the plaintiff has been using her electrical appliances extravagantly and consuming too much power. He deposes that the plaintiff had failed, before officers of the Children's Department, on 4th March, 2010, to demonstrate that the maintenance of **S A B** and **M C B** runs to a figure beyond Kshs. 25,000/-.

N K B swore a second replying affidavit, in her position as a director of P Company Limited which is the registered owner of Plot No.

8713 at which the plaintiff lives, and she deponed that 1st defendant is her husband. The deponent avers that “at no time has any resolution ever been passed [whereby] the company property ... was to be given to the plaintiff and/or her children”.

The plaintiff swore a further affidavit in response to the two replying affidavits; and the burden of her averments is that the house on Plot No. 8713, English Point, Nyali was purchased for her by 1st defendant, and she moved into it in 1997, one of her daughters, **M C B** being born on that property, and at a time when she and 1st defendant resided there. The plaintiff expresses her objection to her children being moved to a rented house, where payment of monthly rent is likely to present difficulties. The plaintiff denies 1st defendant’s averment about having built a rental house for her at Bamburi or anywhere else.

The 1st defendant took the evidence a stage further by swearing a further affidavit on 29th March, 2010: he depones that:

“I am in the process of leasing a two-bedroom residential premises within [the] Mkomani area next to Tamarind Hotel at a monthly rental of Kshs. 25,000/- plus Kshs. 3,000/- service charge which shall be payable by the deponent quarterly in advance”.

He sets out the level of expenditure he will make for the children:

- (a) **full cost of education “plus other school-related expenses which include sports/swimming within Kenya;”**
- (b) **full medical care for the two children at Mombasa Hospital, Pandya Hospital and/or Aga Khan Hospital, Mombasa;**
- (c) **shelter/housing at a monthly rental of Kshs. 25,000/- plus Kshs. 3,000/- service charge;**
- (d) **electricity at Kshs. 10,000/- per month;**
- (e) **water at Kshs. 5,000/- per month;**
- (f) **monthly food requirements – Kshs. 25,000/-;**
- (g) **fuel – Kshs. 4,000/- per month.**

The application was fully argued before me on 29th March, 2010, the plaintiff/applicant represented by learned counsel **Mr. Gikandi**, and the defendants/respondents represented by learned counsel **Mr. Mogaka**.

Mr. Gikandi reviewed the affidavit evidence and urged that 1st defendant and the plaintiff have had such an intimate relationship, it had been common knowledge that they were man and wife – and “that fact cannot be denied”. Counsel submitted: “1st defendant cannot now come and say it was a casual, one-night affair, it was a very deep relationship”. Counsel gave the example of the motor vehicle which 1st defendant bought for the use of the family, and which was registered exclusively in the name of the plaintiff; the example of the children born of the union between the two; the example of the house utility bills which always came in the name of 1st defendant; the example of 1st defendant always paying such service bills. Counsel urged that the house electricity bills, as a random sampling showed them to range between Kshs. 14,000/- and Kshs. 24,000/-, could be relied upon to provide reasonable estimates on the cost of electricity for the plaintiff’s household.

As regards P Company Limited, the registered proprietor of the plot on which the plaintiff lived, counsel urged that since that company was registered in 1993 but the relationship between the plaintiff and 1st defendant started in 1992, and since there is evidence of representations to the plaintiff that she would be the owner of the house in question, 2nd defendant should, by the law of estoppel (The Evidence Act (Cap. 80, Laws of Kenya), S. 120), be estopped from denying that the true owner of the said house was the plaintiff herein. Counsel urged that the plaintiff had been put in the house in question in 1997, and that since then she has always lived in that same house.

Counsel submitted that 1st defendant could not give the guarantee that he would timeously pay rents for a house for the plaintiff and her children – because already he had failed to pay the accruing water and electricity bills; and that such a situation was causing apprehension and trauma in the minds of the children.

Consequently, the plaintiff was seeking injunctive relief; and counsel urged that the case for such relief fell squarely within the principles enunciated by the Court of Appeal in **Giella v. Cassman Brown** [1973] E.A. 358: that the plaintiff’s suit had a high probability of success; that irreparable harm would be occasioned to the plaintiff if her prayers were not granted; that the balance of convenience favoured the plaintiff.

Mr. Gikandi, while arguing the foregoing points of law, perceived that the plaintiff’s case was dependent on difficult questions touching on the doctrine of **presumption of marriage**. Counsel’s contention was that marriage should be presumed, in the relationship between the plaintiff and 1st defendant: for it was demonstrated, **inter alia**, by the parental role which 1st defendant played in relation to **A A**, whose father was not 1st defendant.

