



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NUMBER 341 OF 2010

JAMES B O ANUNDA. PLAINTIFF/APPLICANT

VERSUS

ROSE NAMASAYA ANUNDA. DEFENDANT/RESPONDENT

R U L I N G

Before me is a Chamber Summons dated 2nd July 2010 filed by Otieno Okeyo & Co. Advocates for the plaintiff/applicant **JAMES B O ANUNDA**. The defendant/respondent is named as **ROSE NAMASAYA ANUNDA**. The application was filed under section 1A, 1B and 3A of the Civil Procedure Act (*Cap 21 Laws of Kenya*), and Order XXXIX Rules 1, 2, 3, 5 and 9 of the Civil Procedure Rules. The prayers in the application are 6, three of which have been spent, as follows: -

1. *(spent)*

2. *(spent)*

3. *(spent)*

4. *That pending the hearing and determination of the suit this Honourable Court be pleased to issue an Order of temporary injunction restraining the Defendant/Respondent either by herself, servants and/or agents or any person howsoever working on her behalf from dealing and/or handling any matter relating to the suit property land Reference Number 9042/2/2 Jua Kali – Embakasi village Nairobi.*

5. *THAT pending the hearing and determination of the suit, this Honourable court be pleased to issue an Order of Interlocutory injunction restraining the Defendant/Respondent either by herself, servants and/or agents or any person hersoever working on her behalf from collecting and/or tampering any rent or any monies accruing from the tenancies on the suit property of Land Reference Number 9042/2/2 Jua Kali – Embakasi village, Nairobi being a commercial property belonging to the plaintiff.*

6. *THAT the costs of the application be provided for.*

The application has grounds on the face of the Chamber Summons. It was filed with a supporting Affidavit sworn by **JAMES B O ANUNDA** on 2nd July, 2010.

It is deponed in the said affidavit, inter alia, that the applicant was the husband of the respondent; and that the applicant had also another wife; that the applicant was a retired administration police officer who had his matrimonial home at Ingotse village of Butso, North Location, Kakamega District; that he purchased a property Land Reference Number 9042/2/2 Jua-Kali – Embakasi village Nairobi in his own name using a loan from Standard Chartered Bank Ltd and Harambee Co-operative Sacco; that he intended to put up a five storey commercial and residential building for the purposes of generating income for his family including the defendant/respondent; that by the year 2006 he had constructed two floors of commercial and residential apartments; that he had rented out the completed flats and expected to generate rent of approximately Kshs.100,000/-; that without any lawful justification the respondent deserted the matrimonial home and occupied two rooms of the flats on the second floor and directed payment of rent to herself and had violently stopped any further construction on the suit property; that the said action had caused the plaintiff/applicant mental anguish, loss and damage and made him totally unable to repay the loan which had led to accumulation of interest and possible auction of the suit property; that the said auction had also led to accumulation of electricity bills to Kshs.235,845/50 and water bills of Ksh.27,350/-; that he had tried to reason with the defendant/respondent but in vain; and that the defendant's action, if not restrained would occasion him and his family loss of business, livelihood and opportunities which could not be compensated by damages.

The applicant also filed a supplementary affidavit sworn on 20th July, 2010 by himself. It was deponed in the said supplementary affidavit, inter alia, that the same was in response to the replying affidavit filed; that it was not true that the respondent had been forced out of the matrimonial home; that it was not true that the applicant had threatened to kill the respondent; that it was not true that the respondent contributed to the acquisition and development of the subject property. It was also deponed that **ADOLF KEYA ANUNDA** was the applicant's first born son from a previous customary marriage; that the respondent deserted their home at Ingotse Kakamega for Nairobi to disrupt the commercial venture on the suit property; that the applicant married **FLORENCE AKINYI** as his second lawful wife under customary law with 4 issues of the marriage; that there was no evidence that the respondent paid school fees for the children; that the subject property was not a matrimonial home; that the applicant had two wives that is the respondent and one Florence Akinyi; that the mistake on the electricity bill reflecting plot No. 9042/4/6 Embakasi instead of Plot No. 9042/2/2 Embakasi had been rectified; that the respondent had made no effort towards payment of outstanding bills; and that the family of the applicant would be totally jeopardized if the suit property was lost.

