



**REPUBLIC OF KENYA**

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

**ELC NO 263 OF 2013**

**NANCY WAIRIMU NDUNGU..... PLAINTIFF/APPLICANT**

**VERSUS**

**SIMON MWANGI NDUNGU.....DEFENDANT/RESPONDENT**

**RULING**

The application for this court's consideration is the Notice of Motion dated 18<sup>th</sup> February 2013 brought under **Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules and section 3A Civil Procedure Act** seeking for orders that:-

- 1. The Honourable Court do issue a temporary injunctive order restraining the defendant/respondent whether by himself, agents, employees, workmen and /or any other person acting under his instructions from depositing building materials and/or constructing any structures in the plaintiff/applicant's Plot No 364(R374) Phase II situated in Lucky Summer Estate, Kasarani, Nairobi until the hearing and determination of this suit.***
- 2. A temporary order for injunction do issue against the defendant/respondent restraining him whether by himself, agents, employee, workmen and any other person acting under his instructions from trespassing, occupying or in any other way interfering with the plaintiff's quiet possession of her Plot No 364 (R374) Phase II situated in Lucky summer Estate, Kasarani, Nairobi until the hearing and determination of this suit.***

This application is premised on the grounds stated on the face of the plaintiff/applicant and the supporting affidavit of **Nancy Wairimu Ndungu** who stated that by a written sale agreement dated 27<sup>th</sup> April 2007 she purchased plot no 364 (R374) Phase II situate in Lucky Summer Estate within Nairobi County, from one **Simon Maina Mwangi**, who was an allottee of the said plot from Luky Summer Estate Company Limited, vide Certificate No. 0260 issued to him on 29<sup>th</sup> June 1990. That the purchase price was a sum of Kenya Shillings Four Hundred Thousand Shillings [Ksh 400,000] where she paid the full purchase price. That after the completion of the payment of the purchase price, the vendor handed to her the original allotment letter and a copy of his Identity Card. She took possession of the suit premises and started developing it by constructing three permanent rooms. It is her averment that she accommodated the defendant/respondent herein who is her brother in one of the rooms but after a while the defendant/respondent started making claims that the suit property was a family property in which he had an equal right to it. This dispute degenerated to a fight where the plaintiff's husband was attacked with a panga and that she has been physically assaulted by his brother. She therefore prays that this court grants her the orders sought by restraining the defendant/respondent from trespassing onto her property.

This application is opposed. The defendant/respondent filed his replying affidavit on 19<sup>th</sup> March

2013, stating that sometime in year 2002, the plaintiff and him agreed to purchase the suit premises jointly and they raised **Ksh 300,000/=** with each person contributing **Ksh 150,000/=**. He averred that they approached the vendor who agreed to sell them the suit property for **Ksh 400,000/=**. They later took over the suit property and jointly put up three rooms. That when he asked for the transfer a document, the plaintiff was adamant in producing them which led to a family meeting and it was resolved that the plaintiff pursue the transfer documents and subdivision process. He therefore states that he is a joint owner of the suit property and has an equitable interest of the said property urging the court to recognise the same by dismissing the application.

In reply to the defendant/respondents averment's in his replying affidavit, the plaintiff filed a further affidavit stating that the allegations made by the defendant/respondents that they jointly purchased the property was false and misleading since the transaction of the purchase of the suit property was solely between the vendor and her. That the transaction took place in 2002 and not 2007 as alleged by the defendant/respondent and the family meetings referred to by the defendant/respondent was not on the dispute of the suit property. The vendor, **Simon Maina Mwangi** also swore a supplementary supporting affidavit to the Plaintiff/Applicant stating that he sold the property to the Plaintiff/Applicant and that he had never met the Defendant/Respondent therefore the averment that there was a joint purchase of property was false.

Parties prosecuted this application by way of written submissions where the plaintiff/plaintiff/applicant reiterated the contents of her affidavit and added that she purchased the suit property on 27<sup>th</sup> April 2007 and fully paid the purchase price on 29<sup>th</sup> November 2007. The defendant/respondent filed his submissions on 6<sup>th</sup> June 2013 restating his affidavits and relied on the case of **Giella –vs- Cassman Brown**.

I have considered the pleadings; the written submissions and the authorities relied upon by the parties herein in canvassing their arguments. The issue for this court's determination is whether the plaintiff/applicant has made out a case to warrant the relief sought in her application.

In deciding whether or not to grant an injunction, courts have been guided by the consideration that unless the injunction is granted, the damage so occasioned is such that the plaintiff/applicant would not be adequately compensated by an award of damages. Secondly, the Plaintiff/applicant must show that his case has a probability of success. Thirdly, if the court is in doubt, it will decide the application on the balance of probability.

