



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 14 OF 2017 (OS)**

**I A.....APPLICANT**

**VERSUS**

**J N N alias Y N N.....RESPONDENT**

**RULING**

1. By a notice of motion dated 20<sup>th</sup> June, 2017 and brought under section 1A, 1B, 3,3A, and 63 (c) and (e) of the Civil Procedure Act and Order 40 Rules 1, 4 and 10 of the Civil Procedure Rules, the applicant seeks a temporary injunction restraining the respondent, her servants, agents, and or personal representatives from trespassing on, occupying, constructing on, alienating or otherwise interfering in any way whatsoever with all that parcel of land measuring approximately 0.25 of an acre (Plot No. [particulars withheld], Sabaki Estate Mavoko Municipality now known as L.R. No. [particulars withheld] measuring approximately 0.0972 of a hectare (*suit property*) together with improvements thereon and the applicant's possession and or occupation thereof pending the hearing and determination of the applicant's originating summons.

2. It was the case that the Applicant and the respondent married each other in the year 1999 under Islamic Customary Law but later divorced on 7<sup>th</sup> May, 2005. The applicant bought the suit property during the subsistence of the marriage and due to the affection he had for her, he caused the inclusion of the respondent's name as a joint purchaser. The sale agreement is said to have been executed on 2<sup>nd</sup> April, 2002. That the property and improvements thereon including a five-bedroom residential house with a detached servants quarter was acquired through the applicant's sole effort and funds. That since the said purchase, the respondent has never occupied the said property and has never claimed ownership of the suit property from the applicant or any authority or court of law. That on 26<sup>th</sup> June, 2016, the respondent arbitrarily entered upon the property and broke all locks of the house being developed by the applicant prompting the applicant to seek Athi River Police Station intervention. That the respondent was summoned to the said police station and directed to lock the house and desist from interfering with the property until relevant court order is obtained. That despite the directive, the respondent has refused to heed the same and on 5<sup>th</sup> July, 2017 she again arbitrarily entered upon the property and broke all the locks to and within the house and is arbitrarily attempting to renovate the house and or continue with construction of the same and the Applicant has been compelled to move to court to restrain her.

3. The respondent on the other hand contended that she identified the property which was with Loyd Masika, the agents to the property. That she took a loan of KShs. 130,000/= with Telecom Kenya, her then employer with which she made initial payment for the property. She approached an architect to draw a plan and which costed KShs. 20,000/= and then applied for approval of the map at Mavoko County Council. She was later introduced to a mason by the name Okello who constructed the house and she bought her items at Waeni Mutimia's hardware. She stated that she took several loans for purposes of the

construction namely:- KShs. 170,000/= from Masaku Traders Sacco on 16<sup>th</sup> September, 2003, Kshs.300,000/= from Co-operative bank on 18<sup>th</sup> October, 2003, 26<sup>th</sup> March, 2004, 27<sup>th</sup> September, 2004 and 22<sup>nd</sup> November, 2006 and withdrew KShs. 250,000/= from Jumbo Junior Account at Co-operative Bank. That the applicant's net pay could not suffice the purchase and construction of the property.

4. It was the applicant's submission that with the tendered copy of the agreement and Grant No. [particulars withheld], statement of accounts from Oxford University Press East Africa Limited, Housing Finance Company, Kenya Commercial Bank, Numaco Staff Welfare Group Athi River Project, Petty Cash vouchers, current electricity bill, he has prima facie established ownership of the property. Secondly, it was submitted that the respondent has demolished some of the construction work he did to the property including the demolition of step leading to the main entrance to the property and if not deterred she will further destroy the property occasioning him loss. That the respondent cunningly occupied the premise after the institution of this suit between 12<sup>th</sup> July, 2011 and 13<sup>th</sup> July, 2017 and has denied the applicant his rights to the property. In support of his case, the applicant cited vast authorities among them **Giella v. Cassman Brown & Co. Ltd (1973) EA 358**, **Mrao v. First American Bank of Kenya Limited and 2 others (2003) KLR 125** and **Locabail International Finance Ltd v. Agro-Export and Another [1986] 1 All ER 901**.

