



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.781 OF 2017

NYAMBURA N. KARIUKI..... PLAINTIFF/APPLICANT

-VERSUS-

JOSEPH NJAKAI KARIUKI.....DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant has brought this *Notice of Motion* application date **28th September 2017** and has sought for the following orders:-

- a. That a temporary injunction do issue retracing the Defendant/Respondent, his servants, agent or anyone claiming through him from alienating, wasting, damaging, selling and/or otherwise interfering or dealing with land reference Ruiru East Block 1/Githunguri/1387 until the hearing and determination of this suit and/or further orders.**
- b. That an injunction do issue to prohibit the Defendant/ Respondent by himself, his agent or servant from interfering with the quiet user of the Plaintiff of land reference Ruiru East Block 1(Githunguri)1387 until determination of this suit and/or further orders.**
- c. Cost of this application be provided for.**

The application is supported by the grounds stated on the face of the application and by the *affidavit* of **Nyambura N. Kariuki**, the Applicant herein. These grounds are:-

- i. That the Plaintiff and the Defendant are joint owners of the suit premises.**
- ii. That the Plaintiff resides and utilizes the suit premises and it is her matrimonial home.**
- iii. That the Defendant has threatened to dispose to third parties unbeknown and without the consent of the Plaintiff/Applicant.**
- iv. That the Plaintiff and Defendant have three children of marriage and though they are adults the Plaintiff and the children of marriage would suffer irreparable damage if the Defendant would dispose off the suit premises.**

In her Supporting Affidavit, the Applicant **Nyambura N. Kariuki** reiterated the contents of the grounds in support of the application and further averred that she got married to the Defendant/Respondent on **4th June 1983** as per the copy of their *Marriage Certificate* marked **NNK-1**. Further that they jointly purchased and are the registered owners of **LR.Ruiru/Ruiru East Block 1(Githunguri/1387** as is evident from the *Search Certificate* marked **NNK-2**. She also averred that they have developed their matrimonial home on the suit premises. That it has come to her knowledge that the Defendant has now subdivided the suit premises into plots and has purported to sell the same to third parties. It was her allegations that the said third parties who are strangers to her, have gone to the premises with construction materials purporting to take possession and constructing on the suit premises. She annexed **NNK-3** to confirm the said purported sale to 3rd parties. She is therefore apprehensive that unless the Defendant is issued with injunctive orders as sought, the Defendant will proceed and dispose the suit premises and render the Plaintiff and their children homeless and destitute.

She further averred that it is fair and just for the court to grant the orders sought and she urged the Court to do so.

The application is contested by the Defendant/Respondent who filed his *Replying Affidavit* on **22nd November 2017**, admitted that he is legally married to the Plaintiff and thus are jointly registered owners of land parcel **No.Ruiru East Block 1(Githunguri)/387** measuring approximately

1¼ acres. He also admitted that they have three adult children with the Plaintiff as stated in *paragraph 5* of his *Replying Affidavit*. However two of the named children are married and are in well paying jobs and the last one though not employed, he recently graduated with a Bachelors Degree in Real Estates. It was his contention that he solely acquired the suit property from *Githunguri Constituency Ranching Co. Ltd* and paid for all the requisite fees thereto as is evident from *annexture JNK-B*. He also contended that the said property is not ancestral land as alleged but he registered as a joint property out of love for the Plaintiff to each hold equal shares. However their marriage has hit rock bottom and it is beyond salvation and although they both live on the suit land, each one of them live in a different house and his home is so prone to attacks from goons and thugs hired by the Plaintiff and this matter is being investigated by the police. He further contended that since they each own the land in equal shares of *50:50 basis*, he engaged a *Surveyor* who subdivided the land equally between the two, Plaintiff and Defendant. The plot was subdivided into *10 plots* and each one of them got *5 plots* as is shown by *JNK-C*. The Respondent deposed that he has built on two of his plots and Plaintiff has built on one of hers and cultivates the other four plots. Though the Applicant has filed a representative suit for herself and on behalf of their children, all the children are adults and they can speak for themselves. Further that he has not disinherited anyone because he owns other properties in Othaya where their ancestral home and land stand. He further stated that his advocate has advised him that the land will eventually be shared equally between the two of them in the event of any divorce and he is therefore free to do what he would wish to do with his portions as a registered owner. He urged the Court to dismiss the instant application.

The application was canvassed by way of *written submissions* which this Court has carefully read and considered. Further, the Court has considered the pleadings in general and the annexures thereto.