Counsel urged that if a three-month tenancy was now to be the accommodation plan for the two remaining minor children of 1st defendant and plaintiff, then these children would have been reduced in status, contrary to their best interests.

Mr. Gikandi submitted that 1st defendant had intended to build a business empire, and he asked the plaintiff to terminate her employment, and help in empire-construction: so equity should come to her assistance when she is being forced out of a house in which she had lived as hers.

Learned counsel, **Mr. Mogaka** for the defendants, contested the applicant's case, relying on the affidavits of 1st defendant and that of his wife, **N K B**.

Learned counsel contended that 1st defendant could not, in law, have made a promise or given the residential property on Plot No. 8713 to the plaintiff: because by well-established principles of company law, the registered owner of that property was a separate entity from 1st defendant, and that corporate entity acted only by collective resolutions, "so, if anybody purported to give that property [away], it would be contrary to statute". Counsel urged that as the Court cannot sanction an illegality, it followed that the doctrine of estoppel, in this matter, does not apply in favour of the plaintiff; "any promise if made is a nullity, as it was not sanctioned by the board of directors".

Counsel urged further, that since 1st defendant was not the owner of the property in question, he could not be restrained as the plaintiff was attempting to do: "a director or shareholder cannot be sued on behalf of the company".

On the vital question of husband-and-wife relationship, **Mr. Mogaka** urged that the existence of such a relationship was denied by 1st defendant who, besides, produced as an exhibit his certificate of marriage under the Marriage Act (Cap. 150, Laws of Kenya), and was statutorily married to **N A K**; this marriage had been solemnized on 12th March, 1987. Counsel submitted that "a man married under [the Marriage Act, Cap. 150] lacks the capacity to enter into another marriage".

Mr. Mogaka urged that the plaintiff was clear in her own affidavits: that she knew 1st defendant was married to **N**, in a first marriage that was subsisting. Counsel then submitted:

"What does the Court do to somebody who flagrantly breaches the law? She goes into a relationship with somebody already statutorily married, and without the capacity to contract another marriage. Parties cannot consent to waive a statutory provision".

In these circumstances, counsel urged, there would be no presumption of marriage.

Counsel submitted that while it was not denied that the two children have been living in the "suit property" with the plaintiff, there was "no legal bar [to] a father changing the residence of the children"; and counsel submitted that no averment had been made by the plaintiff that "1st defendant is refusing to provide shelter". Counsel urged that the children had been living on the "suit property" "because 1st defendant has been providing them with shelter"; and that he is securing an apartment for the children because "the company has resolved to sell the suit premises". So responsible has 1st defendant been, counsel urged, that the question may be asked: "Can a Court be asked to injunct that kind of person?"

Mr. Mogaka submitted that the foundation of the plaintiff's suit appears to be **presumption of marriage** – but not "the welfare of the children".

With the central issue now defined as a conflict between claims of **presumption of marriage** and claims of the **welfare of children**, learned counsel **Mr. Gikandi** raised a question regarding the merits of the Marriage Act (Cap. 150). Counsel questioned the principle running through the Marriage Act, contending it was conceived on the basis of British traditions which were in departure from rights-guarantees of the Constitution of Kenya (S. 78), in respect of freedom of **thought**, freedom of **religion**, freedom of **belief**, freedom of **worship**. Counsel urged that such guarantees of the Constitution ran counter to the assumptions made under the Marriage Act – that "once a Christian, always a Christian", "once a Muslim, always a Muslim", "once a traditionalist, always a traditionalist". Counsel asked the Court to take judicial notice of the fact that among Kenyans, there were many second or third marriages which one man has contracted following a first marriage under the Marriage Act – and it would be inappropriate to view such subsequent marriages as nullities. These later marriages could not be null, counsel submitted, because they had led to the **siring of children** who were accorded special protection under the Children Act, 2001 (Act No. 8 of 2001).

Mr. Gikandi submitted that 1st defendant, by his known practices in family life, had converted himself from belief in monogamy to belief in polygyny – and so the Court should come to the conclusion that the plaintiff herein was a co-wife to **N K B**, on the basis of a presumption of marriage in favour of the plaintiff.

Counsel submitted that while 1st defendant was not denying his paternity to the children shown in the birth certificates for **S A B** and **M C B**, he was using the Marriage Act (Cap. 150) as a place of concealment for his true marital situation. Such concealment of family character, counsel urged, was contrary to public policy because it could hurt the rights of children.

