



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Case 284 of 2007**

**MARGA GROUNSTRA.....PLAINTIFF**

**VERSUS**

**BAYA ABRAHAM WANJE.....DEFENDANT**

**RULING**

In her plaint dated 8<sup>th</sup> November 2007, the plaintiff prays for three principal orders namely:

- (a) A declaration that the defendant holds plot number MN/111/2012, motor vehicles registration numbers KAX 872M and KAY 860H and funds in account number 165209265 at Barclays Bank Bamburi in trust for the plaintiff and that the defendant be compelled to transfer them to the plaintiff.
- (b) A permanent injunction to issue restraining the defendant from selling, or transferring, alienating or otherwise parting with the possession of the property in (a).
- (c) The defendant be ordered to refund the balance or remaining amount in account number 165209265 at Barclays Bank Bamburi as at 3<sup>rd</sup> October 2007.

The foundation of the plaintiff's claim is pleaded in paragraphs 4, 5 and 6 of the plaint. In a nutshell, the plaintiff contends that in 2006 she gave the defendant money which he used to purchase the suit properties and registered the motor vehicles in his own name and the plot in the joint names of the plaintiff and the defendant. She avers that the registration was so effected on the representation by the defendant that as a foreigner she could not own property in the country. The relationship between the plaintiff and the defendant soured and the defendant started mistreating the plaintiff and took away one of the vehicles and transferred money from the said account to an unknown account.

In the premises, the plaintiff seeks the said orders referred to at the beginning of this ruling. Simultaneously with the filing of the plaint the plaintiff lodged a chamber summons for interim injunctive reliefs in the terms prayed for in the plaint. The plaintiff appeared ex parte before Sergon J. on 8<sup>th</sup> November 2007 and obtained an order of temporary injunction restraining the defendant from alienating, selling, disposing or in any other way interfering with the suit motor vehicles and suit land. The defendant was further temporarily restrained from interfering with account number 165209265 at Barclays Bank Bamburi.

When the application came up for inter partes hearing on 21<sup>st</sup> November 2007, the Learned Judge recorded a consent order that the application would be mentioned on 13<sup>th</sup> December 2007 with a view to recording a settlement. The interim orders in force were contended to that date. The settlement never came to be and after a couple of adjournments the application came before me for hearing on 29<sup>th</sup> April 2008.

The application is supported by an affidavit sworn by the plaintiff. In the affidavit, it is deponed that the plaintiff came to Kenya in 2006 when she met the defendant and when she returned to her country she kept in touch with the defendant. She further depones that she returned in January 2007 for a short stay and went back home returning to Kenya in February 2007 when she started living in Kenya with the defendant. She desired to buy a car to save on costs of hiring taxis. She was informed by the defendant that as a foreigner she could not own property in Kenya which information she believed. She therefore bought the first motor vehicle and allowed the defendant to register the same in his name. With the trust she had in the defendant she transferred funds from her home country to the defendant. Once more believing the defendant that she could not even open a bank account. The plaintiff further depones that she bought a second car and similarly had it registered in the name of the defendant. She then decided to settle in Kenya and to that end bought the suit land which was registered in their joint names.

The plaintiff swears that all the said properties were purchased by her money and the respondent contributed no cent. She further swears that in September the defendant's behaviour changed. She then obtained her bank statement and discovered that withdrawals had been made from her account without her knowledge or consent. The defendant became arrogant and even assaulted her in October and November 2007 leading to her realization that she had been duped.

The plaintiff contends that they now live separately and despite her requests for the defendant to transfer the suit properties to her she has not been successful. Hence the suit and this application.

The application is opposed and in that regard there is a replying affidavit sworn by the defendant. It is sworn in that affidavit that the motor vehicles were bought by the plaintiff who is the absolute registered owner thereof. With respect to the land, the defendant depones that, the same is in their joint names and he is entitled to a half share thereof. The defendant has further deponed that the plaintiff gave him a gift of 40,000 Euros without any conditions and the same cannot be recalled. It is also deponed by the plaintiff that he never withdrew any money from the plaintiff's account and the withdrawals complained about were made by the plaintiff herself. In the defendant's view the plaintiff no longer finds him useful and that is why she has commenced these proceedings which according to the defendant should be dismissed.

I have considered the application, the affidavits filed, the annexures exhibited and the submissions of counsel. Having done so, I take the following view of this matter. The conditions for the grant of an interlocutory injunction are that firstly an applicant should show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it should decide the application on a balance of convenience.

Prima facie, I am persuaded that the plaintiff did avail some money to the defendant and the money may have been used by the defendant to purchase the two vehicles and the suit land. The defendant admits receipt of some of the money i.e. 40,000 Euros but swears that it was a gift given by the plaintiff which cannot be recalled. Whether that sum was given as a gift or was for the use of the plaintiff is an issue that has to await the trial of the action. Prima facie however, it supports the contention by the plaintiff that the money she gave the defendant was used to purchase the suit properties. The relationship that existed between the plaintiff and the defendant was such that what the plaintiff claims happened could indeed have occurred.

I therefore consider that the plaintiff has demonstrated an arguable case that were it not for the representations of the defendant to her that she could not as a foreigner own property on her own, the suit properties could not have been registered as they are. This is particularly so considering the vulnerability of the plaintiff that is implied in both affidavits filed in support and in opposition to this application. The defendant's insistence that he is the absolute registered owner of the two vehicles and half share in the suit land is not backed by any financial statements or other wealth declaration. I find and hold that the plaintiff has shown a prima facie case with a probability of success at the trial.

As regards damages, I am persuaded that unless an interlocutory injunction is granted, the plaintiff stands

to suffer irreparably as any damages that may be awarded may be irrecoverable. Those findings are and cannot be definitive. They are only prima facie on the basis of material availed to the court.

I am also persuaded that the balance of convenience weighs in favour of granting the plaintiff interlocutory relief although not necessarily in the terms sought. I am so persuaded because in my view the property in dispute should be preserved pending the hearing of the suit. None of the parties will suffer serious prejudice by preserving the suit property as they litigate.

In the end, pending the hearing and determination of the suit a prohibitory interlocutory injunction will issue as follows:

- 1) The defendant either by himself, his agents, workers and or any other person working under his instructions is restrained from alienating, transferring, selling, disposing of or in any other way interfering with motor vehicle registration number KAY 860H and plot No. MN/111/2012.
- 2) The defendant either by himself, his agents, workers and/or any other person working under his instructions is restrained from alienating, transferring, selling, disposing of motor vehicle registration number KAX 872M.
- 3) The defendant either by himself, his agents, workers and/or any other person working under his instructions is restrained from, interfering with account number 165209265 at Barclays Bank Bamburi Branch.

The injunction will be conditional on the plaintiff filing within the next seven (7) days an undertaking on oath to pay damages if any, to the defendant in the event that it is found at the trial that the injunction ought not to have been issued.

Costs shall be in the cause.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> DAY OF MAY 2008.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:

Gisemba for the plaintiff and Gikandi for the defendant.

**F. AZANGALALA**

**JUDGE**

**26<sup>TH</sup> MAY 2008**