



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO 328 OF 2013**

**JOSEPH NGAIRA MATERE.....PLAINTIFF**

**VERSUS**

**ELECTA AKINYI OTIENO OBURA.....DEFENDANT**

**RULING**

Through the Notice of Motion dated 13<sup>th</sup> August 2013 brought under **Order 40 Rule 1(a) and 2(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**, the Applicant is seeking restraining orders against the Defendant in relation to quiet occupation and enjoyment of flat L.R.140/287/057, being National Social Security Fund Tenant Purchase Scheme, Embakasi Estate Nairobi. The applicant also prays that the Officer Commanding, Embakasi Police Station do supervise and oversee the execution and enforcement of this order.

The application is premised on the ground among others that the Defendant, on 22<sup>nd</sup> July, 2013, broke into the suit property and removed the padlocks to the door replacing it with different locks with the aim of preventing the Plaintiff from gaining access and letting the premises out.

The application was canvassed by way of written submissions The Plaintiff submitted that although the originating summon is filed under Order 37 Rule 10 which refers to a partnership, the Plaintiff is seeking the court to bring to an end the joint ownership of the house and to determine the respective rights of each party thereby. The Plaintiff submitted that the true position of the matter is that the property may appear to be in joint names but the joint ownership came about through fraud committed by the Defendant. That the correct position is that the sole owner of the property who has been contributing to its acquisition and pays the purchase price of the property is the Plaintiff.

The Plaintiff submits further that the Defendant through her paragraph 16 of plaint, has admitted that she has indeed interfered with the suit property but tries to justify her actions by saying that she is a co-owner of the property. The Plaintiff complains that Defendant's action in taking control of the property makes it difficult for him to rent the premises to the tenants who will pay rent to assist in the payment of the purchase installments, a situation which may lead to default, and consequently, auction-sale of the property by the National Social Security Fund. The Plaintiff submitted also that he has established a prima facie case against the Defendant, who has interfered with the status quo prior to the filing of the suit. The interference may lead to loss of rent and default of payment of the purchase price. The Plaintiff also argues that the balance of convenience is in favour of the Plaintiff therefore a temporary injunction should be granted.

The Defendant on the other hand, submitted that the orders sought cannot be granted wholesomely as the Defendant/Respondent has equal right of access to the premises being a co-owner. The Defendant argues

that the prayer for an injunction is an admission there was a partnership. The Defendant also submitted that it is not practical that one would be restrained from a property she jointly owns. The Defendant also stated there was no proof presented to the court that the registration of joint names was a forgery and the court should not believe so.

The issue for determination is ***whether on the facts and circumstances of this case the Plaintiff is entitled to the orders of injunction sought at this interlocutory stage.***

The principles guiding the grant of interlocutory injunction are well settled. A party needs to show that they have a prima facie case with a probability of success; that they stand to suffer irreparable damage that cannot be compensated by an award in damages and that in the event of any doubt in regard to the above two conditions, that the balance of convenience having regard to the circumstances of the matter tilts in favour of the applicant. See: **Giella –VS-Cassman Brown & Co Ltd (1973) EA 358.**

In exercising its discretion in determining whether or not to grant the injunction sought, the Court is enjoined to consider the principle of proportionality under the overriding objective which objective the Court is required in a suitable case, to give effect to in the exercise of its powers under the civil procedure Act. In **Suleiman Vs. Amboseli Resort Limited [2004] 2 KLR 589 Ojwang, AJ** expressed himself as follows:

***“It is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice...The argument that the law governing the grant of injunctive relief is cast in stone is not correct, for the law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before. Traditionally, on the basis of the well-accepted principles, the Court has had to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied? (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice...***

In applying the principles in the above case, it is probable that the parties herein may or may not be in some kind of relationship during which time the property in dispute may have been acquired. The question arises as to whether the Plaintiff has made out a prima facie case with a probability of success? In **MRAO Vs First American Bank Of Kenya Limited & 2 Others (2003) KLR 125,** a prima facie case was described as follows:

***“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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 latter.”***

Recently the Court of Appeal in the case of **Nguruman Limited Vs Jan Bonde Nielsen & 2 Others,** Civil Appeal No 77 Of 2012 (2014) eKLR held:

***“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not***

***establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed. "***

It is the applicant case that he is the owner of the said house having bought it from NSSF. He claims that he has leased the house to a tenant who pays monthly rent which goes to reduce the purchase price and satisfies monthly contract with the seller. He further claims that the Defendant got herself to the ownership through fraud. The Respondent on the other hand claims that the house was purchased jointly and she made a contribution of Kshs.350,000/- towards the deposit. She submitted that the agreement was to use the monthly rent from the said house to pay for the balance of the purchase price. Looking at the above circumstances and keeping in mind the unresolved issue as to whether the property is owned by the Plaintiff or jointly owned by both parties, an issue which cannot be resolved at this interlocutory stage, I find that the Plaintiff has made out a prima facie case with a probability of success against the Defendant which case is that if an injunctive order sought is not granted to maintain the status quo ante, the default in payment of monthly instalments from monthly rents is likely to occur and lead to the total loss of the property whether jointly owned or otherwise. See **Chief Samuel Adebisi Falomo Vs. Obaomoniyanigbesc. 127/1995** the Supreme Court of Nigeria Held that:

***“On Object of interlocutory injunction - Interlocutory injunction is granted before the trial of an action and its primary object is to keep matters in status quo ante until the question at issue between the parties can be decided (usually determined by the court, thus facilitating the administration of justice at the trial.) Although it is recognised that there are certain basic issues which the courts need to consider in deciding whether or not an interlocutory injunction should be granted the remedy must be kept flexible and discretionary and each case must be considered as a whole on the basis of fairness, justice and common sense.....”***

Also In **Ougo and another Vs Otieno, Civil Appeal No. 3 of 1987** - where the Court of Appeal held that:-

***“where there are serious conflict of facts the trial Court should maintain the status quo ante until the dispute has been decided in a trial”***

In my opinion the order that would commend itself in the interest of justice to both the parties and which would sustain protection of the suit property in which both parties may have a beneficial interest, would be that the parties maintain the status quo ante. That is to say, the property should be kept in the hands of the Applicant/Plaintiff until the ownership issue is decided. If after the trial of the suit the court finds that the property is jointly owned and if the Plaintiff will be shown to have gained any benefit during his control and management of the property, the trial court will have the power to order adjustment in such a way as to proportionately share the benefit(s) that the Plaintiff may have solely enjoyed.

The result is that the injunctive orders sought in the application are hereby granted with costs in the cause. Orders accordingly

Dated and delivered at Nairobi this 16<sup>th</sup> day of July, 2015.

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**D A ONYANCHA**

**JUDGE**