**Section 63(e) Civil Procedure Act** gives this Honourable Court power to grant orders of a temporary injunction in all cases in which it appears to it to be just and convenient to do so to restrain any person from doing acts that are contrary. The grant of a temporary injunction is invariably in the discretion of the Court. The general considerations for the granting of a temporary injunction under **Order 40 Rule 2 of the Civil Procedure Rules** are that;

1. ***“In any suit for restraining the defendant/respondent from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant/respondent from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.***
2. ***The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”***

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **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”.***

The Plaintiff/Applicant made a claim that the Defendant / Respondent has trespassed and occupied her suit Land property after she had accommodated him for some time in her suit property. It is also her claim that the defendant/respondent had invaded the suit property with construction equipment and building materials with the view of commencing construction on the suit property yet she solely purchased the said property. Applicant has shown this court how she purchased the suit property and has annexed a sale agreement which bore her name only. She has also annexed written notes showing that she had been paying the purchase price.

On the other hand the Defendant/Respondent claims that the suit property was jointly purchased by the two parties herein and that the plaintiff/applicant had been tasked with the paying of the money they both raised to the vendor. He has shown the minutes of a meeting where it illustrates that the defendant and the plaintiff has jointly purchased the property and that they had to raise funds to complete the transaction. It is therefore not clear who between the two parties is being candid to the court on whether the suit property is jointly owned by the parties herein or the suit property belongs to the plaintiff/applicant. The dispute can only be determined when the parties have been given an opportunity in the main hearing to canvass their case.

Further the plaintiff /applicant has in her supporting affidavit stated that she accommodated her brother the defendant in one of the rooms in the suit premises. The Defendant/Respondent has also acknowledged staying on the suit premises with the knowledge that he was a joint owner to the suit premises. This court believes that the plaintiff /applicant has deemed the defendant a trespasser for the reasons that the permission to stay on the suit property has expired because of the dispute. However this court notes that injunctions generally operate upon unperformed and unexecuted future, rather than past acts and a cause of action for injunction arises when a real threat of future violation of a nature is likely to continue or likely to recur. In the case of **State v. Odell, 193 Wis.2d 333 (1995)**, Court stated that,

***“..... an injunction is a prohibitive, equitable remedy issued or granted by a Court at suit of a Petitioner directed at a Respondent forbidding the respondent from doing some act which the respondent is threatening or attempting to commit or restraining a Respondent in continuance thereof, such act being unjust, inequitable or injurious to the Petitioner and not such as can be addressed by an action at law.”***

In this case the defendant/Respondent has been in occupation of the suit property with the permission of the Plaintiff/Applicant. It would therefore not be possible to injunct the Defendant/Respondent from trespassing and /or occupying the suit premises since he has been in occupation of the same. To this end this court finds that the plaintiff/applicant has not shown this court that she has a prima facie case on the 3<sup>rd</sup> prayer.

On whether the plaintiff/applicant would suffer irreparable loss, this court notes that both parties reside on the suit property and since this court is yet to establish the ownership of the property, I find that the plaintiff/ applicant has not established that she would suffer irreparable loss that cannot be atoned by damages. I am guided by the Court of Appeal case of **Devani -Vs- Bhadresa & Another [1972] EA 22** where the court held that,

***“where there is a substantial question to be investigated, the judge has a discretion and must consider the balance of convenience and the extent for which damages would be more appropriate than an injunction.”***

However, I note that the Plaintiff /applicant has shown by exhibiting photographs that the defendant/respondent has the intention of constructing structures on the suit property. The Court also notes that the defendant/Respondent is a violent person who has inflicted pain on the plaintiff/applicant

and her family as exhibited in the treatment sheets. It is therefore imperative that this court stops the defendant /respondent from his intentions of construction until the actual owner (s) of the suit property is established. For the above reasons , the Court finds that the Plaintiff/Applicant herein deserves prayers No.2 .

The upshot of the foregoing is that the Court allows the applicants Notice of Motion dated 18<sup>th</sup> February, 2013 in terms of prayer No.2.

Costs shall be in the cause.

It is so ordered

Dated, Signed and delivered this 6<sup>th</sup> day of October 2014

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

Mr Kimani holding brief Mr Muriithi for the Plaintiff/Applicant

M/s Otieno holding brief for Juma for the Defendant/Respondent

Kamau: Court Clerk

**L.N. GACHERU**

**JUDGE**