



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 50 OF 2014

MNM.....PLAINTIFF

VERSUS

PMM.....1ST DEFENDANT

EDWARD MWANGI MACHARIA.....2ND DEFENDANT

RULING

1. This is the notice of motion dated 9th October 2018 brought under Section 1A, 1B, 3A of the Civil Procedure Act, Order 40 Rules 1, 2, and 3 of the Civil Procedure Rules and all enabling provisions of the law.

2. It seeks:-

(1) That the respondents by themselves, their servants, and or their agents be restrained by an injunction from selling, collecting rents, dealing with or in any other way interfering with the property known as Plot No. 4/245A in Soweto Ex-kabarage Resettlement Scheme until the final determination of the suit herein.

(2) That the OCS Soweto Police station do assist in the enforcement of this order.

(3) That the costs of this application be provided for.

3. The grounds are on the face of the application and are:-

(a) That the property in issue is jointly owned by the plaintiff/applicant and 1st defendant/respondent.

(b) That the 1st respondent fraudulently sold the property without the consent of the applicant.

(c) That since the filing of this suit the respondents have been collecting rents.

(d) That the respondent is using the grant herein to sell the house.

(e) That applicant and her children were relying for up keep from the rents from the half share that belonged to the applicant.

(f) That the respondent will suffer no prejudice in grant of the order sought.

4. The application is supported by the affidavit of MNM, the plaintiff/applicant herein sworn on the 9th October 2018.

5. The applicant is opposed. There is a replying affidavit sworn by Edward Mwangi Macharia, the 2nd defendant/respondent sworn on the 21st November 2018.

6. On the 28th November 2018, the court directed that the notice of motion be canvassed by way of written submissions.

7. It is the plaintiff's/applicant's submissions that she was the owner of half share of Plot NO. [...] in Soweto Ex Kabarage Settlement Scheme. That sometime in 2008, due to irreconcilable differences the plaintiff and the 1st defendant had to separate whereupon they agreed on how to share income from the houses. The 1st defendant in total disregard of the agreement sold the suit property to the 2nd defendant.

The defendants are now collecting rent much to the detriment of the plaintiff. No spousal consent was obtained from the plaintiff before the parcel was sold to the 2nd defendant. The 2nd defendant was aware the suit property was matrimonial property. Under Section 9 3(3) of the Land Registrations Act, a purchaser is obliged to inquire from the plaintiff whether spousal consent is granted. She has established a prima facie case with a probability of success at the trial. She has put forward the case of **Munyu Maina vs Hiram Gathiha Maina Civil Appeal No. 239 of 2009**.

8. The suit property is the plaintiff's matrimonial home and damages would not be adequate in the circumstances. The balance of convenience tilts in favour of the plaintiff/applicant. She has put forward the case of **Sophy Njiiri vs National Bank of Kenya Ltd & Another [2015] eKLR**. She prays that the application be allowed.

9. It is the 2nd defendant's/respondent's submissions that he bought the suit property for Kshs.800,000/- from the 1st defendant. That the plaintiff had knowledge of the said transaction and was a beneficiary from the proceeds of the sale. Further that the plaintiff/applicant's case has not met the threshold of the principles of injunction as laid down in the case of **Giella vs Cassman Brown**. The plaintiff/applicant has not demonstrated that he is entitled to the orders sought.

10. I have considered the pleadings, notice of motion and the affidavit in support and the annexures. I have also considered the replying affidavit, the written submissions of counsel and the authorities cited. The issues for determination are:-

(i) Whether the plaintiff's/applicant's case meets the threshold for grant of temporary injunction.

(ii) Who should bear costs.

11. At this juncture, it is necessary to briefly examine the legal principles governing the application of this nature. In an application for injunction the onus is on the application to satisfy the court that it should grant an injunction. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

12. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557** Bosire J (as he then was) held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

13. The plaintiff has established that the suit property is matrimonial property. No spousal consent was obtained before it was sold to the 2nd defendant. The 2nd defendant was aware it was matrimonial property. I find that the plaintiff has established a prima facie case with a probability of success at the trial. She has also demonstrated that damages could not be an adequate remedy. The balance of convenience tilts in favour of the plaintiff who is a joint owner of the suit property.

14. In conclusion, I find merit in this case and I grant the orders sought namely:-

(a) That an order of injunction be and is hereby issued restraining the defendants/respondents by themselves, their servants and or their agents from selling, collecting rent, dealing with in any other way interfering with the property known as Plot No. [...] in Soweto Ex-Kabarage settlement scheme pending the hearing and determination of this suit.

(b) That the OCS Soweto Police Station do ensure compliance of this order.

(c) That costs do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 11TH day of JULY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Mrs. Koech advocate for the Plaintiff

Mr. Ng'ani advocate for the 2nd Defendants

Kajuju - Court Assistant