



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NO.27 OF 2016

IN THE MATTER OF AN APPLICATION BY P N N

**IN THE MATTER OF SECTION 17 OF MATRIMONIAL PROPERTY ACT 2013 AND
SECTION 3A OF CIVIL PROCEDURE 47**

P N N-----PLAINTIFF

VERSUS

E W N-----DEFENDANT

B W M-----INTERESTED PARTY

RULING

1. This ruling is in respect of the application dated 28th September, 2016 in which P N N hereinafter (the plaintiff) seeks orders:

1. Spent

2. Spent

3. That the Interested Party be restrained from selling, charging, leasing or in any way interfering with the title to the property herein pending hearing and determination of the petition.

4. That cost of this application be in cause.

2. The application is premised on 5 grounds as listed on the face of the application namely:

a) The property herein belongs to the applicant who registered the same in the 1st respondent's name as his wife.

b) All development and collection of rents fro the same has been done by the applicant since the year 2010-11 when he developed the same

c) The 1st respondent has proceeded to sell the same to the 2nd without the consent or knowledge of the applicant.

d) The title has been unlawfully transferred to the 2nd respondent who is now demanding rents

from the tenants

3. The Plaintiff also relies on the averments in his affidavit in support of the originating summons herein and also on the affidavit sworn on 28th September, 2016.

4. The gist of the application as gleaned from the affidavits and grounds in support is that the Court ought to restrain the interested party from selling, charging, leasing or in any way interfering with the title to the property Nakuru Municipality Block [particulars withheld] for reasons that;

The property belongs to the applicant who registered the same in the name of his wife the respondent, who has in turn sold the same to the Interested Party.

5. It is feared that should the Interested Party proceed to dispose off the property by way of sale, charge or transfer, the applicant will suffer irreparable loss.

6. The applicant states that he solely bought the property and developed rental units thereon and he has been collecting rent.

7. He adds that he only came to learn of the purported sale through the CID. He did not give consent to the sale as required by the provisions of the Law, no Land Control Board consent was obtained and the property being his, the sale cannot stand.

8. The application is opposed. E W N (hereinafter the defendant) states in a replying affidavit that the property came to her by way of a compromise reached in Nakuru Separation Cause Number 2 of 2014 before the Chief Magistrate's Court.

9. In the compromise the plaintiff voluntarily surrendered some properties by way of a consent filed in Court and adopted as orders of Court.

10. The said consent in clause (vii) stated inter alia:

"that no party should interfere with each other's life, business, welfare and any property not included in this consent."

The consent is exhibited.

11. The defendant avers that the property is legally hers and this is not affected by the collection of rent by the plaintiff when they were husband and wife.

12. It is explained that the plaintiff reneged on an agreement in the consent to clear some outstanding loan in respect of a property that was to be transferred to the defendant. Upon demand by the creditor, the defendant sacrificed her property herein in order to settle the loan which stood at Kshs.1,800,000/=.

13. In her response the interested party has in a replying affidavit sworn on 14th October, 2016 stated that she conducted due diligence, bought the property in question and a transfer was effected and a title deed issued.

14. She urges that she is the bonafide owner of the property and her interest should be protected. She asks that collection of rent from the premises should be deposited in court pending the finalization of the matter herein.

15. This matter was canvassed by way of written submissions. All parties complied and filed their respective submissions.

16. I have had occasion to consider the application, the supporting affidavit, annexures thereto as well as the replies by the defendant and Interested Party.

17. I have had regard and considered at length the submissions by the parties and the authorities tendered. I have put into account all the expositions even those which I may not recast here.

18. Of determination is whether the applicant has achieved the threshold for the grant of an interim injunction pending the hearing and determination of the case herein.

19. The clear facts are that property known as Nakuru/Municipality Block [particulars withheld] is now registered in the names of the Interested Party who has tendered evidence of purchase of the same from defendant herein.

20. The plaintiff claims interest on the said property as an owner who solely acquired the property and registered it in the name of his wife, the defendant, and the later has now sold the property to a 3rd party.

21. There is certainly a live dispute between the plaintiff and the defendant that will require resolution through evidence in a trial. The determination to finality of these issues will have to be left to the trial judge.

22. The principles set in **Giella Vs. Cassman Brown** come to play. These are;

- i) Whether the plaintiff has established a *prima facie* with a probability of success.
- ii) Whether the plaintiff is likely to suffer irreparable loss if an injunction is not issued and,
- iii) Where in doubt the court will consider the balance of convenience in the circumstances of the case.

23. The plaintiff claims the property on the basis that it is a matrimonial property. It is common ground that the plaintiff and the defendant were husband and wife. The plaintiff's case is that even though the property was in the name of the defendant, it is he who bought and developed the same.

24. **Section 6(1) of the Matrimonial Property Act No. 49 of 2013** defines matrimonial property to mean;

- a) Matrimonial home or homes.
- b) Household goods and effects in the matrimonial home or homes or;
- c) Any other movable or immovable property jointly owned and acquired during the subsistence of the marriage.

25. To that extent, and the fact that the plaintiff and the defendant were husband and wife, one needs to interrogate the evidence each will adduce to determine the status of the property in question. A *prima facie* case is established with a probability of success.

26. On irreparable damage, it is obvious that the property herein being developed land, the plaintiff would suffer irreparable loss should the same be sold to yet another 3rd party or charged, transferred or otherwise adversely dealt with. Preservation of the property would serve the interests of justice to avoid irreparable damage being occasioned.

27. But then one must not forget that in between this dispute between a former husband and wife is now a 3rd party (interested party) who purchased the property from the defendant.

28. As aptly put by **Lord Diplock** in the case of **American Cyanamid Company V. Ethicon**, [1975] 1ER 505, the object of an interlocutory injunction is to protect the plaintiff against injury by violation of his right which he could not adequately compensate in damages recoverable in the action if the uncertainty is resolved in his favour at the trial.

29. But the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from having been prevented from exercising his own legal rights for which he would not be adequately compensated under the plaintiff's undertaking.

30. In our instant suit the interests of the plaintiff must be weighed against the interests of the interested party.

31. If the subject matter was to be disposed of by way of sale, charging, leasing or in any other adverse way including change of character of the property, the plaintiff's right may not adequately be compensated by damages should the trial resolve in his favour.

32. Equally the interested party must be cushioned against an injury that may result from her being prevented from exercising her legal rights over the property which she would not adequately be compensated should the trial resolve in favour of the defendant and thus herself.

33. From the foregoing, I am satisfied that the prayer for injunction is merited. However, given the circumstances of this case, such an injunction need be based on conditions to protect the interest of the interested party.

34. Consequently orders shall flow in the following terms:

a) The interested party is hereby restrained from selling, charging or in any way interfering with the title to the property known as Nakuru Municipality Block [particulars withheld] pending the hearing and determination of this suit.

b) The plaintiff is to give a written undertaking as to damages in default of which order (a) lapses.

c) All rents collected from the subject property be deposited in court during the pendency of these proceedings.

d) To give effect to (c) above, the 3 parties herein to appoint a reputable property management firm/Estate Agent to collect the said rent.

e) Costs of this application to abide the final outcome.

Dated, Signed and Delivered at Nakuru this 20th day of July, 2017.

A. K. NDUNG'U

JUDGE