



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 252 OF 2017

FRANK DONATH.....PLAINTIFF/APPLICANT

AND

LYDIA GACHIUKI MURIUNGI.....DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion application dated and filed herein on 21st December 2017. By the said application Frank Donath the Plaintiff herein prays for orders framed as follows:-

4. That upon inter-partes hearing, this Honourable Court be pleased(to) issue temporary mandatory injunctive orders restraining the Defendant/Respondent by herself, her agents, servants, representatives, relatives or any other person claiming under her from gaining access, entering, occupying, staying, living or from adversely with (sic) the Plaintiff's/Applicant residential permanent house standing on Plot No. R91 Wiyoni Phase 1 situated at Wiyoni Area in Lamu Island within Lamu County pending the hearing and determination and final disposal of the suit herein.

5. That upon inter-partes hearing, this Honourable Court be further pleased to issue a temporary order of preservation to preserve all that permanent residential house standing on Plot No. R91 Wiyoni Phase 1 situated at Wiyoni Area in Lamu Island within Lamu County from being wasted, damaged, sold, transferred, alienated pending the hearing, determination and final disposal of the suit herein.

2. The said application is supported by an Affidavit sworn by the Plaintiff and is premised on the grounds:-

i) That the Plaintiff is the sole owner of the said residential house;

ii) That Lydia Gachiuki Muriungi, the Defendant/Respondent has been the Plaintiff's girlfriend but the relationship has since broken down;

iii) That the Plaintiff built the said residential house during the time of their relationship with the Defendant but the Defendant did not contribute a single cent for the purchase of the Plot and/or construction of the house;

iv) That the Defendant is now maliciously claiming joint ownership of the said residential house purporting the same to be matrimonial property and has now forcefully occupied the same with her friends and family members thereby forcing out the Plaintiff therefrom;

v) That the acts of the Defendant amount to a malicious attempt to arbitrarily deprive the Plaintiff of his property and it is in the interest of justice that this Court intervenes to safeguard the Plaintiff's rights.

3. On 8th February 2018, two law firms separately came on record for the Defendant. On that day Messrs Gekanana & Company Advocates filed a Memorandum of Appearance dated 7th February 2018 while Messrs Aboubakar, Mwanakitina & Company Advocates filed a Notice of Appointment. As it turned out and after being granted a period of time to enable them sort out the issue of representation, the Defendant did not file any response to the application.

4. I have considered the Plaintiff's application and the submissions of Mr. Omwancha Advocate, Learned Counsel for the Plaintiff.

5. It is the Plaintiff's case that he is the sole proprietor of the residential plot built on a plot of land measuring 30 x 60 feet described as Plot No. R. 91 Wiyoni Phase 1 within Lamu Island. The Plaintiff avers that he purchased the said Plot from one Mbaraki Omar Slim at a consideration of Kshs 900,000/-. In support of this position, the Plaintiff has attached a Sale Agreement dated 26th September 2014 as annexure 'FD-3' to his supporting affidavit.

6. The Plaintiff has further annexed documents from the County Government of Lamu showing the formal procedures of approval he went through before he was allowed to construct the said house on that plot of land. In addition he has annexed a statement from his account held at Diamond Trust Bank Lamu indicating withdrawals made to finance the construction of the house.

7. The principles governing the grant of an order for injunctions were long stated in the celebrated case of ***Giella –vs- Cassman Brown (1973) EA 358***. First, the Applicant must demonstrate that he has a prima facie case with a probability of success at the trial. Secondly, a party must demonstrate that he or she is likely to suffer irreparable loss or damages which may not be sufficiently compensated by an award of damages. Thirdly, where the Court is in doubt it may decide the matter on a balance of convenience.

8. In ***Mrao Ltd –vs- First American Bank Kenya Ltd & 2 Others(2003) KLR 125***, the Court of Appeal defined a prima facie case as follows:-

“..in civil cases 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.”

9. On the material placed before me, I am satisfied that the Plaintiff purchased the Plot of land and constructed the residential house which is the subject matter herein. He accuses the Defendant of entering the house as his girlfriend and thereafter claiming a stake therein as a co-owner after their relationship broke down. The Defendant did not file a response to the Plaintiff’s claim and his assertions therefore remain uncontroverted.

10. In the circumstances, I am satisfied on the material presented before me that the Plaintiff’s right to his property has been infringed by the actions of the Defendant. Accordingly I find merit in the application dated 21st December 2017. I allow the same with costs to the Plaintiff.

Dated, signed and delivered at Malindi this 14th day of March, 2019.

J.O. OLOLA

JUDGE