On the defendant's position that the "suit property" belonged to a limited liability company, counsel urged that it was meet, in the circumstances, to lift the veil of incorporation – for the purpose of overcoming an attempt to compromise the rights of the children. Counsel urged that the said company could not produce a formal resolution, on the basis of which the plaintiff came to occupy the "suit property" in

the first place; and similarly there was no company resolution to the effect that the plaintiff would be moved out of the property.

While conceding that a father has the right to move his children from one accommodation to another, **Mr. Gikandi** asked the Court to bear in mind the protections for children set out the Children Act: and that on that basis, the Court cannot allow a re-location of children that ends up compromising their welfare. Counsel urged that the children now have a permanent residence, and they cannot be taken out and lodged in a leased residence. Counsel submitted that 1st defendant had not come before the Court to explain his decision to move the children into leased premises.

Counsel urged that at the very least, the *status quo* at the “suit premises” be maintained.

From the affidavit evidence, it is quite clear that 1st defendant, though statutorily married to **N K B**, had established and cultivated a long-lasting parallel family with the plaintiff, and out of this relationship, things of jural significance had emerged: children, enjoying rights under the Children Act; immovable property, serving as home for the plaintiff and the children; movable property, such as a motor vehicle, with registered ownership. It is equally clear that the good-will which kept 1st defendant and plaintiff together in such a context, eventually dried up, and the matter now before the Court represents disputes touching on the said jural elements. The Court’s duty is to resolve such conflicting claims on the basis of the *law* and, particularly at this interlocutory stage, *equity*.

From the evidence at this stage, the real dispute turns on the *family status* of the plaintiff, and what that implies for material things that accord her benefits; the issue about the children is secondary, as 1st defendant well acknowledges his obligations as a father.

Learned counsel, **Mr. Gikandi** urges that the plaintiff was a common law wife to 1st defendant, notwithstanding 1st defendant’s earlier statutory marriage. This, clearly, is a novel concept, though one which the Court should give directions upon.

Whereas **Mr. Gikandi** has consistently argued that an injustice prevails, towards the plaintiff, which this Court should arrest by interim orders of injunction, **Mr. Mogaka** reiterates that the statute law stands in favour of the 1st respondent and against the applicant – and so the applicant must fail in her attempt to secure orders of injunction.

The statute law which **Mr. Mogaka** rests his case upon is the *Marriage Act (Cap. 150)*, which protects the status of a monogamous marriage. Indeed, learned counsel urges that some form of censure be dispensed against the applicant who, in his words, “flagrantly breaches the law”. **Mr. Mogaka’s** objection to the applicant’s conduct is that “She goes into a relationship with somebody already statutorily married”. But quite to the contrary, **Mr. Gikandi** submits that the legal doctrine upon which 1st defendant relies runs counter to Kenya’s Constitution; supports values unrelated to Kenyan reality; tends to oppress the applicant unnecessarily; departs from the protection for children provided for in the Children Act, 2001.

As far as the position of the children is concerned, 1st defendant has expressly acknowledged his role as a father, and has made specific indications on how he will provide for the two minor children. There has not been much of a contest on the adequacy of the provisions which 1st respondent is making for the minor children; and consequently, any contention on that point must await hearing and disposal at the hearing of the suit. At this stage, the orders to be made shall be that there be no perceptible compromise to the provisioning made for the children.

Does the plaintiff’s position call for protection by interlocutory orders?

A final determination of the applicant’s claims must await the hearing of the main case; but at this stage orders have to be made on the most pertinent prayers, namely,

- (i) **that 1st defendant be restrained from alienating the house standing on Plot No. 8713, English Point, Nyali, Mombasa;**
- (ii) **that 1st defendant be restrained from interfering with the custody of S B and M C B;**
- (iii) **that 1st defendant be ordered to pay electricity and water bills as and when they fall due;**
- (iv) **that 1st defendant be ordered to pay the lump sum of Kshs. 1,500,000/-, and the monthly sum of Kshs. 100,000/- for the plaintiff’s family expenditure.**

The 1st defendant uses the technicality of *corporate personality* to support his contention that the title-holder for Plot No. 8713 is not himself, but a limited company wherein he is only a director and shareholder with his wife **N K B**. At this stage, 1st defendant has shown **no document of resolution** stating how authority had been given in 1979 for the **plaintiff** to be the tenant of the said premises; how the plaintiff’s removal from the said premises was **authorized**; how the terms of the plaintiff’s **many years’ stay** on the premises had been authorized; how the said company had now determined that 1st defendant’s minor children living on the premises were to be **relocated**. The

1st defendant in his affidavit touching on the accommodation of the said minor children, only avers that he will move them to leased premises, but he says nothing with regard to the corporate body's position on these children.

