



No. 284

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 7 OF 2014

ALICE KWAMBOKA NYANGWARAPLAINTIFF

VERSUS

CHARLES GESAIRO MOSOTA.....1ST DEFENDANT

ALOYS MATAYA MOSETI 2ND DEFENDANT

RULING

1. By amended plaint dated 30th January 2014, the plaintiff brought this suit against the defendants seeking; an injunction to restrain the defendants from evicting, selling, interfering with, dealing, or disturbing the plaintiff's peaceful occupation and/or enjoyment of all that parcel of land known as **LR No. Central Kitutu/Mwabundusi/1184**(hereinafter referred to as "**the suit property**") and an order for the cancellation of the 2nd defendant's registration as the proprietor of the suit property and the transfer thereof to the plaintiff. In her amended plaint, the plaintiff averred that she is the wife of the 1st defendant with whom they are blessed with three (3) children. The plaintiff averred further that soon after her marriage to the 1st defendant, the plaintiff's brother purchased for her the suit property on which he also constructed for her a permanent house. The plaintiff averred further that without her consent, the 1st defendant fraudulently sold and transferred the suit property to the 2nd defendant. The plaintiff averred that since the year 1996, they lived peacefully with the 1st defendant on the suit property until the year 2007 when the 1st defendant married another wife and deserted the suit property which is situated in Jogoo estate for Nyanchwa. The plaintiff averred that the 1st defendant has since been threatening to sell the suit property so that he may purchase a new parcel of land for his new wife.
2. The plaintiff averred that on 15th December 2013 the 1st defendant through his son from the first wife attempted to forcefully evict the plaintiff from the suit property which incident was reported to the police after the plaintiff and his said step son were injured. The plaintiff has since been charged with the offence of assault as a result of the said incident. It is on account of the foregoing that the plaintiff has sought an order of injunction to restrain the defendants from evicting her from the suit property. Together with the amended plaint, the plaintiff filed an application by way of Notice of Motion dated 30th January 2014 seeking a temporary injunction to restrain the defendants by themselves or through their agents, servants or representatives from evicting, interfering, dealing or disturbing the applicant's peaceful occupation and enjoyment of the suit property pending the hearing and determination of this suit. The plaintiff's application

- was supported by the affidavit of the plaintiff sworn on 30th January 2014.
3. In her affidavit, the plaintiff reiterated the contents of the amended plaint which I have highlighted hereinabove. The plaintiff stated that the plaintiff and the 1st defendant had stayed as husband and wife on the suit property until the year 2007 when the 1st defendant moved out of the said property to go and stay with his new wife at Nyanchwa. The plaintiff reiterated her averment in the amended plaint that the suit property was purchased for her by her brother one, Hon. Zephania Moraro Nyangwara who also constructed for her a permanent house thereon. The plaintiff stated further that on 28th January 2014 the defendants came to the suit property and demanded that the plaintiff do vacate and handover the same to the 2nd defendant within 7 days. The plaintiff stated further that the suit property is her matrimonial home where they have all along resided with the 1st defendant and raised up their children. The plaintiff stated further that she never consented to the sale of the suit property by the 1st defendant to the 2nd defendant and that she has not benefited from the proceeds of that sale.
 4. The plaintiff contended that unless the defendants are restrained by an order of injunction, the plaintiff is likely to be evicted by the defendants from the suit property together with her children. The plaintiff contended that the 1st defendant did not make any contribution towards the purchase of the suit property or the construction of the house standing thereon. The plaintiff annexed to her affidavit in support of the application a copy of the certificate of official search dated 29th January 2014 which shows that the suit property was registered in the name of the 2nd defendant on 31st December 2013.
 5. The plaintiff's application was opposed by the 2nd defendant through a replying affidavit sworn on 13th February 2014. In his affidavit in opposition to the plaintiff's application, the 2nd defendant stated that he purchased the suit property from the 1st defendant for valuable consideration on 6th June 2013. The 2nd defendant annexed to his affidavit, a copy of the title deed for the suit property dated 31st December 2013 and a copy of a certificate of official search dated 29th January 2014 on the title of the suit property in proof of his ownership of the property.
 6. The 2nd defendant stated that before purchasing the suit property, he conducted due diligence on the title of the suit property and was satisfied that the property was registered in the name of the 1st defendant. The 2nd defendant stated that the suit property was purchased by the 1st defendant from one Francis Ongeru Omwenga. The 2nd defendant annexed to his affidavit a copy of a letter of consent dated 3rd December 2013 issued by the land control board authorizing the sale of the suit property by the 1st defendant to the 2nd defendant, a copy of a transfer of land form dated 18th January 2001 through which the suit property was transferred by the said Francis Ongeru Omwenga to the 1st defendant, a certificate of official search dated 26th January 2011 which shows that the suit property was registered in the name of the 1st defendant on 18th January 2001 and a copy of the register for the suit property which contains the history of its ownership.
 7. The 2nd defendant stated that he took vacant possession of the suit property in July 2013 and has since been in full control of the same. The 2nd defendant termed the plaintiff's affidavit sworn on 30th January 2013 as full of untruths and denied that the suit property was purchased for the plaintiff by her brother Hon. Zephania Moraro Nyangwara. The 2nd defendant denied further that the suit property was the plaintiff's matrimonial home. The 2nd defendant stated that the plaintiff is the 1st defendant's estranged wife and that she has her matrimonial home elsewhere.
 8. The plaintiff's application was argued before me on 21st May 2014 when Mr. Sagwe advocate appeared for the plaintiff and Mr. Minda advocate appeared for both defendants. In his submissions in support of the application, Mr. Sagwe submitted that the suit property is the plaintiff's matrimonial home and that the 1st defendant who is the plaintiff's husband did not obtain the consent of the plaintiff before he sold and transferred the suit property to the 2nd defendant. Mr. Sagwe reiterated the contents of the plaintiff's affidavit in support of the application to the effect that the suit property was purchased for the plaintiff by her brother who caused the same to be registered in the name of the 1st defendant. Counsel submitted that the plaintiff and the 1st defendant together with their children have resided on the suit property over

