



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL SUIT 1303 OF 2004

CHARLES GICHEHA MWANIKI.....PLAINTIFF

VERSUS

MONICA MUKODA GICHEHA.....DEFENDANT

RULING

The Applicant herein Charles Gicheha Mwaniki has moved the Court under Order XXXIX Rules 2,2A, (2) and 3 of the Civil Procedure Rules seeking, inter alia, the following orders against the Respondent, Monica Mukoda Gicheha:

1. A temporary injunction restraining the Defendant/Respondent, her servants, agents, independent contractors from transferring, disposing of, giving away, exchanging, charging or in any way whatsoever parting with possession of Plot No. C.41 Githurai Kimbo Phase 2 until this suit is heard and determined.

2. Costs of the application to be provided for.

The grounds in support of the application are that

(1) The Applicant, who is resident in the United States of America remitted Shs.2.5 million to the Respondent to purchase the subject plot and to construct residential houses and have the property registered in the joint names of the Respondent and the Applicant.

(2) That the Respondent purchased the plot and constructed rental houses thereon but fraudulently registered the plot in her name excluding the Applicant.

(3) That the Respondent has secretly planned to dispose of the property and move to Uganda.

The Respondent opposes the application on the grounds that no such agreement as alleged by the Applicant existed to the effect that she buys property and registers the same in their joint names and that she bought the property and developed the same using her own money. Although she admits having received money from the Plaintiff/Applicant the Respondent states that the same was for the upkeep of the children and not connected to her purchase and development of the suit premises. Counsel for the Respondent has submitted that the application is incompetent being supported by forged affidavits. This is in view of the fact that in paragraph 3 of the Further Affidavit of one James Ndungu the deponent has sworn that he has signed all the documents which ought to have been signed by the Applicant. Yet the Supporting Affidavit of 22nd November 2004 is purported to have been sworn by the Applicant, at a time when he was not in the country.

The deponent of the said affidavit James Ndungu purports to hold a power of attorney conferred upon him by the Applicant. A power of attorney in my view does not empower a party to swear another person's oath since a deponent must swear only to facts which he himself is capable of his own knowledge to prove. I therefore agree with Counsel for the Respondent that the Supporting Affidavit is defective and contrary to procedure, the same having been drawn in the name of the applicant but signed by the alleged attorney.

As regards the merits of the application, I find that the Applicant has not established a prima facie case in that the alleged agreement for the joint purchase and registration of the suit premises has not been submitted in Court or particularized in the pleadings. He also has not tendered any evidence to prove that the payment of the sums remitted to the Respondent was for the purchase and development of the suit premises. Nor has he proved that the Respondent is about to leave Kenya. Looking at the document annexed as "CGM 1" titled "ion History Request" which documents the various Money Gram remittances to the Respondent, I feel more inclined to agree with the Respondent that the same was for the care, maintenance and upkeep of the family. I am led to this conclusion by the nature of remittances, the amounts and frequencies thereof. The Applicant has not refuted the Respondents' contention that the remittances were for the said purpose. That the applicant is likely to suffer irreparable loss if the injunction is not granted is also not proven. The contrary obtains; he is doing much better than the Respondent and the children of their marriage whom he abandoned when he deserted to settle in the United States of America.

I find that this application falls short of fulfilling the legal essentials for the granting of injunctive orders as set out in the leading case of GIELLA vs. CASSMAN BROWN LTD [1973] E.A. 358 in that a prima facie case has not been established and a threat of an irreparable loss on the part of the Applicant has not been demonstrated. I do not find it necessary to consider where the balance of convenience lies since I have no doubt that the first two essentials have not been met. In the circumstances I disallow the application and hereby dismiss the same with costs to the Respondent.

Dated and Delivered at Nairobi this 8th day of June 2005.

M.G. Mugo

Judge

In the presence of:

Mwaura : For the Plaintiff/Applicant

N/A : For the Defendant/Respondent