



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.312 OF 2011

JOYCE CHEPKEMOI NGENO PLAINTIFF/APPLICANT

VERSUS

SAMUEL KIPKORIR NGENO 1ST RESPONDENT

JEMORORAN CONSTRUCTION CO. 2ND RESPONDENT

AND

ORIENTAL COMMERCAL BANK LTD INTERESTED PARTY

RULING

There are two applications for determination in this matter, the one dated 24/10/2011 seek for temporary restraining orders to issue against the 2nd defendant, its agents, auctioneers and/or bailiffs, from evicting, ejecting or removing, or in any manner interfering with the applicant's quiet and peaceful occupation of her family house standing on Nakuru Municipality Block 7/608.

The applicant is married to the respondent who she states has deserted her and now lives in some unknown place. The couple is neither divorced nor judicially separated. It is the applicant's contention that although the property is registered in the respondent's name, it is actually a family plot for which she made financial contribution towards its purchase. She borrowed money from her employer (The Municipal Council of Nakuru) to enable her build the house which stands on that plot.

The respondent is described as being a strict adherent of the Kalenjin community's customs where a wife is only to be seen and not be heard. As a consequence, he decided to dispose of the family property without consulting or informing her.

Recently, the firm of TANGO AUCTIONEERS stormed into the family house and seized a motor vehicle, claiming that the house belongs to a new owner who required rent. The motor vehicle was sold on an undisclosed date, and for an undisclosed sum. On 5th October 2010, the respondent sold the house at Kshs.7,000,000/= to 2nd respondent and a copy of the same agreement is annexed. The 2nd respondent has now threatened to evict her and the children from the house and seize all her household goods, yet this is the only family house she has known.

The application is opposed and in a replying affidavit sworn by David Cheruiyot Rono, (the 2nd respondent's director) he insists that the application is simply intended to deny him possession of the

property yet when he had expressed interest in the house, it was the applicant who showed him around the house. He further contends that the applicant was informed about the proposed sale of the house in his presence and it was apparent to him, that the matter had been discussed at the family level.

As far as he is concerned the 2nd defendant complied with all the prerequisites for purchase of the property and he paid the full purchase price to the 1st respondent.

The respondent explains that he intended to use the property both for residential purposes and as an office, - currently he lives in a rented house. He confirms that the applicant and respondent have all along lived together on the property but disputes the applicant's claim that she developed the land.

He only points out that 1st respondent and the applicant have a matrimonial home in Olenguruone and 1st respondent owns other plots in Nairobi which would be used to settle any interests raised by the applicant. As for the children, they are said to be adults who reside in Australia. He sees this application as a scheme hatched by 1st respondent who has been reluctant to move out of the house. He complains that he is being denied possession, yet he has paid for the property and is having to service a loan on account of the funds used to make the purchase.

The applicant had obtained temporary restraining orders issued on 26/10/2011. On 22/11/2011, the 2nd respondent filed an application seeking restraining orders to issue against the plaintiff, (Joyce Chepkemoi), in relation to the same property. He wanted her stopped from denying him access or her trespassing on the property, on account of being the lawful owner. He urged the court to allow him the use of bailiffs or auctioneers to forcefully remove the said Joyce Chepkemoi Ngeno and that the OCs Nakuru Central Police Station be ordered to assist in enforcing the orders.

The contention in this 2nd application is that the Ngeno's rights to the property were extinguished once the sale was concluded and any other activity by the couple with regard to that property, including occupation is outright interference. This basically is the sum total of what is contained in his supporting affidavit.

In an affidavit sworn by the 1st defendant (Samwel Kipkorir Ngeno) he denies living on the suit property, saying he infact does not oppose the application made by the 2nd defendant.

He confirms that the plaintiff and her children live in the suit property, which is why he had requested for three months after full payment of the purchase price, to deliver vacant possession. Apparently he had expected complications in having the plaintiff leave the suit property, which is why he sold it at what he describes as a lower market value. It is also confirmed by the 1st defendant that he never informed the plaintiff about the sale.

Incidentally, he acknowledges that when 2nd defendant purchased the suit property, some of the payments were made with cheques drawn in the plaintiff's name, although she was not aware what the payments were for. He describes his decision to sell the suit land as stemming from the fact that he is the man of the family and his decision is final, and had no reason to consult the plaintiff. His parting shot is that as long as he is maintaining the plaintiff and her children, she has no business over his wealth.

Oriental Commercial Bank joined the matter as an interested party. Its Branch Manager challenges the plaintiff's prayers saying the property has been charged to the bank after the 2nd defendant secured a loan from the bank for its purchase.

The matter was disposed of, by way of written submissions. The uncontested issues in this matter are:

- a. The plaintiff lives in the suit property – this having been their matrimonial home.
- b. The property was registered in the 1st defendant's name.
- c. The property has been sold to the 2nd defendant by the 1st defendant.

The contested issues are:-

- a. What is the plaintiff's interest on the property – should she have been consulted before the sale/was she in fact consulted and made aware of the sale.
- b. Should she be ordered out of the property on account of the sale?
- c. Should the 2nd defendant be restrained from interfering with the property despite the sale?

What the applicants in their respective prayers need to establish are:-

1. That there is a *prima facie* case with high chances of success?
2. Damages would not adequately compensate if the orders sought are not granted – i.e. irreparable harm is likely.
3. Where does the balance of probability tilt, in the event that (1) and (2) above are not satisfied?

It is submitted on behalf of the plaintiff that being a husband and wife that the plaintiff and 1st defendant were equitable tenants in common of matrimonial property by virtue of both having contributed towards its purchase, although only the 1st defendant's name appears as the registered proprietor. Secondly, the plaintiff is in actual occupation and therefore should have her status preserved.

