

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 262 OF 2004

SUSAN WANJIRA KIMANI.....PLAINTIFF

VERSUS

JOHNSON KURIA KIHUMBA.....DEFENDANT

RULING

The Plaintiff, Susan Wanjira Kimani, has made an application under the provisions of **Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules and Section 3A and 63(e) of the Civil Procedure Act** praying for the orders of this Court that pending the hearing and determination of the suit the Defendant, his servants or agents be restrained from entering or remaining on those parcels of land known as *Kiambogo/Kiambogo Block 2/1030 (Mwariki) and Plot No. 7/44 Umoja II Lanet* or denying the Plaintiff, her servants or agents from having peaceful and quiet enjoyment of the said parcels of land and the houses or structures erected thereon. The Application is supported by the annexed affidavit and a further affidavit of the Plaintiff and the grounds stated on the face of the application. The said grounds are that the Plaintiff states that the Defendant is a trespasser and had no right to remain on the said parcels of land which is owned exclusively by the Plaintiff. The Plaintiff further stated that the Defendant had assaulted her and evicted her from her house built on the said property. The Plaintiff further stated that the Defendant had invaded the suit land and settled on the said parcels of land based on fraud and undue influence with the aim of ultimately dispossessing the Plaintiff of her property. The Application is opposed. The Defendant, John Kuria, has sworn a replying affidavit opposing the Application filed by the Plaintiff.

In her submission before Court, Miss Bosibori Learned Counsel for the Plaintiff submitted that the Plaintiff was the owner of the two plots, the subject matter of the suit. The Plaintiff submitted that the Defendant had trespassed into the said parcels of land and remained therein without the permission of the Plaintiff. Learned Counsel submitted that the Defendant had assaulted the Plaintiff and had succeeded in evicting her from her property. The Plaintiff further submitted that the Defendant had moved into the two parcels of land with the sole intention of dispossessing the Plaintiff of the two parcels of land. The Plaintiff further submitted that she was the registered owner of the parcel of land known as *Kiambogo/Kiambogo Block 2/1030 (Mwariki)* whilst she had been issued with a share certificate of parcel number *Plot 7/44 Umoja II Lanet*. It was the Plaintiff's submission that she purchased the said parcels of land using her own financial resources. The Plaintiff exhibited some of the receipts that she was issued with after she had paid the purchase consideration. The Plaintiff denied the averments made by the Defendant that she had stolen money from the Plaintiff's business to secure the funds to purchase the said properties. The Plaintiff admitted that she had cohabited interruptedly with the Defendant but denied that their relationship matured into any formal marital relationship. The Plaintiff further submitted that she was not claiming anything from the Defendant but only sought to be given possession of her properties. She prayed that the Court allows her application.

Mr Ikua, Learned Counsel for the Defendant opposed the application. He submitted that the Application was contradictory as the Plaintiff was not sure whether she was in or out of the property. The Defendant submitted that he was married to the Plaintiff. The Defendant further submitted that the Plaintiff had left the matrimonial home. The Defendant submitted that the Plaintiff had not been residing on the said parcels of land. It was the Defendant's submission that the Plaintiff wanted to use the orders of the Court to gain access and residence at the said parcels of land. The Defendant claimed that the properties in dispute belonged to him. The Defendant denied that he had chased away the Plaintiff and the adopted children. It was the Defendant's submission that he was staying with the said children at the

matrimonial home. The Defendant further submitted that the Plaintiff could not separate the ownership of the property and the marriage that has been existence since 1994. The Defendant further submitted that he was not dependant of the Plaintiff. The Plaintiff urged this Court to dismiss the Application. It was the Defendant's submission that if the application was granted it would disrupt the lives of the children.

I have considered the rival arguments made by the Counsel for the Plaintiff and the Counsel for the Defendant. I have also read the pleadings filed by the parties to the Application. It is not disputed that the Plaintiff is the registered owner of all that parcel of land known as *Kiambogo/Kiambogo Block 2/1030 (Mwariki)*. It is further not disputed that the Plaintiff is possessed of the allotment certificate of *LR No. Dundori/Lanet Block 7/44* also known as Plot No. 7/44 Umoja II Lanet. The Plaintiff claims that she used her own funds to purchase the said properties and erect the houses and structures thereon. The Defendant on the other hand is claiming that the said parcels of land belong to him as the Plaintiff had stolen money from his business to purchase and construct houses on the said parcels of land. The Defendant claims that he was the one who constructed the houses on the said parcels of land. The Defendant further claims that the Plaintiff is his wife of ten years. The Plaintiff denies that the Defendant is her husband. She however admits that she has cohabited interruptedly with the Defendant but she denies that the said cohabitation concretized to be a marriage.

