



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 400 of 2008

AM..... PLAINTIFF

VERSUS

ASM DEFENDANT

RULING

Chamber summons dated 31/7/08 under **Order XXXIX Rules 1, 2 and 3** of the **Civil Procedure (Revised) Rules, Section 3 of Matrimonial Causes Act and Rule 3 (3) of the Matrimonial Causes Rules** and all other enabling provisions of the law seeking orders that:-

- 1. Temporary injunction be issued restraining the respondent from trespassing into the plaintiff's proper Flat C 1 of L.R. No.209/16434 situated in Westlands, Nairobi, or offering for sale, selling, transferring, disposing or in any other way acting in a manner likely to prejudice or extinguish the plaintiff's title to the property, peaceful and quiet enjoyment of the property and all other aspects of her life pending the inter parties hearing and determination of application;***
- 2. Permanent injunction restraining respondent whether by himself, his servants or agents or otherwise from trespassing into the plaintiff's property pending the hearing and determination the suit;***
- 3. Declaration confirming that the plaintiff is the sole legitimate, equitable, registered and beneficial owner of all the property described as House Flat No. C1 in L.R. No. [PARTICULARS WITHHELD], Westlands, Nairobi to the exclusion of all other persons;***
- 4. Mandatory injunction directing the Registrar of Titles or the relevant registering authority to expunge from record or cancel the name of the defendant from registration documents of the said property, Flat No.[...] and depict the plaintiff as the sole registered, legitimate and beneficial owner of the said house.***

The application is supported by the affidavit of AM on the grounds that:-

- 1. The respondent has fraudulently transferred all the funds from their joint account to a secret separate account at Standard Chartered Bank;***
- 2. The defendant forcefully seized all the plaintiff's original documents including identification and title documents on the property unlawfully and is likely to use them to***

perpetuate fraud and utter false documents;

3. The marriage has irretrievably broken down and the plaintiff is living in perpetual fear of the respondent who is constantly threatening her if she doesn't forcefully transfer the property to him;

4. It is in the interest of justice that the orders sought be issued.

The supporting affidavit of AM who is the plaintiff shows

that she acquired Plot C1 in L.R. No. [PARTICULARS WITHHELD] on her own and that she met the defendant who initially proposed marriage but the marriage did not take long before breaking down. Parties were separated. The marriage broke down because of his persistent fraud and cruelty against the plaintiff by the defendant. The parties have initiated divorce cause No [PARTICULARS WITHHELD].

During the period of hostility, the defendant forcefully seized from her two original files, one of which was her personal documents including original passport, birth certificate, marriage certificate, academic certificates and P.I.N. The second file containing the original title documents and transaction records for the property described as Flat No C1 of L.R. [PARTICULARS WITHHELD]. further, the defendant has also been fraudulent and without the knowledge of plaintiff transferred funds from their joint account at V [PARTICULARS WITHHELD] Commercial bank without her knowledge, consent or authority to his account at Standard chartered bank (UKay branch) No. [PARTICULARS WITHHELD].

It is shown that on the whole the marriage between the plaintiff and defendant was not meant to last and the husband was throughout cruel to her.

On the part of the respondent, ASM, affidavit in reply is filed on 5/9/2008. He states that the plaintiff's affidavit is incurably defective and liable to be struck out and is an abuse of court process on the account of the pendency of the divorce case No. [PARTICULARS WITHHELD] between the same parties before Kadhi's court and interim orders in the same terms were granted on 20/6/08. It is stated also that this application seeks for final orders at an interlocutory stage.

Furthermore, the plaintiff has no prima facie case with any chance of success and this is a case that can be settled by payment of damages if the property is sold, and that the balance of convenience does not favour the plaintiff for she has not given undertaking as to damages. Furthermore, the value of the property was Kshs.8.5 million and in a case where the claim can be assessed, injunction should be granted.

It is to be noted that ex parte order of injunction was granted.

The respondent states that at all material time the parties were joint owners of the suit plant. This is repeated in the replying affidavit. The defendant swears that there are no strong grounds to warrant issuing a mandatory injunction and that there are no chances of succeeding. The value of property at purchase was Kshs.8.5 million and therefore value of property is ascertained and there is no reason to issue injunction and furthermore applicant is guilty for non disclosure.

On the issue of purchase money, the defendant says the loan was Kshs.4.500,000/= while price was Kshs.8.5 million. Each made Kshs.2 million down payment and the balance was obtained from the bank.

I have perused affidavits filed and it is clear that this dispute cannot be resolved by affidavit evidence at all. The plaintiff resides on her own and required the defendant to be prohibited

from entering into the house. She also demand permanent injunction. She also requires declarations that she is the sole owner of Flat No. C1 in L.R. No. [PARTICULARS WITHHELD] to the exclusion of other persons, and that a mandatory injunction for Land Registrar to cancel the name of the defendant as owner of the said land.

I see that both parties are claiming right to ownership of the suit property. The parties are still married. It is my view that a full trial has to be conducted to enable each party to tender full evidence for court to be able to do justice between the parties.

I therefore dismiss the application but with no order as to costs.

DATED, SIGNED and DELIVERED at Nairobi this 17th day of July, 2009.

JOYCE N. KHAMINWA

JUDGE