The application is brought under *Order 40 Rule 1* of the *Civil Procedure Rules* which states:-

“Where in any suit it is proved by affidavit or otherwise—

a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or y g wrongfully sold in execution of a decree; or

b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

Further, the application is also anchored under *Section 3a* of the *Civil Procedure Act* which donates power to court to make any orders that are necessary in ensuring that justice is met and to prevent abuse of the court process.

As the court embarks in determination of this instant application, it will take into account that injunctive orders are issued to prevent occurrence of a future event but not issued against on event that has already occurred.

Again, at this juncture, the court is not called upon to determine the contested issues with finality but only to decide whether the Applicant is deserving of the injunctive orders sought.

Edwin Kamau Muniu...Vs...Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002, where the court held that:

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All that the Court is entitled at this stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”

The principles that will guide this Court are the ones laid down in the case of *Giella...Vs...Cassman Brown & Co. Ltd 1973 E.A 358*. These principles are:-

a. The Applicant must establish that he has a *prima facie* case with probability of success.

b. That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.

c. When the Court is in doubt, to decide the case on a balance of convenience.

It is not in doubt that the Plaintiff and the Defendant are husband and wife who got married in the *year 1983*. They have adult children and two of them are allegedly married and have their own families.

It is not in doubt that suit property herein *Ruiru East Block 1(Githunguri)/1387* is registered in the joint names of the Plaintiff and the Defendant. Both the Plaintiff and the Defendant have admitted that though they live on the suit property, each of them has his or her own house. They do not live in the same house and this suit property cannot be called a matrimonial home.

Further, it is evident that the Plaintiff did *register a restriction* on the title on *22nd May 2017* indicating **“No dealings on the land without the consent of the Applicant”**. There is no evidence that such restriction has been removed. Therefore the title of this suit property is protected.

Further, the court has seen *annexture NNK-3*, wherein the Defendant/Respondent has acknowledged that he has sold two plots to **Grace Wanjiku** and **Alex Kamau** and had received full purchase price. Therefore the event of sale of two plots has already occurred and cannot be injuncted.

The Court has considered the affidavit of the Respondent. He averred that he has subdivided the suit property into 10 plots and each one of them was to obtain **five plots** and that the two plots that he has sold are the ones meant for him. It is evident that the Plaintiff and the Defendant are not living together as husband and wife as they each live separately. Even without determining the contested issues with finality, in the event the two will file for divorce, then their property will be divided into two equal shares and the plots sold by the Defendant will be taken into account. This Court finds no reason of granting an injunction for an event that has already occurred. See the case of **Jane Kemunto Mayaka....Vs...Municipal Council of Nakuru & Others, HCCC No.124 of 2005**, where the Court held that:-

“Injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure the Applicant and are not issued where such an event has taken place....”

Therefore, the Court finds that the Applicant has not established that she has a *prima-facie* case with a probability of success at the trial.

On whether the Applicant will suffer irreparable loss which cannot be compensated by an award of damages, it is evident that the Applicant has built her house on one of the plots which is a resultant subdivision of the suit property. That plot has not been sold and so Plaintiff has a place to live and cannot claim that the sale of the two plots by the Defendant will leave her homeless and a destitute.

Further, the Court has seen evidence of other title deeds in favour of the Defendant. The Plaintiff has not sought to injunct the sale of those other properties. Therefore the Defendant owns other suit properties wherein the Applicant has a stake over them as a wife of the Defendant. Therefore she cannot claim that she is homeless and that if no injunction is issued, she will suffer irreparable loss which cannot be compensated by an award of damages. See the case **Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322**, the Court held that:-

“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.

On the balance of convenience, this Court is not in doubt. Further, it is evident that the Plaintiff/Applicant has registered a restriction on the title of the suit property. The property is therefore protected and this Court finds that the said restriction is sufficient. The balance of convenience tilts in favour of allowing the instant restriction on the suit property to stand and there is no need of any injunctive orders against the title.

Consequently, the Court finds that the Plaintiff/applicant has not established the principle for grant of injunctive orders and for the above reasons, the instant **Notice of Motion** dated **28th September 2017**, is not merited and it is dismissed entirely with costs to the Respondent.

Further, the parties to prepare the main suit for hearing expeditiously so that the contested issues can be resolved at once.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of October 2018.

L. GACHERU

JUDGE

19/10/2018

In the presence of

M/S Mwangi holding brief for M/S Wangare for Plaintiff/Applicant

Mr. Maina holding brief for Mr. Kanyi for Defendant/Respondent

Lucy - Court clerk

L. GACHERU

JUDGE

Court - Ruling read in open court.

L. GACHERU

JUDGE

19/10/2018