



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**E.L.C CASE NO. 140 OF 2017**

**TEMBUR CHELANGAT JOYLINE.....APPLICANT**

**VERSUS**

**KENNEDY KIPNGETICH CHERIRO.....1<sup>ST</sup> RESPONDENT**

**KENNEDY YEGON.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. The application before me is dated 15<sup>th</sup> December 2017. The said application which is brought pursuant to Order 40 Rule 1, 2 (1) , 3(1) and 9 of the Civil procedure Rules as well as sections 3A and 63 of the Civil Procedure Act seeks an injunction to restrain the 2<sup>nd</sup> defendant /respondent by himself, his agents, servants, employees or otherwise from threatening to evict, evicting the plaintiff and their three children from the parcel of land or the matrimonial home , entering and/or trespassing or painting the house on that parcel of land known as KERICHO/CHEMOIBEN/1477 pending the hearing and determination of the main suit.
2. The application is premised on the grounds stated on the face of the Notice of Motion and the plaintiff's affidavit sworn on the 15<sup>th</sup> December 2017. In the said affidavit the plaintiff depones that she is lawfully married to the defendant, having conducted a civil marriage in 2001. The said marriage has been blessed with three children aged between 14 and 8 years.
3. The defendant depones that after the defendant lost his job in Nairobi, they moved to their rural home and later bought a house on land parcel number KERICHO/CHEMOIBEN /1477 where they have been living as their matrimonial home.
4. The plaintiff depones that in November 2017 he learnt that the 1<sup>st</sup> defendant had sold their house to the 2<sup>nd</sup> defendant at Kshs. 2,750,000 without consulting her. On learning that the 1<sup>st</sup> defendant used a fake spousal consent at the time of the sale, the plaintiff then placed a caution on the said title before instituting this suit.
5. The plaintiff depones that she is likely to suffer irreparable loss if the suit property is transferred to the 2<sup>nd</sup> defendant as the 1<sup>st</sup> defendant has not made any alternative accommodation arrangements for the family and they shall be rendered homeless.
6. The application is opposed by both defendants.
7. In his affidavit sworn on 5<sup>th</sup> March 2018, the 1<sup>st</sup> defendant depones that he bought the suit property through his own hard labour without any contribution from the plaintiff. He further depones that the plaintiff was aware of the sale and even consented to the same. He depones that they have another matrimonial home at Kaptele village where his parents have been residing. He explains that he sold the suit property in order to settle some family debts and pay school fees for his children and even though the plaintiff had initially consented to the sale she later changed her mind and refused to move to their rural home.
8. In his affidavit sworn on the 27<sup>th</sup> February 2018, the 2<sup>nd</sup> defendant depones that the application is misconceived and mischievous as the plaintiff was all along aware of the sale of the suit property and she consented to the same. He therefore claims that the plaintiff has not come to court with clean hands as she had failed to disclose material facts and she is therefore undeserving of the prayers sought.
9. The application was canvassed by way of written submissions and each of the parties' advocates filed their submissions.

**Issues for Determination**

10. I have considered the pleadings, application, rival affidavits and submissions and the following issues arise for determination:

- i. Whether land parcel number KERICHO/CHEMOIBEN /1477 is matrimonial property
- ii. Whether the plaintiff consented to the sale of the suit property
- iii. Whether the plaintiff is entitled to an order of temporary injunction
- iv. Who should bear the costs of this suit

### **Analysis and Determination**

11. Section 6 of the Matrimonial Property Act defines matrimonial property as follows:

*For the purposes of this Act matrimonial property means:*

- a) *The matrimonial home or homes*
- b) *Household goods and effects in the matrimonial home or homes*
- c) *Any other movable or immovable property jointly owned and acquired during the subsistence of the marriage*

*Under section 2 of the Matrimonial Property Act 2*

*“a matrimonial home means any property that is owned or leased by one or both spouses and occupied by the spouses as their family home”.*

12. It is common ground that the suit property is the plaintiff's matrimonial home acquired during the subsistence of the marriage where the plaintiff and 1<sup>st</sup> defendant have been living with their three children.

13. The second issue is whether the plaintiff consented to the sale of the suit property to the 2<sup>nd</sup> defendant. In her affidavit the plaintiff denies that she consented to the sale. Even though her name appears on the sale agreement, it is handwritten and not typed like the names of the other witnesses. She has also deponed that her signature was forged. Whereas I am unable to conclusively state whether she is telling the truth at this interlocutory stage, it is my finding that the her alleged consent cannot at this stage be ascertained. I am guided by the case of **Mbuthia Vs Jimba Credit Corporation Ltd (1988) KLR1**, where the court stated as follows: -

***“in an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties' cases,”***

**14. I must now determine whether the plaintiff is entitled to a temporary injunction.** In order for the court to exercise its discretion in granting injunctive relief the applicant must meet the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

*“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”*

A further test for the grant of an injunction has emerged from the approach adopted by Ojwang J (as he then was) in the case of **Amir Suleiman V Amboseli Resort Limited (2004) eKLR** when he relied on the English case of **Films Rover International 1986 3 All ER 772** where the court stated as follows:

*“A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong”.*

The first issue that the court must determine is whether the plaintiff has established a prima facie case with a probability of success.

In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

*“A prima facie case is... one 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”*

15. From the material placed before me so far, I am satisfied that the applicant has met the threshold for a prima facie case as defined in the Mrao case (supra). She has proved that her right to equality in marriage and peaceful occupation of her matrimonial home has apparently been infringed. I am also satisfied that if the orders sought are not granted, the plaintiff shall suffer irreparable loss as she will be displaced and rendered homeless. In the circumstances I am of the view that the she has satisfied the conditions set out in the case of **Giella V Cassman**

Brown & Company Limited.

16. Accordingly, I grant a temporary injunction in the following terms:

a) A temporary order of injunction is hereby granted restraining the 1<sup>st</sup> defendant /respondent by himself, his agents, servants, employees or otherwise from threatening to evict, evicting the plaintiff and their three children from the parcel of land or the matrimonial home on that parcel of land known as KERICHO/CHEMOIBEN/1477 pending the hearing and determination of the main suit.

b) A temporary order of injunction is hereby granted restraining the 2nd defendant /respondent by himself, his agents, servants, employees or otherwise from threatening to evict, evicting the plaintiff and their three children from the parcel of land or the matrimonial home, entering and/or trespassing or painting the house on that parcel of land known as KERICHO/CHEMOIBEN/1477 pending the hearing and determination of the main suit.

c) The costs of this application shall be in the cause.

**Dated, signed and delivered at Kericho this 13<sup>th</sup> day of June 2018**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Nyadimo for the Applicant
2. Mr. Langat for 2<sup>nd</sup> Respondent
3. Miss Kitur for Mr. Koske for the 1<sup>st</sup> Respondent