



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO 253 OF 2017**

**PATRICK ROY ONYINSI.....PLAINTIFF/APPLICANT**

**-VS-**

**ROSE VUGUSTA LUNDA....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**TYSON NGANYI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Application under consideration is the Notice of Motion 11<sup>th</sup> July 2017 in which the Plaintiff/Applicant is seeking the following orders: -

**1. THAT this Application be certified as urgent and heard ex-parte at the first instance.**

**2. THAT this Honourable Court be pleased to grant a Temporary Injunction restraining the Defendants whether by itself, its servants or agents and/or otherwise whomsoever from encroaching on all that unsurveyed parcel of land measuring 100 x 50 feet situated at Utange within Mombasa County or interfering and/or intermeddling with the said property pending the hearing and determination of this Suit.**

**3. THAT this Honourable Court be pleased to grant an interlocutory mandatory injunction to compel the Defendants to demolish any structure constructed in the said parcel of land.**

**4. THAT any other or further or better relief that this Honourable Court may deem fit and just and convenient to grant in the circumstance.**

**5. THAT the costs of this Application be provided for.**

2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of Patrick Roy Onyinsi, the Plaintiff sworn on 11<sup>th</sup> July, 2017 and a further Affidavit sworn on 2<sup>nd</sup> October 2017. Briefly the Applicant avers that he is the beneficial owner of all that unsurveyed parcel of land measuring 100 x 50 feet situated at Utange within Mombasa County (herewith the suit property) having purchased it from one Kahindi Chengo Kombe at a price of Kshs.170,000.00 and constructed a matrimonial home where he resided with his estranged wife, the 1<sup>st</sup> Defendant herein. He states that the 1<sup>st</sup> Defendant without his knowledge and/or consent disposed off the suit property to the 2<sup>nd</sup> Defendant who has encroached on the Suit Property and is threatening to demolish the Plaintiff's matrimonial house. He further states that he has reported the Defendants unlawful actions to the police but is apprehensive that unless the injunctive orders are granted, the Defendants will continue with the encroachment as the 2<sup>nd</sup> Defendant has reconstructed the house standing thereon.

3. The Application is opposed by the Defendants with the 1<sup>st</sup> Defendant filing a Replying Affidavit sworn by herself on 15<sup>th</sup> August 2017 in which she deposes that she bought the Suit Property from one Kahindi Chengo Kombe for Kshs.170,000.00. The 1<sup>st</sup> Defendant denied being legally married to the Plaintiff and further denied that the house she sold to the 2<sup>nd</sup> Defendant was their matrimonial house. On his part, the 2<sup>nd</sup> Defendant filed a Replying Affidavit dated 15<sup>th</sup> August 2017 in which he states *inter alia* that he bought the Suit Property from the 1<sup>st</sup> Defendant who was not married to the Plaintiff and that having purchased it, he had every right to do any structural changes to the houses there. The Defendants denied the Plaintiff's allegations and stated that the Plaintiff has not established a prima facie case and prayed that the orders sought should not issue, instead averred that the matter should proceed to full trial.

4. Both parties filed written submissions which I have read and I need not reproduce their contents herein.

5. I have considered the Application, the affidavits in support and against and the rival submissions made. The principles to be applied when considering an Application for temporary Injunction are well settled. In the famous case of **Giella –v- Cassman Brown & Co (1973) EA 358** the Plaintiff must show that he has a *prima facie* case with a probability of success; that he stands to suffer irreparable damage,; and if the Court is in doubt, it will decide the matter on a balance of convenience. The Plaintiff besides seeking an order for Temporary Injunction is also seeking an interlocutory Mandatory Injunction to compel the Defendants to demolish any structure constructed on the Suit Property. The law as regards the principle to be applied when considering the prayer for demolition is different from the principles set out in the Giella case for the standard of approach when considering whether or not to grant an Interlocutory Mandatory Injunction is higher than that of Prohibitory Injunction.

6. In the case of **Locabail International Finance Ltd –v- Agro Export & Another (1986) 1 ALL ER 901**, it was stated:

***“A Mandatory Injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the Court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than required for a prohibitory injunction.”***

7. The Courts have been reluctant to grant mandatory injunctions at the interlocutory stage. However, where it is *prima facie* established as per the standards spelt out in the law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.

8. In this case both the Plaintiff and the 1<sup>st</sup> Defendant claim to have purchased the suit Property from the same person, that is one Kahindi Chengo Kombe, and for the same price. Each has exhibited an agreement for sale allegedly signed with the said person. It is common ground that the 2<sup>nd</sup> Defendant has taken possession and is in occupation of the property pursuant to the sale agreement he entered with the 1<sup>st</sup> Defendant and has renovated the house which is thereon. The Plaintiff alleges that the 1<sup>st</sup> Defendant is his estranged wife and had sold the Suit Property without his consent and/or knowledge. The 1<sup>st</sup> Defendant has however denied the alleged marriage between her and the Plaintiff.

9. Before this Court, it has been established that the Defendant is in occupation of the Suit Property which both the Plaintiff and the 1<sup>st</sup> Defendant claim ownership. The renovations undertaken are in the house the Plaintiff regards as their matrimonial house with the 1<sup>st</sup> Defendant which, of course has been denied by the Defendants. There is a dispute as to who between the Plaintiff and the 1<sup>st</sup> Defendant purchased the Suit Property from Kahindi Chengo Kombe. This is a dispute that has to be determined at the main trial.

10. Having carefully considered the material before me, in my humble view a case for mandatory injunction has not been made out. I am not satisfied that the Plaintiff has established a *prima facie* case with a probability of success to warrant the injunction orders sought. The Plaintiff has also not shown what irreparable injury he will suffer in the event the injunction is not granted. The demolitions can still be undertaken in the event the Plaintiff succeeds at last.

11. The upshot of this is that the Notice of Motion dated 11<sup>th</sup> July 2017 lacks merit and the same is hereby dismissed

Each party to bear their own costs.

12. I have also considered the value of the subject matter herein. Both the Plaintiff and the 1<sup>st</sup> Defendant claim that they bought it for Kshs.170,000.00. The alleged agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant is for Kshs.1,000,000. I am of the view that this is a matter that falls within the jurisdiction of the Magistrate’s Court. Accordingly, I *suo moto* transfer this matter forthwith to the Chief Magistrate’s Court, Mombasa for trial and determination.

**Delivered, signed and dated at Mombasa this 20<sup>th</sup> February, 2018.**

---

**C. YANO**

**JUDGE**