



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 332 of 2012

GRACE WANJA NJUGUNAPLAINTIFF/APPLICANT

VERSUS

ANDREW KINGORI.....DEFENDANT/RESPONDENT

RULING

1. Before me is a Notice of Motion dated 12/6/12 under Section 3 A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 50 Rule 1, Order 40 Rules 1, and 2 of the Civil Procedure Rules and the inherent powers of the Court, seeking the following orders:-

i. That pending the hearing and determination of the suit herein, the respondents, by themselves, their servants, agents or otherwise howsoever be temporarily restrained from trespassing onto the plaintiff matrimonial home without just cause, threatening to unlawfully evict the plaintiff/applicant from her matrimonial home, threatening to dispossess the applicant of her matrimonial home through harassment, intimidation, and outright fraud and also interfering with the quiet and peaceable enjoyment, possession and occupation of the applicant's property on plots Nos. 29 and 30 Njiru Githunguri farm plot certificates numbers L.R. No. 6845/147B.

ii. That the costs of this application be awarded to the applicants.

The application is based on the following grounds:-

i. That on or around the year 2003, the plaintiff/applicant and one Josphat Keya Nyangi got married under Kikuyu customary Law.

ii. That on or around 11th May 2005 the plaintiff/applicant and the said Josphat Keya Nyangi formalized their marriage Act Cap 150 and was issued with a certificate of marriage Number 121567. Out of the said marriage the plaintiff/applicant was blessed with two issues of the marriage being Isaac Smith born on the 9th of April, 2004 and Levis Keya born on 13th August, 2010

iii. That during the course of the said marriage the plaintiff/applicant together with her husband purchased and developed their matrimonial home at plot nos. 29 and 30 Njiru Githunguri farm from Urutagwo Mwiritu Women Group and were issued with plot certificates numbers LR No. 6845/147B and 6845/147B respectively.

iv. That the two plots above are registered in the names of the plaintiffs/applicants husband Josphat Keya Nyangi though they bought and developed the same jointly.

v. That towards the end of May, 2012 the plaintiff's/Applicant's husband left the country to Comoros Island without her knowledge and/or information.

vi. That on 31st May, 2012 and other subsequent dates the defendant/respondent trespassed and have threatened to continue trespassing onto the plaintiff's/Applicant's matrimonial home without a just cause.

vii. That on 31st May 2012, the defendant/respondent broke into the plaintiff's/Applicant's house and therein caused destruction of the plaintiff's/Applicant's household items. The defendant/respondent left and threatened the plaintiff/applicant that he will again visit the plaintiff's/Applicant's matrimonial home and evict her unlawfully.

viii. That the plaintiff/applicant is apprehensive that the defendant/respondent being aware that the plaintiff's/Applicant's husband is out of the country, the defendant/respondent intends to dispossess the plaintiff/applicant of her matrimonial home through harassment, intimidation and outright fraud.

ix. That the plaintiff/applicant's claim against the defendant/respondent is for an injunction restraining the defendant/respondent from trespassing onto or in any way interfering with the plaintiff's/applicant's quiet possession of her properties.

x. That due to the aforesaid breach, the plaintiff/applicant has suffered loss and damages which she now claims from the defendant/respondent.

xi. That the ends of justice demands that an injunction be issued to protect the rights of the applicant from being infringed which may result to an irreparable damage as the defendant/respondent seeks to deprive her and the issues of marriage of their matrimonial home.

2. The plaintiff applicant filed a supporting affidavit dated 12th June 2012. In it she avers that in May 2005 she married Joshat Keya Nyangi and during the course of their marriage they developed a matrimonial Home at plot No. 29 and 30 Njiru Githunguri farm which they bought from Urutagwo Mwiruti Women Group and were issued with plot certificates numbers, L.R No. 6845/147B and 6845/147B (GWN2) respectively. The two plots were registered in her husband's name and they developed the same jointly. In May 2012 her husband left the country to the Comoros Island without her knowledge. On the 31st of May the defendant broke into her house and caused destruction of her household items and threatened her that he would return and evict her. She is apprehensive that the defendant being aware that her husband is out of the country intends to dispossess her of the matrimonial home through harassment, intimidation and fraud. She therefore seeks an injunction to restrain the defendant from trespassing or interfering with her quiet possession of her properties. She states she will suffer loss and damages and that the injunction should be issued to protect her rights from being infringed by the defendant who seeks to deprive her of their matrimonial home.