5. The respondent on the other hand reiterated her averments in the affidavit and submitted that under the Married Women's Property Act Section 17 and Matrimonial Property Act Section 4 she was entitled to acquire, administer, hold, control, use and dispose of property whether movable or immovable. She further argued that she equally has a right to property acquired during the subsistence of the marriage upon divorce. She cited **R.M.M. v. B.A.M. [2015] eKLR**, **P.N.N. v. Z.W.N [2017] eKLR** and **S.N.K. v. M.S.K. & 5 others [2015] eKLR**.

6. The principles applicable when granting or refusing to grant an order for injunction were well settled in **Giella v. Cassman Brown & Co. (1973) E.A. 358**. For an applicant seeking injunction orders to succeed in his/her application, it must be established that there is a prima facie case with a probability of success, that he/she stands to suffer irreparable loss and in the absence of the two, the court shall consider on which party the balance of convenience tilts.

7. On the first limb, I note that both the Applicant and Respondent have staked a claim onto the suit property as they have each availed a copy of sale agreement signed by both of them as joint purchasers. The Grant No. [particulars withheld] presented by the Applicant is in the names of the vendor who sold the property to both of the parties herein. Each of the parties herein are claiming that they heavily contributed towards the purchase of the property. This then indicates that each of the parties have a prima facie case with a probability of success against the other as regards the question of contribution towards the purchase of the property. This then seems to weaken the Applicant's quest for an injunction and which is again affected to some extent by the fact that the Respondent is currently in occupation of the suit property with her children. The report of the Deputy Registrar dated 14/07/2017 confirms the same. This then leads me to find that the Applicant has not established a prima facie case with a probability of success in that he has not shown that he is the sole owner of the property at this stage and the same has to be established during the hearing of the main suit.

8. As regards the second limb, I note from the report of the Deputy Registrar that there was no ongoing construction on the premises but that there was evidence of some fresh paint on the walls and ceilings as well as incomplete construction of the rooms within the compound. Since the Applicant is also entitled to the property as evidence by the sale agreement, I find that any construction carried out on the property might change or interfere or even depreciate the value of the property and which might occasion him irreparable loss. This then calls for restraining orders against the Respondent until the suit is heard and determined. This is notwithstanding the fact that the Respondent will still be in occupation pending the determination of the suit.

9. As regards the last limb, I note that the dispute between the parties is not only about ownership but the case advanced by the respondent is that she also contributed to the acquisition of the property or rather she bought the property entirely, an issue that shall be dealt with on merit during the trial. The respondent

is at the moment in occupation of the property and despite the applicant having satisfied one of the two limbs, I am inclined to balance the convenience in favour of the Respondent bearing in mind the fact that the respondent is in occupation of the property. That being the position I find that it would not be prudent to disposses her of the occupation at this stage but let her remain in occupation pending the outcome of the case.

I am in that regard guided by **Mula on Code of Civil Procedure 16<sup>th</sup> Edition** in which it is stated as follows on dispossession:

***“A person in possession cannot be dispossessed without due process of law. A bona fide possessor should not be dispossessed pending suit unless there is some substantial reason. The matter should be considered judicially in all its aspect.”***

10. In view of the foregoing observations the Applicant’s Application dated 20/06/2017 is allowed in the following terms:-

***(a) The Respondent shall continue to be in occupation of the suit premises pending the determination of the suit.***

***(b) The Respondent, her servant agents and or personal representatives are restrained from constructing on, alienating or otherwise interfering in any way whatsoever with the property save only on occupation with the children, pending the hearing and determination of the suit herein.***

***(c) The Respondent shall pay utility bills arising out of the occupation on the property until the determination of the suit.***

***(d) The Applicant be at liberty to visit the premises upon mutual arrangement with the Respondent.***

***(e) Due to the nature of the relationship with the parties herein I order that each party to bear their own costs.***

**Orders accordingly.**

**Dated and delivered at MACHAKOS this 8<sup>th</sup> day of May, 2018.**

**D. K. KEMEI**

**JUDGE**

**In the presence of:**

Muthama for Nyoike - for the Applicant

Muia for Odawo for the Respondent

Kituva - Court Assistant