



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**H.C. CIVIL CASE NO. 35 OF 2002**

**PATRICK MUIRU GICHERU..... PLAINTIFF**

**V E R S U S**

**JOYCE WATHITHI GATARI ..... 1ST DEFENDANT**

**MOSES KAGUONGO .....2ND DEFENDANT**

**R U L I N G**

The plaintiff has filed this application dated 12th July, 2002 to seek mandatory injunction against the 1st Defendant to reinstate and restore full and unconditional possession of the suit premises, which according to him is a matrimonial home, and an order of eviction against the 2nd Defendant from the suit premises. Curiously, he has also sought for an interim injunction and I quote that prayer, Viz:-

***3. That the Honourable court do issue an interim injunction restraining the 1st Respondent from evicting and/or interfering in any manner whatsoever with the Applicant's quiet and peaceful possession of the matrimonial premises known as plot No. Q/102 Umoja 1 Estate pending the hearing and determination of this suit."***

The property i.e. Plot No. Q/102 Umoja 1 Estate is the suit property and other two prayers mentioned hereinbefore are also in respect of the same property.

In short the plaintiff's case is that the suit premises, although registered in the name of the 1st Defendant has been acquired with joint efforts of both of them, that the suit premises is their matrimonial property and that they have cohabited since 1976 and have two issues, that he was evicted from the suit premises by the 1st Defendant unceremoniously forcing him to live with the son in his house within the same premises. He has averred that due to such eviction he has suffered embarrassment, mental anguish and inconvenience and deprivation of his peaceful and quiet enjoyment of the matrimonial home. It comes out clear that the suit premises is a three storeyed building and the 2nd Defendant as well the parties' son stay in the said premises.

The 1st Defendant disclaims any marriage relation with the plaintiff. According to her, they had a relationship around 1976 and she had a son from the plaintiff but he refused to marry her. The Birth Certificate of the son shows that 1st Defendant was shown as a single parent. The daughter is stated not have been fathered by the plaintiff. In short the case is that there is no marriage, that they have not been cohabiting as the plaintiff went off to Mombasa and married another woman (which fact the plaintiff also has admitted), that the suit premises was bought by her through her own efforts and the plaintiff has not played any part in its purchase or development, that she has brought up the children through her own efforts, that around the year 2001 the plaintiff requested her to provide him with some shelter when he came from Mombasa which she obliged on humanitarian grounds. When the plaintiff started being bad

influence to her son and interfering with her life, she decided to take the steps which she took and denies that it is an illegal or unlawful action.

Their son has also sworn an affidavit and confirms the averments made by the plaintiff that his goods were removed and dumped in the corridor next to his house. He further states that the plaintiff is living with him in the suit premises.

With the above facts the plaintiff seeks mandatory injunction and other interim prayers as outlined hereinbefore.

There is no specific statutory provision in Civil Procedure Act, Civil Procedure Rules or in any other statutes of our country which empowers this court to grant the mandatory injunction. But I think, and hope I am right, under Section 3A of the Civil Procedure Act which endows this court, under its inherent power, to grant any order as may be necessary for the ends of justice or to prevent abuse of the process of the court. Thus, the courts in Kenya have been granting mandatory injunctions in proper cases. Over and throughout the years of judicial history, it is clearly understood that, when the issue is a grant of mandatory injunction, it has to be exercised in clearest and most special cases and the discretion to do so should be exercised sparingly.

The above understanding is based on sound principles of justice and fairness as in most of the cases when mandatory injunction are granted in interlocutory applications the orders tend to give the finality to the suit.

This application, I am afraid does not fall within the ambit of the aforesaid principle. The facts are not clear and the plaintiff is not facing extreme hardship or non remediable loss. He has also not demonstrated that this is a special case where mandatory injunction is justified as necessary.

As per his own case, he still lives in the premises which he claims to be matrimonial property. He has also not clearly identified the place from where he claims to have been ousted, and prays to be reinstated.

The upshot of all the above is that I do not allow the application and dismiss the same with costs.

I must however direct that the suit to proceed for hearing with urgency.

**Dated and delivered at Nairobi this 14th day of November, 2002.**

**K. H. RAWAL**

**JUDGE.**