Quite clearly, gaps exist in 1st defendant's evidence, regarding the standing of Plot No. 8713 which must lead this Court, on a **prima facie** basis, to draw the inference that the company has taken **no decision** regarding this premises; and in that case it is only proper to consider on their own merit the claims of the plaintiff to continued occupancy of the house on Plot No. 8713 – pending the hearing and determination of the suit.

Is it **equitable** that the plaintiff should, in the meantime, be allowed to continue occupying the "suit premises"?

It is not contested that, for some 13 years, the plaintiff has lived on plot No. 8713, without a break; for more than half of that duration, she shared the suit property with 1st defendant; the plaintiff has lived with the two minor children sired by 1st defendant, on the suit property, for more than a dozen years.

I take **judicial notice** that such a longevity of tacitly-approved, family-setting occupancy would confer upon the plaintiff **legitimate expectations** that the suit premises was, indeed, her home. This, I again take judicial notice, is a **natural humanreaction** on the part of the plaintiff, which the process of the law ought to serve.

The foregoing persuasion is strengthened by the undisputed history of the prolonged love relationship and companionship between 1st defendant and the plaintiff. It is in 1st defendant's account that he was in an intimate love relationship with the plaintiff; there is evidence that this relationship had longevity; and there is irrefutable evidence that the relationship brought forth **children now in their teens**, children in whom the law is deeply interested thanks to the **Children Act, 2001**. The 1st defendant in his several affidavits has not failed to acknowledge his legal and family obligations with regard to **S B** and **M C B**; he has gone as far as proposing new ways in which he will continue to perform his obligations to those children.

This Court takes **judicial notice** that the minor children of 1st defendant were physically brought forth by their **mother**, the plaintiff herein; and so the Court does not accept **Mr. Mogaka's** submission that even as the law protects the children, and recognizes 1st defendant as their father, the law should at the same time **censure** the plaintiff for having had a family-kind relationship with 1st defendant. The law as applied by this Court will not allow 1st defendant to enjoy complete refuge in the terms of the Marriage Act, while limiting equity's application to the reality of life in which the plaintiff found herself. Equity will allow the plaintiff's legitimate claims, pending appropriate legislative measures to determine the rights of those in her position.

On the foregoing principles, I shall order that the plaintiff's occupancy of the "suit premises" is to be protected pending the hearing and determination of the main cause.

One of the supporting affidavits states that 1st defendant has sought to have the custody of **S B** and **M C B** transferred to their grandmother. Such a proposition, which has not been controverted in any reply, would be unreasonable, as the children have a mother and a father; this Court would not endorse the proposition.

As regards the various service payments, the difference between the parties is on **amounts**, but 1st defendant has expressed readiness and willingness to make certain payments.

At this interlocutory stage, I will make orders as follows:-

- (1) **The 1st defendant is hereby restrained from alienating the house standing on Plot No. 8713, English Point, Nyali, Mombasa.**
- (2) **The 1st defendant is hereby restrained from interfering with the custody of S B and M C B.**
- (3) **The 1st defendant shall provide the full cost of education, with all attendant amenities, for S B and M C B.**
- (4) **The 1st defendant shall provide full medical care for S B and M C B at MombasaHospital, PandyaHospital and/or Aga KhanHospital, Mombasa.**
- (5) **The 1st defendant shall provide shelter/housing for S B and M C B in accordance with the terms of Order No. 1 herein.**
- (6) **The 1st defendant shall pay for electricity service for the house occupied by S B and M C B at the rate of Kshs. 10,000/- per month.**
- (7) **The 1st defendant shall pay the monthly sum of Kshs. 5,000/- for water and conservancy services at the accommodation occupied by S B and M C B.**
- (8) **The 1st defendant shall pay the monthly sum**

of Kshs. 25,000/- for the food requirements of S B and M C B.

(9) *The 1st defendant shall pay the monthly sum*

of Kshs. 4,000/- for fuel used in the management of the needs of S B and M C B.

(10) *The costs shall be in the cause.*

DATED and **DELIVERED** at **MOMBASA** this 21st day of April, 2010.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Ibrahim

For the Defendant/Applicant: Mr. Gikandi

For the Plaintiff/Respondent: Mr. Mogaka