



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 331 OF 2012

FEDERICO ROSAPLAINTIFF

VERSUS

MARC M. J. CRUTZEN (SUED AS THE LEGAL REPRESENTATIVE

OF THE ESTATE OF THE LATE RUTH WANJIRU MWITHIA).....DEFENDANT

RULING

The plaintiff brought this suit against Ruth Wanjiru Mwithia, deceased (hereinafter referred to as “the deceased”) on 7th July 2008 seeking; vacant possession of all that property known as Pent House Number D7, LR. No. 330/98 (Original No.330/40/9/2) (hereinafter referred to as the “suit property”), severance of the joint tenancy between the plaintiff and the deceased and, the vesting of the suit property in the plaintiff as the sole proprietor thereof. In his plaint dated 7th July 2008, the plaintiff averred as follows. At all material times, the plaintiff was in a serious intimate relationship with the deceased which they agreed would culminate into a marriage. In preparation for their marriage, it was agreed that the plaintiff who is an Italian national would purchase a house in Nairobi which the two would use as their matrimonial home. Towards this end, the plaintiff and the deceased identified the suit property which was being sold at Kshs. 15,000,000/-. The plaintiff paid 10% of the purchase price in the sum of Kshs. 1,500,000/- as a deposit for the suit property through electronic funds transfer directly to the vendors account and the balance amounting to Kshs. 13,500,000/- through a bankers cheque which was purchased by the deceased with the funds from the plaintiff’s bank account at Commercial Bank of Africa. At the request of the deceased, the suit property was registered in the names of the plaintiff and the deceased as joint tenants although the full purchase price and related expenses were met solely by the plaintiff. The plaintiff and the deceased took possession of the suit property which the plaintiff furnished at his own cost.

After purchasing and taking possession of the suit property as aforesaid, the plaintiff noted that the deceased no longer had enthusiasm in their marriage plans. The plaintiff soon discovered that the deceased was living with another man in the suit property. This made the plaintiff to terminate his relationship with the deceased and to cancel the plans they had for the future. Since the marriage between the plaintiff and the deceased which was the consideration for the registration of the suit property in the names of the plaintiff and the deceased as joint tenants was no longer feasible for the reason given above, the plaintiff asked the deceased to vacate the suit property. The deceased refused to give vacant possession of the property contending that she was a joint owner of the same. It is on account of the foregoing that the plaintiff was constrained to file this suit for the reliefs aforementioned.

The deceased entered appearance and filed a statement of defence on 7th August 2008. In her defence, the deceased denied that she was registered as a joint tenant of the suit property in consideration of her agreement to marry the plaintiff. The deceased averred that she paid substantial portion of the purchase

price for the suit property amounting to Kshs. 13,500,000/-. The deceased averred that she was registered as a joint tenant of the suit property unconditionally and denied that the suit property was furnished by the plaintiff. The deceased averred further that she had equal interest in the suit property with the plaintiff and as such the plaintiff's demand that she vacates the suit property had no basis in law. The deceased averred that the joint tenancy she had with the plaintiff in the suit property was not severable and termed the plaintiff's claim untenable in law and an abuse of the process of the court.

The deceased amended her statement of defence on 28th October 2011. In the amended defence, the deceased admitted that she had intimate relationship with the plaintiff. The deceased averred that as a result of their relationship, the plaintiff requested her to work as his assistant in a company known as Federico & Associates based in Italy at which the plaintiff was a manager. The deceased averred that the plaintiff did not pay her any salary but promised her that he would use what she was entitled to in terms of remuneration to buy a house and have it registered in their joint names in undivided equal shares. The deceased averred that the registration of the suit property in the names of the deceased and the plaintiff as joint tenants was done through a mistake on the part of the advocate who handled the conveyancing transaction for them in that the plaintiff and the deceased had agreed to have distinct equal shares in the suit property.