The plaintiff/applicant also filed written submissions through his counsel on 28th July 2010. After highlighting the background of the case as stated in the affidavits, the applicant reiterated that he would suffer irreparable loss if the orders sought were not granted. The applicant relied on the case of **GEILLA Vs CASSMAN BROWN & CO. LTD** [1973] EA 358 on the considerations to be taken by a court in determining an application for an interlocutory injunction. He also relied on the later cases of **NSUBUGA AND ANOTHER VS MUTAWE** [1974] EA 487; and **AIKMAN VS MUCHOKI** Civil Appeal No. 9 of 1982 [1984] KLR 352.

It was argued that the case of **KINYANJUI VS KINYANJUI** – Civil Case No. 1676 of 1995 relied upon by the respondent was distinguishable, as that case was one where the parties were a wealthy family, and that was why the court ordered provision of alternative accommodation for the wife.

The application was opposed. The respondent filed a replying affidavit sworn by herself on 13th July, 2010. It was deponed in the said affidavit, inter alia, that the applicant had admitted marrying the respondent under customary law in 1981 and got 8 children one of whom is deceased. It was deponed that four of the children were currently in school in Nairobi. It was deponed further that the applicant had changed the locks to the matrimonial home at Ingotse and made it impossible for her to get access to the house. There was also an assault case pending at Kakamega court as criminal case No. 29 of 2010. It was deponed that the respondent contributed directly and indirectly to the acquisition of the property at Jua kali – Embakasi village Nairobi from proceeds of farming sugar cane and maize at the rural home in Kakamega. It was further deponed that the applicant was currently living with one **FLORENCE AKINYI**, whom he claims to be his second wife, after deserting the Nairobi Matrimonial home in 25th February 2008. It was deponed further that the income from the rent was being used by the deponent to

pay school fees for the children Keya Jeff Anunda, Anangwe Diana, Daudi Anunda and Purity Nasimiyu Anunda. It was deponed further that the family had properties at Mukuru kwa Njenga, Mukuru Kwa Reuben, Enterprise Road, and Sokoni Embakasi – Nairobi. It was deponed that the applicant wants to evict the respondent in order to move in with his girlfriend.

The respondent also filed a further affidavit, sworn by herself on 23rd July 2010. It was deponed, inter alia, that the contents of the first affidavit were reiterated; that the respondent earned between Ksh.60,000/- and Kshs.80,000/- per year from sugar cane farming which she handed over dutifully to the applicant and same was used for development of the plots; that the applicant wanted to evict her from the Nairobi matrimonial residence thus not treating her equally with the other wife Florence Akinyi; that if the orders sought were not granted, the applicant would have no source of livelihood; that as a wife the court should help her with justice; that the applicant stopped providing for her and children a long time ago, that is 2004; that the orders sought were scandalous and unjustified; and that since the respondent was the legal wife of the applicant, the applicant had no prima facie case herein with probability of success.

The respondent also filed written submissions through her counsel David Mbaya, on 30th July, 2010. The history or circumstances of this matter were highlighted in the submissions. Reference was made to the affidavits of both parties, filed herein. It was emphasized that the respondent was the lawful wife of the applicant. That there was an assault case pending at Kakamega courts. That the applicant locked the matrimonial house at Ingotse Kakamega. That the respondent joined her family in Nairobi in 2006 (*wherein the applicant was residing*), and that in 2008 the applicant deserted the matrimonial home and moved away with one Florence Akinyi. That the respondent was the legal wife of the applicant for 30 years and should not be evicted from the matrimonial home and stopped from collecting rent from which income she pays school fees for the children, since the family had been living there from 1999. The respondent contended that the case of **GEILLA Vs CASSMAN BROWN (supra)** was applicable in her favour in the circumstances of this case. It was contended that all the three parameters in the case, are in favour of the defendant/respondent.

