



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 5 OF 2018

JCK alias J J.....PLAINTIFF/APPLICANT

VERSUS

K Arap K alias J K K.....DEFENDANT/RESPONDENT

RULING

[1] The Notice of Motion dated **27 July 2018** was filed herein on **19 September 2017** by the Plaintiff/Applicant, **J C Kr alias J J**, pursuant to the provisions of **Sections 1A, 1B, 3A, and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, and **Order 40 Rules 7** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders that:

[a] Spent

[b] There be a temporary injunction restraining the Respondent by himself, his servants, employees, agents, assigns or any other persons acting on his behalf from interfering with the Applicant's quiet possession of **LR No. Kipkabus/...** pending the hearing and determination of this suit *inter partes*;

[c] The Court be pleased to vary the orders issued on **23 May 2018** to the effect that there be a temporary injunction restraining the Respondent by himself, his servants, employees, agents, assigns or any other persons acting on his behalf from interfering with the Applicant's quiet possession of **LR No. Kipkabus/...** pending the hearing and determination of the Originating Summons;

[d] There be a temporary injunction restraining the Respondent by himself, his servants, employees, agents, assigns or any other persons acting on his behalf from selling, entering, destroying and developments made on **LR No. Kipkabus/...** pending the hearing and determination of the Originating Summons;

[e] That Costs be awarded to the applicant.

[2] The application was premised on the grounds that the Applicant and the Respondent entered into a consent on **23 May 2018** to the effect that the *status quo* be maintained, namely, that the Applicant be allowed to continue occupying **LR No. Kipkabus/...** pending the hearing and determination of the Originating Summons filed herein; and that the Respondent disobeyed the terms of the consent by trespassing into the land; and by taking potential buyers of the suit property to the land without the knowledge and authorization of the Applicant; and that the Respondent similarly trespassed on the suit property and sprayed the Applicant's oats thereby occasioning her loss and damage. It was consequently the Applicant's prayer that the Consent Order of **23 May 2018** be varied to the effect that the Respondent be restrained from interfering with her quiet possession of the suit property pending the hearing and determination of the Originating Summons.

[3] The application was premised on the Applicant's affidavit, sworn on **27 July 2018** wherein she averred that on the **23 March 2018**, a Consent Order was recorded between the parties to the effect that the *status quo* be maintained pending the hearing and determination of the Originating Summons but that, on **24 June 2018**, the Respondent trespassed onto the suit property and destroyed the crops she had planted. She had the matter reported to Rurigu Police Post and thereafter requested the Agricultural Officer, Burnt Forest, to carry out an assessment of the damage; and that the damage occasioned on the suit property was assessed at **Kshs. 1,153,700/=**.

[4] The second limb of her grievance is that, after the consent order of **23 May 2018**, the Respondent trespassed onto the suit property on **21 July 2018** together with third parties who had gone there with the intention of purchasing the property. Accordingly, it was the averment of the Applicant that unless the orders sought are granted, she stands to suffer irreparable loss and damage. She annexed to the Supporting Affidavit photographs depicting the alleged damage wreaked on the farm by the Respondent as well as a copy of the Assessment Report in respect of the damage, prepared by the Ministry of Agriculture.

[5] The Respondent opposed the application vide his Replying Affidavit sworn on **29 July 2018** and filed on **1 August 2018**. He averred that

he is the registered owner of all that property known as **LR No.Kipkabus/[...]**; and therefore cannot be a trespasser on his own property. He further averred that the Consent Order of **23 May 2018** did not give the Applicant exclusive control over the suit property; and that on the ground, his children occupy a total of 500 acres which they have leased off. It was therefore his contention that, since he still has control over 360 acres of the subject property, the orders sought by the Applicant are not tenable at this stage of the suit. He prayed for the dismissal of the application with costs.

[6] **Mr. Ndege**, Learned Counsel for the Applicant, urged the application on her behalf and propounded the argument that the Applicant is an elderly citizen who is being subjected to mistreatment by the Respondent following the dissolution of their marriage in the year 2017; and that she is being harassed yet she has stayed on the suit property since **1965**. Counsel submitted that it is not the case that the Applicant has misapprehended the import of the Consent Order of **23 May 2018**, but is acting out of a genuine apprehension that irreparable harm is likely to be visited on her by the Respondent herein unless the Court intervenes on her behalf.

[7] In his submissions, Counsel for the Respondent, **Mr. Waziri**, was categorical that the Respondent had no intention of evicting the Applicant from the suit property. He added that, being the registered owner of the suit property, the Respondent cannot be considered a trespasser. Reiterating the averments in the Respondent's Replying Affidavit, **Mr. Waziri**, submitted that the Respondent is entitled to freely use 360 acres of the suit property; and that he only sprayed the same in readiness for farming.

[8] Given the nature of the dispute, the parties were given time to explore the possibility of an amicable out of court settlement; and the feedback on **9 August 2018** was that the Respondent was unhappy with how his Advocate, **Mr. Waziri**, had conducted the matter. Consequently he expressed the desire to act in person and **Mr. Waziri** obliged by filing an application to cease acting herein. Hence, when the Respondent was given an opportunity to address the Court, he stated as follows:

"I do not know what this case is all about. I do not know who has sued me. I know J. She was my wife but we got divorced. She is no longer my wife. I do not know why I have to come to court."