The deceased averred that during their relationship with the plaintiff, she was already married and this fact was well known to the plaintiff. The deceased averred that in the circumstances, the issue of the plaintiff and the deceased purchasing the suit property to be their matrimonial home could not arise. The deceased denied that she made representations to the plaintiff that she was available for marriage. The deceased contended that the registration of the suit property in her name as a joint tenant with the plaintiff was in consideration of the services she rendered to Federico & Associates aforesaid. The deceased contended that the plaintiff's claim that the purchase price for the suit property was solely paid by the plaintiff was not correct. She reiterated that the suit property was registered in their names as joint tenants by mistake and that their intention was to be registered as tenants in common. On the issue of the furniture, the deceased averred that they each bought the furniture for the suit property and denied that the same was solely purchased by the plaintiff. The deceased contended that as a co-owner of the suit property, her interest in the property was equal to that of the plaintiff in extent, nature and duration and as such, the plaintiff had no right to force her out of the suit property.

The deceased died on 20th March 2013 and was substituted with the defendant herein who is her husband and legal representative on 13th May 2013. What is now before the court for consideration is the defendant's Notice of Motion dated 23rd May 2013 seeking a temporary injunction to restrain the plaintiff from evicting and/or interfering with the defendant's quiet and peaceable occupation and possession of the suit property and/or presenting the death certificate of the deceased to the registrar of titles for registration against the title of the suit property pending the hearing and determination of this suit.

The application was premised on the grounds set out in the body thereof and in the defendant's affidavit sworn on 23rd May 2013. The defendant's application was brought on the following grounds. The defendant averred that prior to her demise, Ruth Wanjiru Mwithia ("the deceased") was in possession and occupation of the suit property together with her two minor children. After the death of the deceased, the defendant continued to reside in the suit property with the said children. The plaintiff and the deceased were erroneously registered as joint tenants in the suit property since their intention was to have the property registered in their joint names as tenants in common. The defendant was apprehensive that since the suit property was registered in the name of the plaintiff and the deceased as joint tenants, the plaintiff would proceed and register the deceased's death certificate against the title of the suit property so as to have him as the sole proprietor thereof thereby disinheriting the deceased's estate of its share of the property. The defendant was also apprehensive that once the plaintiff was registered as the sole proprietor of the suit property, the plaintiff was likely to have the defendant and the deceased's minor children evicted from the property a move that would have rendered them homeless. The defendant contended that unless the orders sought in the application were granted, the deceased's estate and minor children would suffer irreparable loss and damage. The defendant contended that the orders sought would not prejudice the plaintiff in any way since the deceased had possession of the suit property and the orders would only

serve to maintain the prevailing status quo.

The defendant's application was opposed by the plaintiff through grounds of opposition dated 28th May 2013 and a replying affidavit sworn on 27th June 2013. In his grounds of opposition, the plaintiff contended that upon the demise of the deceased, the suit property devolved to him and the suit herein automatically abated. The plaintiff contended further that the defendant had no *locus standi* to maintain this suit having known that he was living on the earnings of prostitution contrary to section 153 of the Penal code. The plaintiff stated that the defendant had no legal or moral claim to the suit property.

In his replying affidavit, the plaintiff stated that he met the deceased in February 2006 in Nairobi and they began long distance romantic relationship with her since the deceased lived in Nairobi while he lived in Italy. In the course of their relationship, he asked the deceased to marry him. As a show of his commitment to the relationship, he purchased the suit property in their joint names. He later learnt that the deceased was married to the defendant and that while still in a relationship with him, the deceased was also involved in a relationship with another man by the name, Chris Bernard with whom she had a child.

The plaintiff contended that the deceased lied to him about her true status and her marriage to the defendant and that upon her death, the deceased's interest in the suit property which was registered in their names as joint tenants passed to him. The plaintiff contended that he purchased the suit property with the money he transferred from Italy and that the only contribution the deceased made to the transaction was her fraudulent lie that she would marry him. The plaintiff stated that the entire claim by the defendant was illegal, immoral and unlawful and further, that the defendant had no legal or factual claim to the suit property. The plaintiff reiterated that upon the demise of the deceased, the title of the suit property was automatically transferred to him.

