



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

Environmental & Land Case 326 of 2010

TOM OGENCHE MOGOI.....PLAINTIFF
VERSUS
BEATRICE BOSIBORI OGOI.....DEFENDANT

RULING

1. By a chamber summons dated 7th July, 2010, Tom Ongeche Mogoi, who is the plaintiff, seeks an order of interlocutory injunction restraining Beatrice Bosibori Ogoi (who is the defendant herein), or her agents, employees, or assignees, from selling, alienating, or otherwise dealing with property known as Nairobi Block 82/346 (hereinafter referred to as the suit property), pending the hearing and determination of his suit. The plaintiff also seeks an order of injunction restraining the defendant from interfering with his peaceful occupation and possession of the suit premises. Further, the plaintiff seeks a declaration that the defendant is holding the title in trust for the entire family, constituting the plaintiff and the entire children of the marriage.

2. The facts giving rise to the application as revealed from the plaintiff's affidavit sworn on 7th July, 2010, and a further affidavit sworn on 17th August, 2010, is that the plaintiff and the defendant have been married for close to 20 years. Their marriage has been blessed with 3 children. The defendant deserted the matrimonial home which was the suit property. The plaintiff has now discovered that the defendant is in the process of disposing of the suit property. The plaintiff maintains that the suit property which was initially in his name, was only transferred to the defendant for the purposes of obtaining a loan at favorable terms from her employer. The plaintiff pleads that unless an order of interlocutory injunction is issued, he will suffer irreparable loss as he will be rendered homeless together with the children of the marriage.

3. In response to the application, the defendant swore a replying affidavit on 21st July, 2010. She swears that the suit property belongs to her, having purchased the property from the plaintiff through a loan advanced to her by her employer. She has exhibited a copy of a banker's cheque from her employer in the name of the plaintiff for Kshs.2.5 million, contending that consideration was paid to the plaintiff. The defendant further maintains that the suit property was not the matrimonial home as the matrimonial home was in Siwaka Estate, Madaraka. The defendant states that the plaintiff left the matrimonial home, and moved into the suit property after chasing the defendant's tenants. The defendant explains that the plaintiff's action was actuated by malice with the intention of denying the defendant her rent earnings from the suit property.

4. The defendant further swears that the plaintiff cannot be rendered homeless as he owns a block of 16 flats in Buruburu Estate. The defendant states that as a result of the plaintiff's actions, she has been denied rent from the suit property and is suffering loss as she continues to service the loan which she received from her employer.

5. I have carefully considered the application, and the submissions which were made before me by counsel. At the outset, I have to state that the plaintiff's prayer (4) and (5) of the application dated 7th July, 2010, which were for injunction restraining the defendant from interfering with the peaceful occupation of the suit property by the plaintiff, and a declaration that the defendant is holding the title in trust for the entire family are misconceived. This is because the prayers are not interlocutory prayers. They are prayers which can only be granted after a full hearing. Therefore, the only issue which remains for determination is prayer (3) for the order of interim injunction.

6. Circumstances under which an order of interlocutory injunction can be granted are well known, having been restated in the now notorious case of *Giella vs Cassman Brown & Company Ltd [1973] EA 358*, and several other subsequent cases. Of crucial importance is that an applicant for an interlocutory injunction must establish a *prima facie* case. In this regard, the plaintiff needed to satisfy this court that he has a right which is being infringed or is likely to be infringed unless the order of interlocutory injunction is granted. The plaintiff appears to rely on his allegations that the suit property though registered in the defendant's name, is the matrimonial home and that the defendant only holds it in trust for the family. The defendant has

however exhibited documents showing that she actually purchased the suit property from the plaintiff at a consideration which was duly paid to the plaintiff. The plaintiff appears to deny this. However, the documents speak for themselves. A cheque in the name of the plaintiff has been exhibited. The defendant has also exhibited documents showing that she is still servicing the loan.

7. Under these circumstances, the plaintiff's allegations that the transfer was only for purposes of obtaining a loan cannot hold. Having sold the property to the defendant, the plaintiff's allegation that the suit property is the matrimonial home cannot also hold. I find that the plaintiff has failed to establish a *prima facie* case as he has failed to demonstrate that he has any rights over the suit property. In the circumstances, there is no justification for this court interfering with the defendant's dealings involving the suit property. For the above reasons, I find no merit in the plaintiff's application dated 7th July, 2010. It is accordingly dismissed.

Dated and delivered this 21st day of October, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the plaintiff absent

Morara for the defendant

B. Kosgei - Court clerk