



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.120 OF 2002

HENRY MUTEGI PLAINTIFF

VERSUS

SICILY KATHAMBI MURIUNGI DEFENDANT

RULING

Chamber Summons dated 26th March 2002 and filed into the court on 28th March 2002 is seeking an order that the defendant be restrained by herself, her agents and/or servants from wasting, damaging, alienating, using, selling, letting, constructing or in any other way dealing with a parcel of land known as Plot No.1924 MIKINDANI together with the house thereon pending the hearing of this suit or further orders of the court. It is also seeking that costs of the Application be provided for. The grounds of the application are that the Plaintiff is a joint owner with the Defendant of the parcel of land known as Plot No.1924 MIKINDANI; that the Plaintiff is the one who has single handedly raised the purchase price for the suit land and has used over KSh.800,000/- to put up a house on the said suit land; that the Defendant was included as a joint owner because then, the Plaintiff intended to marry the Defendant and to live with her in the same property, but the Defendant having breached the promise to marry the Plaintiff, now intends to sell the suit property without the knowledge of the Plaintiff, and lastly that the Defendant did not contribute even a single penny towards the purchase and the development of the said piece of land. The application is supported by an Affidavit sworn by the Applicant and there are several annexures to the same Affidavit. There is also supplementary Affidavit sworn by the Applicant in further support of the Application. That supplementary Affidavit also has several annexures to it.

The Respondent opposed the application and filed one ground of opposition which is that the Plaintiff has not exhibited a prima facie case with probability of success and therefore, according to the Respondent, has not brought himself within the realm of the principles governing the grant of injunction. The Respondent has also filed a replying affidavit sworn by herself and a further affidavit. There are annexures to the same Affidavits.

In my mind, this case reflects consequences of love gone sour. Each party is claiming to have done something not only towards the purchase of the property but also towards its development. The Plaintiff says in his affidavit inter alia that he is the one who purchased the plot in question for KSh.200,000/- but included the name of the Respondent purely on trust since the two had agreed to marry each other after the first wife of the Plaintiff had died. He says that in order to purchase the material for the construction of the house on the plot, he deposited money in the Defendant's account at Standard Chartered Bank and he gives the A/c number as 015-015- 9101-000 and claims to have deposited KSh.870,000/- into the account between October 2001 and 5th March 2002. He gives the breakdown. On 7th March 2002, the Defendant changed her mind on the marriage deal. The Applicant then made moves to take over the property fully plus all relevant documents including documents of title. The defendant failed and or refused to avail to him the same and disclosed to him that she has in fact given the original property documents to third party

and has obtained in exchange for the same credit in the sum of KSh.100,000/-.

On the other hand, the Respondent/Defendant maintains that during the existence of their friendship, she was putting up with Plaintiff's four children during school holidays and Plaintiff was sending her money for their upkeep. While in Mombasa, she decided to purchase a plot on which to build a house. She scouted for a plot and got the suit land which the two purchased jointly after she had told the Plaintiff of her wish to purchase it.

She claims to have paid the total KSh.200,000/- which was the purchase price, but she admits that when the plaintiff sent her a sum of KSh.200,000/- she deducted KSh.100,00/- from the same so that they remained having equal share as far as the purchase of the plot was concerned. She says she is the one who procured letters of allotment and that she has undertaken the construction of the same plot and she has moved into the plot. She contends that the same construction has been financed from her own sources and more especially from her savings as a soldier with Kenya Navy and from her business. According to her, plaintiff has not given her any money for construction of her property and the money plaintiff sent to her was for maintenance of the children when she was living with them. She states that she has never tried to sell the suit property as she knows that it is jointly owned by the two of them. The Plaintiff in his supplementary affidavit denied the Respondent's allegation that money sent to her was for maintenance of children and not for construction of the house on the property.

However, notwithstanding the claims and counter-claims, denials and admissions by the parties, most of which can only be resolved at a full hearing where evidence will be adduced and parties and their witnesses will be cross-examined fully, three facts appear to me to stand out clearly. These are first, that in law, the property in question is jointly owned by the Plaintiff/applicant and the Defendant/Respondent. At least both names are in the documents of title – i.e. in the sale and transfer agreement, in the letter of allotment and in several other documents which reflect the ownership of the suit property. Whether one is registered only on trust and one is the full owner are matters that will be ventilated during the full hearing. Whether one has put into the property more by way of development and the other has contributed less are again matters of evidence which in the nature of this case and the allegations therein cannot be resolved by affidavit evidence only.

The second fact that stands out and which does not appear to have been disputed is that the Respondent has moved into the suit land and is now therein. She says at paragraph 13 of her Affidavit as follows inter alia:

*“13. I have undertaken the construction on the suit property and have already moved therein.
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One naturally wonders as to why the Applicant was not aware of this fact.

Whatever happened, this fact is important in so far as the Applicant is seeking among other things that the Respondent be restrained from using the suit property or in any other way dealing with the suit land. It is now trite law that prohibitory injunction cannot issue to restrain what has already happened.

Thirdly, it is also clear to me that the Applicant's fears are founded for he is interested in the property and as the love or friendship that brought them together and made it necessary for them to register this property in joint names has faded and promise of marriage is no longer capable of being fulfilled, anything can happen to the property.

Under all these circumstances, it seems to me that the property must be preserved for the benefit of both parties. Thus I find that as the dispute requires full investigation at a full hearing to be resolved, as I am in doubt as to who is telling the truth on the purchase and development of the suit land, the balance of convenience tilts towards preserving the property. Already the Respondent is in the property so that I cannot remove her from the part she is occupying as that would amount to granting a mandatory injunction which is not a prayer before me, she will remain in the part she is occupying as at the date of this Ruling and only to that extent will she be dealing with the parcel of the suit land. Otherwise, she is

restrained from wasting, damaging, alienating, selling, letting, constructing or in any other way dealing with the parcel of land known as Plot No.1924 MIKINDANI, together with the house thereon till this suit is heard and determined or till further orders of this court. As I have stated, her use of the property will only be confined to the room or rooms she is occupying as the date hereof.

Because of what I have said above, each party will bear his/her own costs. Orders accordingly.

Dated and delivered at Mombasa this 27th Day of November 2002.

J.W. ONYANGO OTIENO

JUDGE