



**REPUBLIC OF KENYA**

**THE ENVIRONMENT & LAND COURT**

**AT GARISSA**

**ELC CASE NO. 64B OF 2012**

**S N M.....APPLICANT**

**VERSUS**

**W M M.....RESPONDENT**

**RULING**

The application coming up before me is the Notice of Motion dated 2<sup>nd</sup> October, 2017 brought under Order 51 Rule 4 CPR Sections 1A, 1B, 3A CPA and Rule 3 (1) of the High Court Practice and Procedure Rules. The applicant is seeking the following orders:

**1. (spent)**

**2. THAT this Honourable court pending the hearing and determination of this matter be pleased to issue eviction orders against the respondent who is already in illegal occupation of the plot land in [particulars withheld] village, Ngutani Location.**

**3. THAT the said eviction has mentioned in order 2 above be supervised by officer from the nearest police station or police post under the directions of the OCS Migwani police station with a view to maintain law and order.**

**4. THAT this honourable court be pleased to make such other or further orders as are deemed to be just and expeditious for the singular objective of satisfying the ends of justice herein.**

**5. THAT this Honourable court be pleased to make the requisite orders in respect of the costs of the application.**

The application is supported by grounds shown on the face of that application and a supporting affidavit of S N M, the applicant herein sworn on 2/10/2017. The application is further supported by numerous documents attached to the supporting affidavit. That application was filed together with the plaint, seeking the following orders:

**1. An order for permanent injunction against the defendant in accessing and/or issuing the plaintiff's property.**

**2. An eviction order against the respondent.**

**3. General damages for inconvenience.**

**4. Interest, if any on (3) above at court rates.**

**5. Any other or further relief that the court may deem just, fit and expedient to grant.**

When the application came up for interparties hearing only the advocate for the applicant attended. The respondents did not enter appearance or file any grounds of opposition or replying affidavit. After satisfying itself that the respondent was properly served the court directed that the application do proceed ex-parte. The brief facts of this case from my reading of the affidavit in support of the application is that both the plaintiff and the defendant were husband and wife before their marriage was dissolved vide court order issued on 10<sup>th</sup> September 2013 by Migwani Magistrate's court (Decree Nissi). At paragraph 6 of the supporting affidavit the applicant deponed as follows:-

**“6. THAT despite the court order that respondent continues to illegally reside in my property.”**

He has annexed a sale agreement dated 18/2/2007 written in vernacular language (kikamba) and translated into English by Joel Kinyua Kathimbi Advocate.

I have considered the averments in support of the application and supporting documents. I have also considered the prayers in the plaint and the submissions by Mr. Onyango Oyieko Advocate for the applicant. As I have stated elsewhere, this application proceeded exparte after this honourable court was satisfied that the respondent was properly served but failed to file grounds of opposition or a replying affidavit is he intends to oppose the application. Despite there being no response filed in opposition to the application, this court must look at the application and the prayers being sought and decide whether the affidavit evidence and the documents attached thereto support the grant of such prayers. In this case, the plaintiff avers that their marriage was dissolved by a court of competent jurisdiction and that the respondent has continued to stay in his property despite the court order. I have looked at the court order issued in Divorce Case No. 14 of 2010 (Mwingi) where the court issued a Decree Nissi. Decree Nissi is not a final order dissolving a marriage. The order did not talk about the suit property or any other properties belonging to the applicant. An eviction is an act or process of legally dispossessing a parcel of land or rental property. The document of title attached by the applicant is a purported sale agreement. A certificate of title is a prima facie evidence of ownership of an interest in land. Section 24 of the Land Registration Act, 2012 provides as follows:-

**“24 (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”**

Again Section 28 of the same Act provides thus:-

**“28 Unless the contrary is expressed in the registrar, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without being noted on the register;**

**a. Spousal rights over matrimonial property.**

**b. Trusts including customary trust...”**

The nature of the applicant's application is such that if the same is allowed at an interlocutory stage it will highly prejudice the interests of persons who may not be identified at this stage. It will be in the best interest of all parties to have any party with such interests to raise those concerns at the main hearing. As noted elsewhere, the prayer for eviction in this application is also one of the prayers in the plaint. It therefore follows that if the application is allowed at this interlocutory stage, there will be nothing left for determination at the hearing of the main suit. Doing the best I would in the interest of justice, this

application must fail and the same is hereby dismissed with costs to be in the cause.

**READ, DELIVERED and SIGNED in the open court this 11<sup>th</sup> December, 2017.**

**E. C Cherono (Mr.)**

**ELC JUDGE**

**In the presence of:**

1. Onimbo holding brief Ayieko for applicant.
2. Ijabo – Court Clerk