On account of this counsel argues that the plaintiff has established a *prima facie* case with chances of success.

The 1st defendant did not give any submissions. The 2nd defendant's counsel submits that the applicant was fully aware of the transaction and Section 27 of the Registered Land Act (RLA) and Section 28 offer the 2nd defendant refuge as the registered proprietor. Counsel argues that a wife's consent is unnecessary when the registered owner of a parcel of land is disposing off such land by sale. He refers to a High Court decision **MUCHOKI V MWANGI (2005) eKLR** which stated:-

“The terms of proprietorship as shown on the document of title include the right of alienation and if not specified that the lawful bidder is under any obligation during his or her lifetime to pay regard to any broader family preference before exercising such a right could lawfully pass onto defendant through an exclusive two party transaction involving vendor and purchaser without the intervention of broader family interests the defendant, if he acted in good faith and gave value for the suit land and lawfully got himself registered as the owner, would become the lawful proprietor of the same. . . . and his title could then not be defeated by claims founded on moral claims of the family.”

It is further contended that the plaintiff has no evidence to demonstrate that she purchased the suit property. In this regard, he refers to the decision in **MUNIU V ITOTIA (1984) KLR** where a wife claimed to have contributed half the purchase price but it was agreed that the suit property be registered in the name of the husband only. Further the wife had been in occupation and brought about development on the land including a semi-permanent house.

It is argued that there is no evidence as regards the plaintiff's source of money to even justify her claims of having contributed towards the purchase.

He urges this court to find that the plaintiff's continued occupation of the premises amounts to trespass. It is argued that the special circumstances relating to this matter dictate that this court grants the mandatory orders the 2nd defendant is seeking.

It was submitted on behalf of the Interested Party that the plaintiff has not come to court with clean hands as she had concealed to this court that she was actually aware of the sale. In any event she has not established her legal rights over the property as she is neither the registered owner nor the chargor, so the remedy of an interlocutory injunction is not available to her, and the Interested Party cannot be restrained

from exercising its statutory duties as a charge.

It is acknowledged that the plaintiff has a registrable interest, but this interest had to be registered when it was still matrimonial property and in the absence of that, then the Interested Party would not have been aware that it was matrimonial property. In light of this, it is argued the plaintiff can no longer exercise the right in disregard to the Interested Party's interest in the property and the orders sought are not available.

Has a *prima facie case* with probability of success been established? All parties seem to acknowledge that this was matrimonial property, but it was registered in the 1st defendant's name. The plaintiff has raised issues regarding contribution towards the purchase, and spousal rights over matrimonial property.

The 1st defendant has also acknowledged that he disposed off the property without consulting the plaintiff.

The plaintiff raises a very pertinent question as regards her constitutional rights in the marriage and therefore her right to the matrimonial property – refer to **Article 45(3)** of the **Constitution of Kenya**.

There is also the issue of her consent or consultation being taken into account before the sale was conducted. 1st defendant confirmed he did not consult her. Furthermore she claims to have contributed to the purchase of property, and to me is under range of case law dealing with the issue of contribution to matrimonial property by a spouse who is not registered as proprietor.

In my view she has established a *prima facie case* with probability of success.

Secondly from the contested issues that I have alluded to, would damages be adequate compensation for the plaintiff in the event that the 2nd defendant is allowed to evict her from the premises. She has indicated that she works in Nakuru, and she lives in that house which is within Nakuru. If she is evicted then the damage is likely to be irreparable – not just in terms of emotional stress involving loss of a house she has lived in and whose purchase and development she claims to have made substantial contribution to, but the fact that if her claim was to succeed, she would have been exposed to such trauma and inconvenience, having to look for alternative accommodation, and the suggestion that since she has another house in Olenguruone then that should cushion her loss is unrealistic. Olenguruone is about 100km from Nakuru Town.

On the other hand what the 2nd defendant has done is to obtain a loan, which he has to service. The property has been charged to the bank, which means if the process stalls, then he is likely to default in his repayment and the bank would then have to recover the money loaned to him through other probably unpalatable process. Whereas *prima facie* the 2nd defendant has established that he has purchased the property, and therefore has a good case, this must be weighed against the plaintiff's claim, and which would then demand that the court considers the second principle – which is whether damage would be adequate compensation.

The most likely step would be for the bank to sell the charged property, but that would not happen if the court restrains the 2nd defendant from taking possession of the property, and this is why the bank (as an interested party) says its interests would be prejudiced. However not all doors are closed to the 2nd defendant because it would seek restraining orders against the bank and in fact damages would adequately compensate him because what has paid is quantifiable, what he has obtained from the bank is also quantifiable, and in my view damages would be calculated to the last coin and adequately compensate the 2nd defendant. He has not yet moved out of the rental premises he occupied.

Thirdly, even if I am wrong on the 2nd limb, then if one looks at the balance of convenience, surely the scale tilts heavily in favour of the plaintiff who is in occupation of the premises – were her claim to succeed when she has already been evicted, then the inconvenience would be tenfold, moving out,

seeking alternative accommodation, then moving back and probably by that time, the 2nd defendant will have effected some structural changes on the property, seeing as he has stated that he wishes to use the property both for residential and office purposes.

The converse applies to the 2nd defendant – it has not moved out of its operational base, and is not in occupation. The balance is in favour of the plaintiff. Consequently the plaintiff's application dated 21/10/2011 is allowed – the restraining orders do issue against the respondents and remain in force until the matter is heard and determined.

The application dated 22/11/2011 is dismissed. Each party shall bear its own costs.

Delivered and dated this 2nd day of May, 2013 at Nakuru.

H.A OMONDI

JUDGE

M.A. EMUKULE

JUDGE

Miss Ayuma holding brief for Mr. Kahiga

Mr. Karanja Mbugua present