The respondent also sought to rely on the case of **KINYANJUI VS KINYANJUI (Supra)** Civil Case No. 1676 of 1995 wherein the court found that a wife should not be moved from the matrimonial home to a less favourable residence.

I have considered the application, documents filed, the submissions on both sides and the law. This is an application for interlocutory injunctive orders. Prayers 1, 2 and 3 are already spent. I will therefore only deal with prayers 4, 5 and 6.

Though there have been a lot of arguments on eviction or relocation of the respondent from the premises, there is no prayer related to same in the application. The prayers relate to dealing or handling any matters regarding the premises (prayer 4), and collecting or tampering with any rent or monies accruing from the subject premises (prayer 5).

In the Concise Oxford English Dictionary – 11th Edition Revised – the word “**deal**” is defined as “1. **Distribute cards to players.** 2. **Distribute or apportion something.** 3. **Take part in the commercial trading of a commodity.** 4. **Take measures concerning.** 5. **Inflict (a blow) on**” [in my view, these words do not include occupation. In my view therefore, prayer 4 does not either cover occupation or eviction of the respondent from premises. This is why I have said that the issues of eviction or relocation do not arise in the prayers herein.

This matter, obviously relates to parties who are married. The marriage is admitted to be customary. There appears to have developed a disagreement between the parties. The applicant now lives with another woman. The respondent, who was living in their rural home at Ingotse in Kakamega has relocated to Nairobi because, she says, the applicant locked the house at Ingotse. She has occupied some premises belonging to the applicant husband (as same is registered in his name) at Jua Kali Embakasi village in Nairobi. The issues herein are not whether the said assets are matrimonial property, and the resultant division of the same. Those issues cannot in any event, be determined in an interlocutory application such

as the one before me.

I must state that as was stated in the case of **KINYANJUI VS KINYANJUI** (supra) a married couple should ideally live together under the same roof. However, I appreciate that there could be circumstances in which the couple might not live under the same roof. In my view, on the facts of this application, it is right for the respondent to have a place to live in the same or similar status as what she used to enjoy before the disagreement. It does not appear possible for her to live currently at Ingotse - as the house is said to have been locked. Before the determination of this case, I find nothing wrong with her occupying the two rooms she is occupying in the said premises at Jua Kali Embakasi.

Now turning to the substantive prayers (4 and 5) in the application, I am of the view that the applicant has demonstrated a prima facie case with probability of success. This is the first consideration in the case of **GEILLA VS CASSMAN BROWN** (supra). The property is in his name. There is evidence that there are tenants paying rent. There is evidence that he developed, possibly mainly, the said assets. The respondent has not attempted to account as to how much she, for example, uses for her upkeep, or to pay school fees for the children. In any event, payments of school fees and upkeep for children, is an equal responsibility for both parents. I find that the applicant has demonstrated a prima facie case with probability of success.

The second consideration stated in the case of **GEILLA VS CASSMAN BROWN** (supra) is whether the applicant will suffer irreparable loss if the injunction is not granted. In my view, where a spouse who has individual title to a property is developing an asset or has developed the same, unless the contrary is established that spouse whether it is the woman or the man, has the first priority in controlling that asset. Therefore in my view the applicant will suffer irreparable loss if temporary injunction is not granted. The balance of convenience is also in favour for the applicant.

I, therefore, find merits in this application. I allow the application and grant prayers 4 and 5. I will state for the record that the respondent, is in the meantime, at liberty to stay in the two rooms she has been using, and at no cost to her pending the hearing of the suit.

Costs in the cause.

Dated and delivered at Nairobi this 16th day of December, 2010.

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GEORGE DULU
JUDGE

In presence of

Mr. Eshuti for plaintiff/applicant

No appearance for respondent

C Muendo – court clerk