- the years. Counsel submitted that the plaintiff has established a prima facie case with a probability of success against the defendants which entitles her to the order of injunction sought.
9. In his submission in reply, Mr. Minda relied on the 2nd defendant's replying affidavit in opposition to the application and submitted that the 2nd defendant is the registered proprietor of the suit property having purchased the same from the 1st defendant. Mr. Minda submitted that there is no evidence before the court to the effect that the suit property was at any time been registered in the name of the plaintiff's brother. Mr. Minda submitted that the registration of the 2nd defendant as the proprietor of the suit property gives the 2nd defendant exclusive rights over the suit property. On the plaintiff's claim that the suit property is her matrimonial home, counsel submitted that, that is far from the truth because the plaintiff's matrimonial home is at a place called Kiamakondo where the plaintiff was married and settled by the 1st defendant.
 10. Mr. Minda submitted further that the 1st defendant did not require the consent of the plaintiff before selling and transferring the suit property to the 2nd defendant. Counsel submitted that on the suit property stands one roomed residential houses at the rear and shop premises in front which were all constructed by the 1st defendant. He submitted that the one roomed houses are occupied by tenants and that the plaintiff is occupying one of the said houses while the tenants are occupying the rest. Counsel submitted that the plaintiff's occupation of one of the said rooms does not entitle her to claim ownership of the suit property. Counsel submitted that it would not be in order to restrain the 2nd defendant who is the registered proprietor of the suit property from dealing with the same.
 11. Counsel submitted that there is no evidence placed before the court in support of the plaintiff's contention that the suit property was transferred to the 2nd defendant by the 1st defendant fraudulently. Counsel submitted further that the plaintiff has failed to establish a prima facie case against the defendants. On whether the plaintiff would suffer irreparable loss unless the orders sought are granted, counsel submitted that the plaintiff's matrimonial home is situated elsewhere and as such she would not suffer any loss if she moves out of the suit property. In response to Mr. Minda's submissions, Mr. Sagwe submitted that the home referred to by Mr. Minda as the plaintiff's matrimonial home at Kiamakondo is the ancestral home of the 1st defendant and not the plaintiff's matrimonial home as claimed. Counsel submitted that it is on the suit property where the plaintiff's matrimonial home is situated and that the plaintiff and the 1st defendant have occupied the suit property since the plaintiff was married to the 1st defendant. Mr. Sagwe urged the court to grant the orders sought by the plaintiff.
 12. I have considered the plaintiff's application together with the two affidavits filed in support thereof. I have also considered the 2nd defendant's affidavit in opposition to the application together with the oral submissions that were made before me by the advocate for the plaintiff and the advocate for the defendants. The law on temporary injunctions is now settled. As was stated in the case of **Giella –vs- Cassman Brown [1973] E. A 358**, an applicant for a temporary injunction must establish that he has a prima facie case with a probability of success against the respondent. He must also demonstrate that unless the injunction is granted he will suffer irreparable loss. If the court is in doubt as to the above, the application will be determined on a balance of convenience.
 13. The plaintiff's case against the defendants is two pronged. The plaintiff has contended first, that the suit property is her matrimonial home and as such the same could not be sold by the 1st defendant to the 2nd defendant without her consent. Under section 28 (a) of the Land Registration Act 2012, spousal rights over matrimonial property is an overriding interest to which the title of a registered owner of land is subject. Under section 2 of the Land Act 2012, matrimonial home is defined as “**any property that is owned or leased by one or both spouses and occupied by the spouses as their family home**”. The plaintiff has contended that she lived together with the 1st defendant on the suit property from the year 1996 until the year 2007 when the 1st defendant moved out of the suit property to go and reside at Nyanchwa with his new wife. The plaintiff continued to reside on the suit property with her children even after the 1st defendant left. If it is true that the plaintiff and the 1st defendant are husband and wife and that they have resided on the suit property as their family home over the years and that the plaintiff is still occupying the suit property as such, then from the definition of matrimonial home that I have set out hereinabove the