The defendant filed a further affidavit sworn on 11th July 2013 in which he stated that, until her demise on 20th March 2013, the deceased was legally married to him and was therefore not available for marriage to the plaintiff. He stated that prior to her death; the deceased informed him that she had contributed towards the purchase of the suit property through her earnings while working as the plaintiff's personal assistant. He contended that the registration of the suit property in the names of the plaintiff and the deceased as joint tenants was in dispute and as such the suit is not spent as claimed by the plaintiff. The defendant stated that the deceased's children who resided in the suit property were attending Neatherlands School which was barely a kilometer from the suit property and that moving them from the suit property would be highly inconveniencing and would destabilize them. He stated that he was currently unemployed and as such not in a position to get a similar house with close proximity to the said school.

The defendant's application was argued by way of written submissions. The defendant filed his submissions on 12th June 2015 while the plaintiff did so on 1st April 2015. The defendant submitted that that even though he had not filed a counterclaim, the court had power to grant the interlocutory injunction sought. The defendant submitted that he had demonstrated that there was real danger of the suit property being alienated by the plaintiff. The defendant argued that the averments contained in his affidavits in support of the application had not been controverted by the plaintiff and that among the issues the court would be called upon to determine in the suit are whether the deceased contributed towards the acquisition of the suit property and whether or not the registration of the suit property in joint tenancy was lawful in the circumstances of this case.

The defendant argued that the aforesaid issues could only be ventilated at the full hearing and as such, the plaintiff could not claim that he had a superior title to the suit property than the deceased. The defendant submitted that he had made out a case to warrant the grant of the orders sought. The defendant submitted that the plaintiff had in the past attempted to levy distress for rent on the defendant for alleged rent arrears. The court was referred to a proclamation annexed to the plaintiff's affidavit in support of his application dated 29th April 2015. The defendant submitted that there was a real threat to his title and possession of the suit property which called for an injunctive order.

The defendant referred to section 91(8) of the Land Registration Act and submitted that a joint tenancy

was only applicable between spouses and that any other joint tenancy created other than between spouses without leave of the court would take effect as a tenancy in common. The defendant contended that his defence raised triable issues which could not be wished away and hence the need to preserve the status quo. The defendant argued that the plaintiff had lured the deceased to commit a crime of bigamy contrary to section 171 of the Penal Code and that disallowing the application would be tantamount to allowing the plaintiff to benefit from his own wrong.

The defendant submitted that the plaintiff's claim is founded on an illegal agreement that is, the alleged promise by the deceased who was in a subsisting marriage to marry the plaintiff which would have resulted into an offence under section 171 of the Penal Code aforesaid. The defendant submitted that such an agreement cannot be enforced by a court of law. In support of this submission, the court was referred to the case of Kenya Airways Ltd vs. Satwant Singh Flora (2013) eKLR where it was held that no court ought to enforce an illegal contract.

The defendant submitted that he had met the conditions for granting a temporary injunction which were enunciated in the case of Giella vs. Cassman Brown & Co. Ltd (1973)E.A 358. The defendant submitted that he had established a prima facie case with a probability of success against the plaintiff. The defendant referred to sections 24, 25 and 26 of the Land Registration Act and submitted that as a co - proprietor of the suit property, the deceased acquired absolute and indefeasible rights over the suit property which were equal to the plaintiff's and as such neither party could purport to have superior rights over the other in respect of the suit property. The defendant reiterated that if the application is not allowed, the estate of the deceased would suffer irreparable loss and damage as the suit property would be taken out of its reach. The defendant contended further that the balance of convenience tilts in favour of the defendant who was in possession of the suit property and that there was no threat of alienation of the property.

