



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 306 OF 2017

Z A.....PLAINTIFF

VERSUS

ROBINSON OTOCH OCHARO.....1ST DEFENDANT

M M A 2ND DEFENDANT

NAKURU COUNTY LAND REGISTRAR... 3RD DEFENDANT

RULING

(An application for injunction to restrain the defendants from alienating or interfering with suit properties; plaintiff and the 2nd defendant are husband and wife and they resided on suit properties; the 2nd defendant transferred suit properties to the 1st defendant without plaintiff's consent; court holds that the suit properties constitute matrimonial property; application allowed)

1. The plaintiff herein and the 2nd defendant are husband and wife. According to the 2nd defendant, they are separated. The plaintiff filed this suit on 20th July 2017. On the same date he filed Notice of Motion dated 19th July 2017. This ruling is in respect of the said application.

2. The application is brought under Order 40 rules 1, 2 and 3 of the Civil Procedure Rules and seeks the following orders:

1. Spent.

2. Spent.

3. Spent.

4. That this honourable court do issue an order by way of an injunction restraining the 1st and 2nd respondents from entering and staying therein, wasting, selling, damaging, transfer, alienating or in any other way interfering with parcel of land namely Dundori/Lanet Block 5/[particulars withheld] (New Gakoe) and Dundori/Lanet Block 5/[particulars withheld] pending the hearing and determination of this suit.

5. That the costs of this application be provided for.

3. The application is supported by an affidavit sworn by the plaintiff wherein he deposed that he bought

the two parcels of land Dundori/Lanet Block 5/[particulars withheld] (New Gakoe) and Dundori/Lanet Block 5/[particulars withheld] (New Gakoe), the suit properties. The plaintiff and the 2nd defendant agreed that the suit properties be registered in the name of the 2nd defendant. The plaintiff then obtained a loan from Harambee Sacco Society Ltd and used the proceeds to construct a matrimonial home on the suit properties.

4. The plaintiff accuses the defendants of conspiring to transfer ownership of the suit properties without the plaintiffs' consent. The plaintiff did a search and realized that Dundori/Lanet Block 5/[particulars withheld] (New Gakoe) has been transferred to the 1st defendant. The plaintiff thus seeks an injunction as prayed in the notice of motion. He annexed copies of his pay slip for June 2016 and statement of account from Harambee Sacco Society Ltd.

5. The 1st and 2nd defendants opposed the application through a replying affidavit sworn by the 2nd defendant. She confirms that she is married to the plaintiff but adds that they are separated. She is employed by Teachers Service Commissions as a teacher and therefore earns a salary which enabled her to purchase the suit properties.

6. The 2nd defendant denied that the suit properties belong to the plaintiff. According to her, she bought the parcels on 14th December 1996 through Umoja Two Self Help Group Sacco. She denied that the home on the suit properties was constructed through a loan taken by the plaintiff. She concluded by stating that the suit properties are now registered in the name of the 1st defendant. She annexed copies of title deeds for both properties as at 22nd November 2016 and 11th November 2016 among other documents.

7. The application does not target the 3rd defendant and the 3rd defendant did not file any response or participate in its hearing.

8. The application was argued by written submissions. The plaintiff's submissions were filed on 8th December 2017 while the 1st and 2nd defendants' submissions were filed on 15th January 2018. I have considered the application, the affidavits filed and the submissions. This being an application for an interlocutory injunction, for the application to succeed the applicant must establish a prima facie case with a probability of success. If no prima facie case is established the application fails. Beyond establishing a prima facie case, the applicant must show that he will suffer irreparable damage if an injunction is not granted. Lastly, if the court is in doubt as to whether there will be irreparable damage then the court should determine the application on a balance of convenience. These principles set down in the well-known case of **Giella v. Cassman Brown & Co. Ltd [1973] EA 358** and were recently restated by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR.**

9. The plaintiff and 2nd defendant admit being husband and wife. They were married as at the time when the suit properties were acquired and registered in the name of the 2nd defendant on 13th July 2009. Though the plaintiff insists that he bought the two parcels and even obtained a loan to construct the matrimonial home on it, the 2nd defendant denies all this and asserts that she bought the plots and developed them from her own earnings. These disputed aspects of the case will be resolved at the trial of the suit. For now, I find it adequate to proceed on the basis of the non-contested aspects.

10. The suit properties were used as a matrimonial home by the plaintiff and the 2nd defendant. Indeed, at paragraph 12 of the replying affidavit, the 2nd defendant deposed among others that the plaintiff "left hurriedly at night on the 13th September 2015 at 11pm." This lends credence to the plaintiff's version that there was a matrimonial home on the suit properties. A "matrimonial home" is defined at **section 2 of Land Act, 2012** to mean

any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.

A similar definition is found in the **Matrimonial Property Act, 2013** save that “any other attached property” is also included in the definition.

11. I have perused the copies of title deed annexed by the plaintiff and the 2nd defendant and I note that Dundori/Lanet Block 5/[particulars withheld] (New Gakoe) was registered in the name of the 2nd defendant until 11th November 2016 when the 1st defendant became the registered proprietor. Similarly, Dundori/Lanet Block 5/[particulars withheld] (New Gakoe) was registered in the name of the 2nd defendant until 22nd November 2016 when the 1st defendant became registered owner.

12. The plaintiff states that he was not consulted prior to the properties being transferred to the 1st defendant. The 2nd defendant seems to take the view that as registered owner she did not need to consult the plaintiff. **Section 7** of the **Matrimonial Property Act, 2013** states:

7. Ownership of matrimonial property

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

13. It follows therefore that the plaintiff had an interest in the suit properties. The transfer of the properties without his consent may be held by the trial to constitute an infringement of his rights. The extent and consequences of the infringement remain the province of the trial court to determine.

14. The phrase *prima facie* case was defined by Bosire JA in the Court of Appeal case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** as follows:

So what is a prima facie case? I would say that in civil cases it is a case in 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.

..... a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.

15. From the foregoing discussion, I am satisfied that the plaintiff has shown that that he has a right over the two parcels of land known as Dundori/Lanet Block 5/[particulars withheld] (New Gakoe) and Dundori/Lanet Block 5/[particulars withheld] (New Gakoe) and that the said right has apparently been infringed by the 1st and 2nd defendants. Consequently, the plaintiff has established a prima facie case with a probability of success.

16. As regards whether or not the plaintiff will suffer irreparable damage, I note that the subject matter of the suit is the two parcels of land. Though land can be valued and sold, the reality in Kenya is that land is a unique commodity whose loss cannot always be fully quantified and compensated. This is more so in a situation such as the present one where the land is matrimonial property and where the plaintiff did not himself seek to commercialize it by for example selling or pledging it as security.

17. In the end, I grant an injunction restraining the 1st and 2nd defendants from selling, transferring, alienating or in any other way making any dispositions in respect of Dundori/Lanet Block 5/[particulars withheld] (New Gakoe) and Dundori/Lanet Block 5/[particulars withheld] (New Gakoe) pending hearing and determination of this suit. Costs to the plaintiff.

18. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 31st day of January 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Bore holding brief for Mr. Gekonga for the plaintiff/applicant

No appearance for the defendants

Court Assistant: Gichaba