



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 448 of 2009

**ELIZABETH MARY KENDALL.....PLAINTIFF
VERSUS
THOMAS MWINZA MANGI.....DEFENDANT
RULING**

I have before me an application for two main orders namely that the defendant be restrained from alienating, transferring, selling, disposing, registering in his own name or in any other way interfering with **sub-division No. 1628 of plot No. 146/2 section 111 Mainland North** (hereinafter “*the suit property*”) and that the defendant be ordered to give vacant possession of the suit property. Both reliefs are sought pending the hearing and determination of this application. The application has however been argued on the premise that the orders are sought pending the hearing and determination of this suit. I will therefore consider the application on that basis. The application is by the plaintiff and is expressed to be brought under Order XXXIX Rules 1, 2, 2A, 3 and 9 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and all enabling provisions of the Law.

The gist of the plaintiff’s case is that she supplied funds which enabled the defendant purchase the suit property and put up a house thereon. But the defendant has kicked her out of the suit premises and she is apprehensive he may register the suit property in his sole name thus defeating her interest in the same. The application is supported by an affidavit of the plaintiff in which her case is elaborated. To the said affidavit are annexed several exhibits and money transfer documents.

The application is opposed and there is a replying affidavit sworn by the defendant in which he deposes, *inter alia*, that the suit property was purchased with the intention of owning the same jointly and that he has not evicted the plaintiff therefrom nor is he intending to dispose of the same. He indeed swears that an order should be made preserving the suit property.

When the application came up before me for hearing on 14th April, 2010, counsel agreed to file written submissions which submissions were duly in place by 10th June, 2010. The submissions were an elaboration of their client’s stand-points taken in their respective affidavits. I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. This being an application for *inter alia*, an interlocutory injunction, I will consider it in the light of the known principles applicable which principles were crystallized in the case of **Giella – v – Cassman Brown & Company Limited and Another [1973] EA 358**. The principles are as follows: - First the applicant must show a prima facie case with a probability of success at the trial but if the court is in doubt, it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages.

So, has the plaintiff met those conditions for the grant of interlocutory relief? From the material on record and the submissions of counsel, the following facts have emerged. The suit property is yet to be registered in the defendant’s name. Prima facie however, I am persuaded that the plaintiff indeed furnished funds for the purchase of the same. But has the plaintiff demonstrated deceit on the part of the defendant? All I have is affidavit evidence which cannot conclusively resolve the issue. The defendant however would have no objection if an order is made preserving the suit property. In the premises, I think I should exercise my discretion in granting an injunction to the plaintiff.

With regard to the prayer for vacant possession of the suit premises, I agree with the defendant that that is a final order and to grant the same at this stage, would amount to granting summary judgment in favour of the plaintiff on affidavit evidence which I have found inconclusive. Besides, the relief for vacant possession is really a mandatory injunction and I am not persuaded that the plaintiff has demonstrated the circumstances for the grant of such an injunction at this interlocutory stage. (See **Locabail International Finance Limited – v – Agroexport and Others [1986] 1 All ER 901.**) It would in the premises be inequitable to order the eviction of the defendant from the suit premises, especially as no such relief is sought in the plaint.

In the end I allow the application in terms of paragraph 2 thereof pending hearing and determination of the suit. I grant the injunction on condition that the plaintiff files an undertaking as to damages within the next seven (7) days from the date hereof.

Costs shall be in the cause.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF JULY 2010

F. AZANGALALA

JUDGE

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Read in the presence of:-

Lutta holding brief for Odumu for the Plaintiff/Applicant and Kenga for the Defendant/Respondent.

F. AZANGALALA

JUDGE

19TH JULY 2010