In his submissions in reply, the plaintiff submitted that the defendant had not met the conditions for grant of a temporary injunction. The plaintiff submitted that the defendant had not established a prima facie case with a probability of success and had also failed to demonstrate that he would suffer irreparable injury which could not be compensated by an award of damages. In support of this submission, the plaintiff cited the cases of Giella vs. Cassman Brown(supra) and Isabel Chelangat vs. Samuel Tiro Rotich & 5 others (2012)eKLR where the principles for grant of temporary injunction were set out. The plaintiff cited section 107(1) of the Evidence Act and submitted that the onus was upon the defendant to prove his case. The plaintiff submitted that the defendant had not tendered any evidence to prove his allegations that there was an error in the creation of the joint tenancy or that the deceased contributed towards the purchase of the suit property.

The plaintiff submitted that the defendant could be compensated if he succeeds in his defence. He submitted that the defendant's fear of loss of a place to stay if the orders sought herein are not granted was unsubstantiated, speculative and immaterial and that the court could not restrain the plaintiff from exercising his crystallized rights because of the defendant's speculative fear of losing the alleged nonexistent rights. The plaintiff argued that upon the death of the deceased, he became vested with the whole leasehold interest in the suit property and became the sole owner thereof. In support of this submission, the court was referred to Halsbury's Laws of England 4th Edition vol 39 at pg. 351 para. 531 and P. L. Onalo's Land Law and Conveyancing in Kenya pg. 25-27. The plaintiff submitted that under the doctrine of *jus accrescendi*, the interest of a joint tenant is extinguished upon death and the survivor becomes the sole owner of the whole interest in the property the subject of the joint tenancy. The court was also referred to the cases of Cornelius Nyabuti Mogaka vs. Fredrick Nyabuti Mogaka & 2 others (2011) eKLR, Re estate of Josephine Mumbua Mehlafl-Deceased(2015)eKLR and Isabel Chelangat vs. Samuel Tiro Rotich & 5 others (2012)eKLR where it was stated that following the death of one joint owner, the property reverts to the ownership of the surviving joint owner.

The plaintiff argued that if the defendant came to the suit property as a tenant or licensee of the deceased, he automatically became the tenant or licensee of the plaintiff upon the death of the deceased. The plaintiff argued that, the defendant could not claim to be occupying the suit property on account of the deceased's interest therein since such interest was extinguished under the doctrine of survivorship.

The plaintiff submitted that the defendant had approached the court with unclean hands. He submitted that the substratum of the defendant's claim was tainted with illegality and immorality and that the court could not grant any relief to the defendant. The plaintiff submitted that by clinging onto the suit property without permission from the plaintiff who is the sole owner thereof, the defendant was in breach of the plaintiff's rights of ownership and, with tainted hands, the defendant could not invite equity to his aid. In support of this submission, the plaintiff relied on the cases of Eliab Ojow Odhiambo & 3 others vs. Habakuk Onyango Abongo (2012) eKLR, Archibald Wamburu Kahora vs. National Bank of Kenya & another (2013) eKLR, Darad Limited & another vs. Kenya Power & Lighting Company Ltd (2002) eKLR and Walter Balsius vs. Emily Wanyoike (1997) eKLR.

I have considered the defendant's application together with the affidavits and submissions which were filed in support thereof. I have also considered the plaintiff's grounds of opposition, replying affidavit and submissions filed in opposition to the application. What is before me is an application for interlocutory injunction. The principles upon which this court exercises its discretion in applications of this nature are now well settled. In the case of Giella vs. Cassman Brown and Co. Ltd. (supra) which was cited by both parties in support of their respective submissions, it was held that an applicant for a temporary injunction must establish:-

- i. A prima facie case with a probability of success
- ii. That if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages and;
- iii. If in doubt, the court shall determine the application on a balance of convenience.

In the of Mrao Limited vs. First American Bank Limited & 2 Others (2003) KLR 125, the court defined a prima facie case as;

"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."

In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR, the court stated that:-

"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion."

The court went further to state that;

".....in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation."

