



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 529 OF 2016

B J KPLAINTIFF

VERSUS

A K N1ST DEFENDANT

NAKURU DISTRICT LAND.....2ND DEFENDANT

S O M.....3RD DEFENDANT

RULING

1. The plaintiff herein filed this suit on 28th November 2016. Simultaneously with the plaint, she filed Notice of Motion dated 28th November 2016 seeking the following prayers:

1. Spent.

2. Spent.

3. That the honourable court be pleased to issue a temporary injunction restraining the 1st and 3rd defendants/respondents, their servants and/or agents from remaining on, from entering or from wasting, damaging, alienating, sub-dividing, from disposing, from mortgaging, from charging, from constructing thereon, from evicting the plaintiff and/or in any other manner, from dealing with all that parcel of land known as Njoro/Ngata Block 7/762 (Chumo) pending the hearing and determination of this suit and/or until further orders of the honourable court.

4. That the OCS Kaptembwa Police Station and OCPD Nakuru shall oversee the execution of this order and ensure that peace and order prevails on the property.

5. That costs of the application be provided for.

2. The application is supported by two affidavits sworn by the plaintiff: a supporting affidavit sworn on 28th November 2016 and a supplementary affidavit sworn on 11th May 2017. The plaintiff states that she is the 1st defendant's wife and that the parcel of land known as **Njoro/Ngata Block [particulars withheld]**, the suit property, though initially registered in the name of the 1st defendant was matrimonial property since it was acquired through the combined efforts of the plaintiff and the 1st defendant. The plaintiff's contribution was from her salary which she earned as a teacher. She annexed as "BJK1b" a copy of a letter from 1st defendant's advocates dated 4th July 2012 wherein it is acknowledged that she contributed to the acquisition of the property. She further annexed as "BJK7" a copy of a petition for divorce which the 1st defendant filed against her in **Nakuru Chief Magistrate's Court Matrimonial Divorce Cause No. 61 of 2012** on 29th November 2012.

3. The plaintiff further deposed that the 1st defendant transferred the suit property to the 3rd defendant on 11th August 2015 without her consent. That the 3rd defendant is now seeking to evict her from the property. Accordingly, she urged the court to grant the orders sought.

4. The 3rd defendant opposed the application through a replying affidavits filed on 11th January 2017. He deposed that he bought the suit property from the 1st defendant on 6th March 2014 at a consideration of KShs. 1,400,000/= and that it was subsequently registered in his name on 11th August 2015. He added that he has had to file Nakuru ELC No. 260 of 2016 against the plaintiff seeking eviction orders. He annexed a copy of a sale agreement and the title deed.

5. The 1st defendant on his part responded to the application through a replying affidavit filed on 13th February 2017. He confirmed that he

was the registered owner of the suit property and stated that the plaintiff was not his wife but a girlfriend who he co-habited with. He added that the plaintiff only contributed partially to the development of the property. He confirmed that he sold the property to the 3rd defendant and that the property is now registered in the 3rd defendant's name. He further deposed that there was an agreement on 19th November 2016 that the proceeds of the sale of the suit property be shared equally at KShs. 700,000/= each between him and the plaintiff but the plaintiff instead filed this case. He also confirmed that he filed the divorce petition referred to by the plaintiff but added that he withdrew it.

6. The 2nd defendant did not file anything and did not participate in the hearing of the application.

7. The application was argued by way of written submissions. The applicant filed submissions on 19th August 2017 while the 1st defendant filed submissions on 6th November 2017. The 3rd defendant did not file any submissions. I have considered the application, the affidavits filed the submissions and the authorities cited.

8. In an application for an interlocutory injunction, the applicant must establish a prima facie case with a probability of success. Even where a prima facie case is established, an injunction ought not to issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers to the above two tests then the court should determine the matter on a balance of convenience. These principles were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. Recently in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal further elaborated the test by stating that all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

9. From the material placed before the court it is not in dispute that the 1st defendant was the registered proprietor of the suit property until 11th August 2015. Though the 1st defendant has denied that he was married to the plaintiff, he admits that he filed a petition for divorce against her on 29th November 2012. I note from the copy of the petition which was annexed by the plaintiff as “BJK7” that he states at paragraph 3 thereof that he and the plaintiff were married in June 2003 under Kisii Customary Law. In the circumstances, I accept the plaintiff's argument that they were married. I also note that at paragraph 4 of the petition he states that he and the plaintiff acquired the suit property during the marriage. The plaintiff's evidence is that she still occupies the suit property. This is confirmed by the 3rd defendant who admits seeking to evict her through Nakuru ELC No. 260 of 2016. The 3rd defendant has however not told the court the status of the said case. His silence on the matter suggests that he has not obtained any eviction orders.

10. Section 7 of the **Matrimonial Property Act** 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.

11. Indeed, section 93 of the **Land Registration Act** makes further clarifies the matter when it states as follows:

93. Co-ownership and other relationships between spouses Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.

12. Though the suit property is now registered in the name of the 3rd defendant, it is clear that the plaintiff had an interest in it and that its transfer without her consent was a violation of her rights. The plaintiff has made a case for preservation of the suit property. She has established a prima facie case with a probability of success. In view of the unique nature of land and in particular matrimonial property, I do not consider that damages will be an adequate remedy. I say so further in view of the fact that the 1st defendant states that he withdrew the divorce petition. Therefore, there are compelling reasons to preserve the property.

13. In the end, I grant an injunction restraining the 1st and 3rd defendants/respondents, their servants and/or agents from alienating, subdividing, disposing, mortgaging, charging, constructing upon, evicting the plaintiff and/or in any other manner interfering with the plaintiff's occupation of land known as **Njoro/Ngata Block [particulars withheld]** pending the hearing and determination of this suit.

14. Costs to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 28th day of February 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Langat holding brief for Mr. Arusei for the plaintiff/applicant

Ms. Moenga for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Mr. Machage for the 3rd defendant/respondent

Court Assistant: Gichaba/Lotkomoi