



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 79 OF 2019

HAMISI KAZUNGU KALUME.....PLAINTIFF/APPLICANT

VERSUS

RITA HELLEN LESIAMITO.....DEFENDANT/RESPONDENT

RULING

1. Coming up for determination is the Notice of Motion dated 8th May, 2019 brought under Article 45 (3) and 159 of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 7 and Order 51 Rules 1, 3 & 15 of the Civil Procedure Rules. In the Application, the Plaintiff/Applicant seeks orders that pending hearing and determination of the application and the suit the court be pleased to issue a temporary injunction restraining the defendant/respondent by herself, servants, agents, and/or employees or whomsoever is acting on her behalf from leasing, evicting the plaintiff or in any manner interfering with the plaintiff's quiet use, occupation and possession of PLOT NO.4136/III/MN situate in North of Mtwapa Creek in Kilifi District including the structures thereon. The application is supported by the affidavit of Hamisi Kazungu sworn on 8th May, 2019 and is premised on the grounds on the face of the motion. The plaintiff's case is that the parties are husband and wife who are separated. It is the plaintiff's case that during the subsistence of their marriage, they acquired the suit property which was subsequently registered in their joint names and they developed and used it as their matrimonial home. The plaintiff avers that the defendant moved the Chief Magistrate's Court in **Miscellaneous Application No. 415 of 2018, Rita Hellen Lesiamito –v- Hamisi Kazungu** and obtained orders of police security to evict the plaintiff on the misrepresentations that the defendant was a tenant who was in rent arrears, hence the filing of this application and the suit.

2. In opposing the application the Defendant filed a replying affidavit on 28th May 2019 in which she admits that she was married to the plaintiff but later instituted divorce proceedings in Mombasa RMCC No.111 of 2018 and has attached a decree nisi issued on 21st March, 2019. The defendant avers that she acquired the suit property before her marriage to the plaintiff but was duped to have it jointly registered with the plaintiff on the pretext that a foreigner could not procure property in his/her own name without being jointly registered with a Kenyan citizen. The Respondent states that they had orally agreed with the applicant that he can reside on the suit property with his wife and children on condition that he pays the respondent rent of Kshs.36,000 per month plus utilities and maintenance but that the applicant failed to adhere to the terms of the agreement, forcing the Respondent to seek redress in CMCC No. 418 of 2018 in which she was granted orders on 18th October, 2018. The respondent avers that the attempts of evicting the applicant were pursuant to a valid court order issued by a court of competent jurisdiction.

3. The application was canvassed by way of written submissions which were duly filed by both parties. I have considered the application and the submissions made. The principles to be considered when considering an application for injunction are well settled. In the case of *Giella – v Cassman Brown & Co.* (1973) EA 358, the Applicant must show that he has a prima facie case with a probability of success; that he stands to suffer irreparable damage which would not be compensated by an award of damages; and if the court is in doubt, it will decide the case on the balance of convenience.

4. In the case of ***Mrao Ltd –v- First American Bank of Kenya (2000) KLR, 125***, a prima facie case was said to be “one in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

5. In this case, it is apparent that both the plaintiff and the defendant claim ownership of the suit property. Indeed the suit property is registered in the joint names of the plaintiff and the defendant. Whereas the plaintiff avers that they jointly own the property, the defendant claims the property is hers solely and that the applicant is a tenant who has failed to adhere to their alleged oral agreement for lease. At this interlocutory stage it is not possible to resolve the issue of ownership as that is a matter for determination at the full hearing.

6. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is the view of this court that the plaintiff has established a prima facie case with a probability of success against the defendant. In my view, it is clear that the plaintiff has shown his right over the suit property as he is a joint registered owner of the property. As regards irreparable damage, I take the view that

should the plaintiff be evicted before the issue of ownership has been resolved, the plaintiff will suffer irreparable loss which may not be quantified in damages. The balance of convenience would tilt in favour of the plaintiff in order to safeguard the current status quo pending hearing and determination.

7. Arising from all the above, I find merit in the application. Accordingly, I allow the Notice of Motion dated 8th May 2019 in terms of prayers (3) and (4). Considering the relationship of the parties, I order that each party shall bear his/her own costs.

Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 25th day of February 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Kazungu holding brief for Obonyo for Defendant

Nguyo holding brief for Bwire for Plaintiff

Yumna Court Assistant

C.K. YANO

JUDGE