On the material before me, I am not satisfied that the defendant has established a prima facie case against the plaintiff with a probability of success. I am in agreement with the defendant's submission that the court has power to grant a temporary injunction to a defendant in appropriate cases even without a counter-claim having been filed. See, the case of, Njoroge Kironyo and others vs. Kironyo Njoroge (1976) KLR 109. According to the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others (supra), the onus was upon the defendant to establish the existence of a right which is threatened by the plaintiff which should be protected by the injunction sought. The defendant's case as I have understood it is that the deceased contributed to the purchase of the suit property through her services to the plaintiff's company, Federico & Associates and as such the deceased was entitled as of right to half undivided share in the suit property. The defendant contended further that the suit property was registered in the names of

the plaintiff and the deceased as joint tenants by mistake since the intention of the parties was to own the property as tenants in common. I am in agreement with the submission by the plaintiff that the defendant has not placed any evidence or material before the court in support of his case set out above. There is no evidence before the court that the deceased was employed by the plaintiff or that she earned any income from the alleged employment. There is also no evidence that there was an agreement between the deceased and the plaintiff that the deceased earnings from the alleged employment would be utilized by the plaintiff to purchase a house in Nairobi to be owned by the plaintiff and the deceased as tenants in common. The defendant did not also place any form of evidence before the court in proof of his allegation that the suit property was registered in the names of the deceased and the plaintiff as joint tenants by mistake. From the evidence placed before the court by the plaintiff, I am convinced that the plaintiff paid the full purchase price for the suit property. In the absence of any evidence placed before the court to the contrary by the defendant, I am also convinced that the intention of the plaintiff and the deceased was to own the suit property as joint tenants.

I am in agreement with the submission and the authorities cited by the plaintiff that upon the death of Ruth Wanjiru Mwithia, deceased, her interest in the suit property was extinguished and the suit property vested in the plaintiff under the doctrine of survivorship. In the case of Peter Mburu Echaria vs. Priscilla Njeri Echaria (2007)eKLR, the court stated as follows;

“The first statement of the law by Gachuhi JA, that in a joint tenancy each party owns an undivided equal share therein is not, with respect, entirely correct. It is in a tenancy in common in equal shares where each tenant owns an undivided equal share in the property. On the contrary, one characteristic of a joint tenancy is that the joint tenants have a unity of interest, that is to say, that, although they have separate rights, the interest of each joint tenant is the same in extent and duration and in reality they are in the position of a single owner. A second characteristic of a joint tenancy is a right of survivorship. On the death of one joint tenant his interest accrues to the other joint tenant(s) by right of survivorship (jus accrescendi). However, the joint tenants have a right to sever the joint tenancy in their lifetime in which case the joint tenancy is converted into a beneficial interest in common in equal shares.”

It follows from the foregoing that upon the death of the deceased, her interest in the suit property devolved upon the plaintiff by operation of law. The deceased's interest in the suit property having been extinguished upon her death as aforesaid, I am not persuaded that the defendant has any right in the suit property capable of being infringed or threatened by the plaintiff as to call for protection by way of a temporary injunction. Due to the foregoing, I am not satisfied that the defendant has established a prima facie case with a probability of success against the plaintiff. That being my view of the matter, it is not necessary for me to consider whether the defendant would suffer irreparable harm if the injunction sought is not granted.

The upshot of the foregoing is that the defendant's Notice of Motion dated 23rd May 2013 lacks merit. The same is accordingly dismissed with costs to the plaintiff. I have noted that the plaintiff is a foreigner with no fixed abode within the jurisdiction of the court. In the circumstances, I am of the view that it would serve the interest of justice if the property the subject of this suit is preserved pending the hearing and determination of the suit. Unless such action is taken, the property runs the risk of being disposed of thereby rendering this suit an academic exercise. For the foregoing reasons, I hereby make a further order that pending the hearing and determination of this suit or further orders by the court, the plaintiff shall not sell, transfer or charge all that property known as Pent House

Number D7 erected on Land Reference No. 330/98(Original Number 330/40/9/2), Nairobi.

Delivered and Signed at Nairobi this 28th day of March, 2017

S. OKONG'O

JUDGE

In the presence of

Ms. Omolo h/b for Kipkorir for the Plaintiff

Mr. Muthee h/b for Kimondo for the Defendant

Kajuju Court Assistant