The issue for determination by this Court is whether the Plaintiff has established a prima facie case to entitle her to the prayers of interlocutory mandatory injunction sought. It was held in **The Despina Pontikos [1975] E.A. 38** and Kenya **Breweries Limited & Anor –versus- Washington Okeyo C. A. Civil Appeal No. 332 of 2000 (Nrb) (unreported)** that interlocutory mandatory injunctions could only be granted in the rarest of circumstances. For the orders of interlocutory mandatory injunction to be granted, the Plaintiff must establish that she has strong case that the Defendant cannot possibly have a defence to. The Plaintiff must also establish that the circumstances of the case is such that the grant of interlocutory mandatory injunction would remedy the situation that could not possibly be compensated by damages. Finally the conduct of the Defendant has to be taken into consideration in deciding whether or not to grant the orders of interlocutory mandatory injunction.

In the instant case, the Plaintiff has established that she is the owner of the two parcels of land. The Defendant in his replying affidavit is saying that the two properties are his having been dishonestly acquired by the Plaintiff using funds from his business. The Defendant has annexed bank statements and other financial documents to show that he is a man who had means and whose income was applied to purchase and develop the said two properties. The Defendant further claims that the Plaintiff is his wife and therefore cannot be granted the orders sought. I have considered the arguments advanced by the Defendant in this application. Even accepting the submission by the Defendant that his funds was used to purchase the two plots, no explanation has been forthcoming from the Defendant as to why the Plaintiff in the first place got registered as the owner of the two plots. Further even if I were to accept that the Plaintiff is the wife of the Defendant, that is no bar to the Plaintiff owning property. According to the **Married Women Property Act 1882**, a married woman can own property in her own name and for her own use, separate from the matrimonial property.

In the instant case I do find that the two properties in question are owned by the Plaintiff unless evidence to the contrary is adduced during the hearing of the case. The Defendant in his submission has implied that the Plaintiff was, in effect, registered as the owner of the two properties in trust for him. There is no evidence submitted before this Court to support this contention. Even if this proposition were true, (which I hold it is not), there is no presumption of Advancement from a wife to a husband. I do also find that the Defendant could not possibly have purchased the two properties as he claims he did at the material time, as he did not have extra money to enable him purchase the two properties. The bank statements annexed in support of his case are well over ten years old. The contention by the Plaintiff that she supported the Defendant is thus plausible. The Plaintiff has submitted that she was chased away from the two properties by the Defendant who thereafter installed himself and his other children by his other marriage into the said properties. The Defendant does not deny the averments made by the Plaintiff in this regard. The submission by the Plaintiff that he was chased away from the said properties to enable the Defendant have a foothold on the said properties so that he would have a basis for dispossessing the Plaintiff is thus not far fetched. It is the finding of this Court that the Plaintiff has established a prima

facie that being the owner of the two properties, she was dispossessed of the same by unlawful means. This Court further finds that the Defendant used the guise of marriage to lay claim on the said properties which legally belongs to the Plaintiff. This Court finds that the Defendant is suffering from male chauvinism which is informed by the fact that women cannot own or manage property. The Defendant believes that “*a married woman*” has no proprietary rights which cannot be overridden by the “*husbands*” right to own the same. I will disabuse the Defendant of this notion.

I find that the Plaintiff has established the conditions necessary to enable this Court grant the order of interlocutory mandatory injunction sought. The fact that the Plaintiff is now living in “*exile*” is more the reason why the Plaintiff should be allowed back to reside in her property. The Defendant is hereby ordered to vacate the two properties known as *Kiambogo/Kiambogo Block 2/1030 (Mwariki) and Plot No. 7/44 Umoja II* land within seven (7) days from today’s date. In default of the Defendant vacating the said premises he shall be evicted therefrom. The Plaintiff shall take possession of her two properties from the Defendant after the expiry of the seven (7) days period. The Defendant, his servants and or agents are hereby further restrained by means of a temporary injunction from interfering with the Plaintiff’s possession and occupation of the said parcels of land pending the hearing and determination of this suit. The Plaintiff shall have the costs of this application.

DATED at NAKURU this 2nd day of November 2004.

L. KIMARU

AG. JUDGE