[9] **There appears to be no dispute therefore that the** parties were husband and wife; or that they cohabited as such from **February 1965** until **6 October 2017**, when their union was dissolved by a Decree of divorce issued by the Chief Magistrate in **Eldoret Chief Magistrate's Divorce Cause No. 9 of 2016: J K vs. Je J**. Following the dissolution of their marriage, the Applicant filed the Originating Summons dated **16 March 2018**, seeking, *inter alia*, a share of their matrimonial property as listed in Paragraph (a) of the Originating Summons. Soon thereafter, the Applicant filed an application **16 March 2018** on the **20 March 2018** seeking the exact same orders that she seeks in the instant application. That is the application that was compromised on **23 May 2018** by consent, to pave way for the hearing of the Originating Summons. Hence, it was ordered that:

[a] The Respondent do file and serve response within 7 days hereof.

[b] The *status quo* be maintained to the effect that the Applicant be allowed to continue occupying **LR Kipkabus/[...]** pending the hearing and determination of the Originating Summons.

[c] Matter be listed for mention for further directions on how the Originating Summons is to proceed on **27 June 2018**.

[10] The Applicant thereafter felt constrained to file the instant application, seeking an order of temporary injunction as well as variation of their consent order. In the premises, what is for determination is whether the Applicant is deserving of the orders sought. The application has been filed under **Sections 1A, 1B, 3A and 63(c) and (e)** of the **Civil Procedure Act**, and **Order 40 Rules 1, 2 and 4** of the **Civil Procedure Rules**. Accordingly, for the intervention of the Court to be attained by way of temporary injunction, it is imperative for the Applicant to demonstrate that her case falls within the strictures of the principles laid down in the case of **Giella vs. Cassman Brown & Co. Ltd** (supra), namely:

[a] **That she has a *prima facie* case with probability of success**

[b] **That she stands to suffer irreparable damage which cannot be compensated by an award of damages; and**

[c] **That the balance of convenience is in her favour.**

[11] In **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123** a *prima facie* case was said to be:

"... a genuine and arguable case. It is a case in which on the material presented to the Court a 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 latte r."

[12] Among the documents annexed to the Originating Summons is the Certificate of Title for the suit property, **LR No. [...]**. It is indubitable that it is in the name of the Respondent as the registered proprietor. I therefore have no hesitation in agreeing with the submissions of the Respondent that he cannot be said to have trespassed on his own property. Nevertheless, the Respondent did concede that until last year, the Applicant was his spouse. She has approached the Court for a share of the matrimonial property. That is, to my mind, a genuine and arguable cause of action; a cause of action which would be rendered nugatory were the Respondent to dispose of the suit property before the hearing of the Originating Summons.

[13] Although the property has a value and is therefore compensable by way of damages, the contention of the Applicant is that it has been her matrimonial home since February **1965**. Indeed, the Court has already made an order, by consent, that she continues to stay on the property pending the hearing and determination of the Originating Summons. Her averment that the Respondent took prospective purchasers

to view the property has not been refuted by the Respondent. And, in her Replying Affidavit, the Respondent deposed, in connection with the consent of 23 May 2018 that **"...I only agreed to allow her to occupy our matrimonial home and ... that consent does not bar me from disposing off any portion of the suit property since I am the registered owner..."**

[14] In those circumstances, I am prepared to hold that she would suffer irreparable harm if she were to be disturbed by an eviction at this stage of the proceedings, in the event of such an eventuality. Indeed, it is now settled that even where damages would be adequate, the Court in its discretion may still grant an order of temporary injunction should the circumstance warrant the remedy. In **Kanorero River Farm Ltd and 3 others –vs- National Bank of Kenya Ltd (2002) 2 KLR 207** for instance, **Ringera, J.** (as he then was) held as follows at page 216, with which I am in full agreement:

"I would for those reasons alone accede to the Plaintiff's prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages."

[15] Clearly, the balance of convenience is also in favour of the Applicant, having been on the property since 1965. Hence, the course that appears to carry the lower risk of injustice is to grant an injunction as sought by the Plaintiff to restrain the Respondent from interfering with the Applicant's quiet occupation and use of the suit property pending the hearing and determination of the suit property (See **Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589**). Granted the foregoing, the *status quo* order of 23 May 2018 has been overtaken by events and therefore ought to be set aside.

[16] In the result, I find merit in the application dated 27 July 2018 and would grant orders in respect thereof as hereunder:

[a] That a temporary injunction be and is hereby issued restraining the Respondent by himself, his servants, employees, agents, assigns or any other persons acting on his behalf from interfering with the Applicant's quiet possession of **LR. No. Kipkabus/[...]** pending the hearing and determination of this suit;

[b] There be a temporary injunction restraining the Respondent by himself, his servants, employees, agents, assigns or any other persons acting on his behalf from selling, entering, destroying and developments made on **LR No. Kipkabus/[...]** pending the hearing and determination of the Originating Summons;

[c] That the *status quo* order issued on 23 May 2018 be and is hereby set aside.

[d] That Costs of the application to be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF JANUARY, 2019

OLGA SEWE

JUDGE