



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.704 OF 2017

INM.....PLAINTIFF/APPLICANT

VERSUS

FM.....DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant has sought for injunctive orders against the Defendant/Respondent to restrain him from disposing off, selling, transferring and/or in any manner interfering with the suit property **No.xxxx at Kahawa Sukari**, pending the hearing and determination of the suit.

The Plaintiff/Applicant has alleged that the above named suit property is a Matrimonial property where the matrimonial home is built and the Defendant/Respondent intends to sell and/or dispose off the same. However, the Defendant/Respondent has averred that though he was married to the Plaintiff in **1978**, they have been separated since **1994**, and the suit property herein is not a Matrimonial property, as he purchased the same solely without the input of the Plaintiff. He also denied that he intends to sell and/or transfer the said property as that is his only source of income. Further, that's all his children are grown up and do not depend on the suit property for their upkeep.

The Plaintiff/Applicant has alleged that the Defendant/Respondent intends to sell and/or dispose off the suit property. However, there was no evidence adduced to confirm that there is an impending sale of the suit property.

Further, the Plaintiff/Applicant has alleged that the suit property is a Matrimonial home and if the same is sold, then the Plaintiff/Applicant and her children will suffer irreparable loss. However, the Defendant/

Respondent has alleged that this is not a Matrimonial home since the two separated in the **year 1994**, and this property is occupied by tenants and one of his sons. Further, that the issues of their marriage are all grown up and do not rely on him for upkeep.

The issues raised by parties herein cannot be canvassed at this interlocutory stage. Evidence needs to be called to confirm if indeed the Defendant intends to sell the suit property, whether the Plaintiff/Applicant has lived apart or alone for the last **25 years** and whether the suit property herein is a Matrimonial property or not. The Court at this interlocutory stage is not called upon to determine disputed issues especially given that what is available is only affidavit evidence. I will be guided by the case of **Edwin Kamau Muniu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”

Further, the Defendant/Respondent has alleged that the Plaintiff/Applicant has not been living on the suit property. The suit property is quantifiable and its value can be ascertained. If Plaintiff/Applicant has not been living on the suit property, then she will not suffer any irreparable loss which cannot be compensated by an award of damages. I will be guided by the case of **Wairimu Mureithi...Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322**, where the Court held that:-

“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.

Since the court is in doubt as to whether the suit herein is Matrimonial property or not and whether the Defendant/Respondent intends to sell it or not, then the Court will decide the application herein on a balance of convenience. The balance of convenience therefore tilts in favour of the Defendant/Respondent who has alleged that he has been renting out the suit property and is only preparing to renovate it due to wear and tear caused by effluxion of time.

The Court therefore finds no reasons to grant any injunctive or restraining orders which orders are granted at the discretion of court and which discretion must be exercised judicially as was held in the case of Nyutu & Others...Vs...Gatheru & Others (1990) KLR 554, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised”.

Having now considered the available evidence, the Court finds that the Plaintiff/Applicant herein has failed to establish any of the principles set out in the case of Giella....Vs...Cassman Brown Co. Ltd 1973 EA at 358. These principles:-

- i. Applicant must establish a prima-facie case with probability of success.***
- ii. Demonstrate irreparable injury which cannot be compensated by damages.***
- iii. If court is in doubt to decide on a balance of convenience.***

Consequently, the Court finds that the **Notice of Motion** application dated **14th August 2017, is not merited**. The same is dismissed entirely with costs to the Defendant/Respondent.

For avoidance of doubt, any Conservatory or Interim Orders in place are hereby vacated.

It is so ordered.

Dated, Signed and Delivered at Thika this 27th day of March 2019.

L. GACHERU

JUDGE

27/3/2019

In the presence of

M/S Ochieng holding brief for M/S Waithira Mwangi for the Defendant/Respondent

M/S Cheserek holding brief for M/S Kabata for the Plaintiff/Applicant

Lucy - Court Assistant

L. GACHERU

JUDGE

27/3/2019