3. The defendant filed a replying affidavit dated 27th of June 2012 in response to the applicant's affidavit. In it he avers that he entered into a sale agreement with Joshat Keya Nyangi on the 15th of August 2011 to purchase piece of Land known as C No. L.R No. 6845/147B plot No. 29 measuring in total (60X40) or thereabouts and all that piece of land known as C NO. L R. No. 6845/147B Plot No. 30. He paid Joshat N. Keya 300,000/- on the 15th of August 2011 and a further 450,000/- was paid by Peter Njuguna on the 2nd of September 2011 to Joshat Keya. Joshat Keya acknowledged payment of the final purchase price of the two plots on the 2nd of September 2011. He obtained an official receipt from Urutagwo Mwiruti Women Group plot No. 30 after he paid 20,000/-. He also obtained a certificate ownership for plots No. 29 and 30 of the said group on the 5th of September 2011. He avers further that these two plots were excised from the larger piece of land registered in the name of Urutagwo Mwiruti Women Group. He later transferred plot No.29 to Peter Njuguna and remained the registered owner of plot No. 30. That the applicant's averments that she bought the plot with her husband are not true. He also denies that the applicant and her husband had their matrimonial home in the said plots. He avers that the applicant was evicted from where she used to stay for failing to pay rent and on the 1st June 2012 she

went to his plot broke into the store and place her items on the said structure. He went to his plot and removed her property and it is thereafter that the applicant went to Ruai police station and gave a false report that he had broken into her matrimonial home and stole her items. He was arrested and was released when the police discovered that the parcel of land had been transferred to him. He avers further that it is the applicant who is trying to use the policemen to intimidate, threaten and infringe his proprietor rights on the said land and that he is not out to trespass on her land or interfere with her acquired possession.

4. Counsels made oral submissions in Court which I have considered together with what is deponed in the affidavits. Mr. Koceyo submitted that the applicant has a prima facie case as the suit land was jointly purchased by the applicant and her husband from Women's Group and developed and they lived there from 2004 to date. That in law a matrimonial home belongs to both parties in equal measure and under the new constitution they have equal rights to matrimonial property. That under section 28 of the Land Registration Act, a spouse interest is an overriding interest on the two pieces of land. That the applicant's husband attempted to sale the plot to the defendant in August 2011 when the applicant was staying in the property of which the defendant was aware. That under section 93 of the Land Registration Act the property still belongs to the plaintiff. He pointed out that the title had not been issued and that the defendant/respondent is not a registered owner and has no legal or equitable interest and that he can only his money from the plaintiff husband. He emphasize that the plaintiff is in possession and that she has established a prima facie case with a probability of success and that the damages cannot compensate her for loss of matrimonial property and that the balance of convenience tilts in her favour.

5. M/s Sang for the respondents submitted that the applicant has failed to meet the principles in the case of **Geilla Vs. Cassman Brown** on injunctions. That she has not shown the irreparable loss she will suffer if the orders are not granted. That the defendant bought plots from Josphat Keya and he has transferred plot 29 to Peter Njuguna. That it is the applicant who trespassed into the property as deponed and she is still being investigated. That the application should be dismissed. Counsel cited two cases the case of **Geilla Vs. Cassman Brown 1973 EA** on the principles of injunction and the case of Mary Wangui Kariithi Vs. Faith Ruguru Ikiaio where Justice Sitati applied the said principles.

6. The applicant seeks injunctive orders. In order to be entitled to the injunction the applicant has to establish that she has a prima facie case with a probability of success, she will suffer irreparable loss if the orders are not granted and that the Court will decide on the balance of convenience on weighing the facts of the case.

7. The applicant's case is that she bought the said plots together with her husband and that it is their matrimonial home. Although she claims this she has failed to demonstrate the same. In the respondent affidavit he claims the applicant is the one who invaded the premises after he had purchased it. This fact was not challenged by the applicant at all. Could it be that she actually moved her property into the store as alleged by the respondent? The applicant ought to have responded to this fact and also the fact that it was alleged that she gave a false report to the police. The respondent has exhibited a letter from the OCS to show that the police investigated her complaint and found that there was evidence to charge the defendant. Could it be that the applicant wants to fix the respondent? I agree with the applicant's counsel's submission that the applicant as a spouse has overriding interest over matrimonial property but in this case the applicant has failed to establish that this is their matrimonial home. It is evident that the plots were in her husband's name who disposed of them. It is also evident from the defendant's affidavit that he has disposed of plot No. 29 to Peter Njuguna who is not a party in this suit. The applicant has failed to show that this was a matrimonial home and therefore her argument that she will irreparable damages is unpersuasive. The balance of convenience tilts in favour of the respondent who purchased properties from one Josphat Keya. I therefore decline to grant the orders sought and dismiss the application with costs.

Orders accordingly.

Dated, signed and delivered this 6th Day of November 2012.

R. OUGO

JUDGE

.....Plaintiff/Applicant
.....Defendant/Respondent
.....Court Clerk