



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

E.L.C. NO 45 OF 2014

FORMERLY E.L.C NYERI 139 OF 2014

WANANGWE MAKOHA.....PLAINTIFF

VERSUS

ESTHER NJOKI MURIUKI.....DEFENDANT

RULING

INTRODUCTION

Mr Wanangwe Makoha the plaintiff/applicant has by his notice of motion dated 18th June, 2014 sought the following orders from this court.

1. That the defendant/respondent and her servants be restrained from evicting or interfering with the applicants peaceful occupation of the suit land parcel number Nthawa/Riandu/2818 pending the hearing and determination of this suit.
2. That the defendant/respondent or her agents be restrained from selling or alienating the suit land pending the hearing and determination of this suit.
3. That the costs of this application be provided for.

The application is opposed by the defendant/respondent who has filed a replying affidavit in opposition to the application. According to her, the suit land is her property having acquired it through purchase from the plaintiff/applicant.

The Case for the Plaintiff/Applicant

According to the plaintiff/applicant, the respondent is his divorced wife to whom he transferred the suit land to enable her secure a loan to extend their family pharmacy business. He has also stated that the respondent donated to his father the power of attorney in order to evict the plaintiff/applicant and also file criminal proceedings against him. He states that the father of the defendant/respondent did file criminal charges of forcible detainer in the court of the Senior Principal Magistrate at Siakago against him which is still pending in the court.

He further states that the defendant/respondent and her family have been harassing him. He also says he has built two permanent houses worth Shs 2.7 million shillings on which he has planted some trees and miraa worth Shs 2.3 million. He says that unless a temporary injunction is issued, the respondent might sell off all those properties.

Finally, he says that he has been in occupation of the suit land although they are divorced which is

evidenced by the issuance of a decree absolute, the latter confirmed as a decree nisi.

The Case for the Defendant/Respondent:

According to the respondent, she is the registered owner of the suit land which she purchased from her divorced husband. She says that she does not hold the suit land in trust for any person. Finally, she says that she has no intention of alienating or disposing off all the suit land. And for this reason the order of injunction should not be issued against her.

The Applicable Law:

The law that governs the grant of temporary orders is found in Order 40 of the 2010 Civil Procedure Rules. The provisions of that order have been interpreted and judicially approved in the case of ***Giella v Cassman Brown & Co Ltd (1973) EA 358***

“An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience.”

According to that case, an applicant for a temporary order must satisfy the following criteria:

1. That he has a prima facie case which has a probability of success.
2. That if the injunction sought is not granted the applicant might suffer irreparable damage which damage is unlikely to be compensated by way of damages.
3. If the two conditions raised above raise doubt in the mind of the court, the court is required to decide the application on a balance of convenience.

Issues for Determination:

In view of the affidavit evidence, the submissions of counsel for the parties and the applicable law, I find the following as the issues for determination:

1. Whether or not the plaintiff/applicant has met the criteria for the grant of a temporary injunction.
2. Who should bear the costs of this application.

Evaluation of the Evidence, Findings and the Law:

I have carefully considered the affidavit evidence, the submissions of both counsel, and the applicable law, I find that the plaintiff/applicant has met the criteria for the grant of a temporary injunction. It is clear from the evidence that the suit land was acquired during the subsistence of their marriage. There is a conflict in the evidence presented by the two parties.

According to the plaintiff/applicant, he transferred the suit land to the defendant/respondent to enable her secure a loan to advance their pharmacy business. The defendant/respondent's version is that she got the suit land from the plaintiff/applicant. This is a conflict in the evidence is a matter for judicial resolution in the main trial. In the circumstances, the application for a temporary injunction is merited to preserve the status quo pending the hearing and determination of this suit.

Verdict and Disposal Order:

In the light of the foregoing, I hereby make the following orders:

1. A temporary injunction is hereby granted in terms of the notice of motion in prayers 2, 3 and 4.
2. Costs of this application will be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this... **2nd** day of **FEBRUARY,..2015**

In the presence of M/S Muriuki holding brief for M/S Muthoni and M/S Gitari holding brief for Momanyi.

Court clerk Mr Muriithi

Right of appeal under Order 43 Civil Procedure Rules of 2010 explained to the parties.

J.M. BWONWONGA

JUDGE