- suit property qualifies as a matrimonial home.
14. For reasons which are not clear, the 1st defendant did not file any affidavit in response to the plaintiff's application. The plaintiff's contention that the suit property is her matrimonial home has therefore not been controverted by the 1st defendant with whom she claims to have resided in the suit property until the year 2007. The 2nd defendant has claimed that the plaintiff's matrimonial home is at a place called Kiamakondo. I am of the view that the persons who are better placed to know where the matrimonial home of the plaintiff is situated are either the plaintiff or the 1st defendant. When what I have is the plaintiff's word as against that of the 2nd defendant on the issue of the location of the plaintiff's matrimonial home, I would be inclined to give the plaintiff's word more weight. I am satisfied therefore that the plaintiff has proved on a prima facie basis that the suit property is her matrimonial home. The plaintiff's other contention was that the suit property was purchased for her by her brother who also constructed a permanent house thereon for her. The plaintiff has claimed therefore that she is entitled to the suit property as of right and as such the 1st defendant had no right to sell the same to the 2nd defendant.
 15. Again, the onus was upon the plaintiff to place evidence before the court in support of these allegations. The plaintiff has placed before the court a statement by the plaintiff's brother one, Hon. Zephaniah Moraro Nyangwara who is said to have purchased the suit property for the plaintiff and also proceeded to construct a permanent house thereon for her. Apart from the said statement which is not on oath, I have no other material before me in proof of the purchase of the suit property by the plaintiff's said brother. I am of the view that this is an issue that will have to be determined at the trial as what I have is the plaintiff's word as against the 2nd defendant's word. The 1st defendant who would have shed more light on the issue has chosen to remain mum. The much I can say at this stage is that the statement which has been given by the plaintiff's brother Hon. Zephania Moraro Nyangwara has not been challenged by the 1st defendant. In the said statement, Hon. Zephania Moraro Nyangwara has explained in detail his relationship with the plaintiff and the 1st defendant and how he assisted them to acquire the suit property. I am of the view that if this statement was false, the 1st defendant who sold the suit property to the 2nd defendant would have challenged the same.
 16. Due to the foregoing, I am satisfied that the plaintiff has established a prima facie case against the defendants. The plaintiff has persuaded me that the suit property is her matrimonial home and as such she has an overriding interest in the same which should be protected by an order of injunction. In view of her interest in the suit property, the plaintiff should have been consulted and her consent obtained by the 1st defendant before the property was sold and transferred to the 2nd defendant. Since the suit property was transferred to the 2nd defendant without the plaintiff's consent, the 2nd defendant's title over the suit property is subject to the plaintiff's right to occupy the suit property as her matrimonial home which right entitles the plaintiff have the sale and transfer of the suit property to the 2nd defendant set aside. On whether the plaintiff stands to suffer irreparable loss unless the order sought is granted, I am satisfied that that would be the case. The plaintiff has stated that she is in occupation of the suit property and that she has no other home. The plaintiff's occupation of the suit property was admitted by the defendant's advocate Mr. Minda in his submission. There is no doubt therefore that the plaintiff would suffer irreparable loss if the injunction sought is denied and the defendants proceed to evict her from the suit property.
 17. The plaintiff having demonstrated that she has a prima facie case against the defendants and that unless the orders sought are granted she will suffer irreparable harm, the plaintiff's application dated 30th January 2014 is well merited. I am of the opinion however that this is an appropriate case to order security as a condition for granting a temporary injunction. The 2nd defendant is the registered owner of the suit property and as such his interest in the suit property should be protected pending the hearing and determination of this suit. I am unable though to assess what would be a reasonable security to impose. I do not have any information regarding the purchase price that was paid by the 2nd defendant to the 1st defendant for the suit property.
 18. For reasons which are not clear, the 2nd defendant placed before the court neither the agreement for sale between the 2nd defendant and the 1st defendant nor the transfer that was executed by the

1st defendant in favour of the 2nd defendant. I have nothing therefore to guide me on the quantum of security to order. Doing the best I can in the circumstances, I would allow the plaintiff's application dated 30th January, 2014 in terms of prayer (3) thereof. The injunction is granted on condition that the plaintiff shall deposit in court a sum of Kenya Shillings Five Hundred Thousand (Ksh. 500,000.00) within ninety (90) days from the date hereof as a security in default of which the injunction granted herein shall stand varied automatically to the extent that the 2nd defendant shall be at liberty to deal with the suit property save for the house or building thereon which is occupied by the plaintiff as her residence. The cost of the application shall be in the cause.

Delivered, signed and dated at KISII this 11th day of July, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Okenye h/b for Sagwe for the plaintiff

N/A for the 1st and 2nd defendant

Mr. Ombasa Court Clerk.

S. OKONG'O

JUDGE