**REPUBLIC OF KENYA**

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

**ELC CASE NO. 157 OF 2015**

**P K A……..…….PLAINTIFF**

**VERSES**

**H S A……..……...1ST DEFENDANT**

**K P A…….……2ND DEFENDANT**

**RULING**

The facts giving rise to this suit are to a large extent not disputed. On 25th September 1995 the Plaintiff herein purported to enter into a marriage with the Defendant's son, one M S A (hereinafter **"M"**) at Sikh Temple in South hall London. The Plaintiff and A moved to Nairobi, Kenya in October 1995. On 8th June 1996 the couple were blessed with one child who was named, A S A (hereinafter **"A"**). When they arrived in Kenya, they were given accommodation in the Defendant's home which is situated on LR No. ***[particulars withheld]***, Riverside Drive, Nairobi. They were given a detached four bedroomed house (hereinafter **"the suit property")** to stay.

In the year 2004, serious differences arose between the Plaintiff and A. The two parties did not resolve their differences and by the 2006, the marriage had broken down irretrievably. This ignited a series of disputes which ended up in court. The first dispute that landed in court concerned the custody of A. A filed a suit for custody of A in the Children's Court. The case was moved to the High Court Family Division where it was heard by Onyancha J. In a judgment that was delivered on 1st July 2009, Onyancha J. gave custody of A to A with limited visitation rights to the Plaintiff. At this time, A had already moved out of their matrimonial home and was staying elsewhere with A. The Plaintiff on the other hand continued to occupy the suit property.

While the child custody case was still going on, A filed a petition in the High Court for the nullification of his marriage to the Plaintiff. The Plaintiff filed a cross-petition to which she sought among others, an order that all properties held solely by A and those held by him jointly with his extended family be declared matrimonial property and the Plaintiff be awarded half share thereof. The Plaintiff also sought maintenance and child custody and support. A's petition for the nullification of his marriage to the Plaintiff was also heard by Onyancha J. In a judgment that was delivered on 3rd July 2009 a few days after he had granted A the custody of A, Onyancha J. nullified the marriage between the Plaintiff and A on the ground that the same was illegal, null and void because the Plaintiff had no capacity to enter into a marriage at the time her marriage to the Plaintiff was purportedly celebrated as her previous marriage had not been lawfully terminated.

The Plaintiff was not satisfied with the two decisions by Onyancha J. and preferred an appeal against the same to the Court of Appeal. The Court of Appeal upheld the decision of Onyancha J. on the nullification

of the marriage between the Plaintiff and A but allowed the Plaintiff's appeal on child custody. In a judgment that was delivered on 10th June 2011, the Court of Appeal gave custody of A to the Plaintiff and A jointly. The court made a further order that "**The mother (the Plaintiff) shall continue occupying the matrimonial home at Riverside Drive where the child (A) will reside wherever he is with the mother (the Plaintiff)"**. Although the Plaintiff's marriage to A was nullified and the court did not award her any property belonging to A or those owned by A and/or his extended family, as she had sought in her cross-petition, the Plaintiff continued to occupy the suit property by virtue of the custody of A that was granted to her jointly with A. A is now an adult and is said to be in school in the United Kingdom. Under the law A can now make decisions for himself and does not require to be under the care and custody of either A or the Plaintiff.

On or about 20th January 2015, A wrote to the Plaintiff through his advocates demanding vacant possession of the suit property so that he may handover the same to the Defendants as the owners thereof. The Defendants are also said to have written to the Plaintiff at the same time offering on a without prejudice basis to pay her Kshs.100,000/= to enable her look for alternative premises to rent if she moves out.

It is these two letters that prompted the filing of this suit. In her plaint dated 24th February 2015, the Plaintiff has averred that when A left the suit property in May, 2007 to go and stay separately, she wanted also to move out of the property and go back to the United Kingdom. The Plaintiff has averred that when the Defendants learnt of her intention, they pleaded with her to stay on and promised her that they would try to reconcile her with A. In order to induce her to stay, the Plaintiff has claimed that the Defendants promised her that they would give her the suit property and that she would not be evicted therefrom whatever the outcome of the nullity proceedings which were going on in court at the time. The Plaintiff has averred that the Defendants promised also to pay all her bills. The Plaintiff has averred that in reliance on these promises by the Defendants, she rejected job offers in Dubai and London and missed a chance to start new life. The plaintiff has averred that following the promises aforesaid and encouragement and assurances by the Defendants that the suit property would be hers, she spent considerable time, money and effort improving the suit property. The Plaintiff has contended that in view of the foregoing, she has acquired an equity in the suit property which would be satisfied by the transfer to her of the beneficial interest in the said property.

The plaintiff has sought judgment against the Defendants for;

> a) A declaration that the Plaintiff is entitled to a beneficial life interest of the house situated on LR No. ***[particulars withheld]*** having acquired an interest on the same by virtue of proprietary estoppel.
>
> b) A permanent injunction to issue restraining the defendants, their agents and/or servants from intimidating, harassing or interfering in any way with the Plaintiff's peaceful possession of the house situated on L.R No. ***[particulars withheld]***
>
> c) Costs of the suit.
>
> d) Any other relief this court may deem fit to grant.

Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 24th February 2015 seeking a temporary injunction to restrain the Defendants from evicting, threatening to evict, harassing or in any way interfering with her peaceful possession of the suit property pending the hearing and determination of this suit. The application was brought on the grounds set out on the face thereof and on the affidavit of the plaintiff sworn on 24th February 2015 in which she reiterated the contents of the plaint and set out the history of her dispute with A which I have highlighted at length at the beginning of this ruling. It is not necessary for me to repeat the same here.

The Plaintiff's application was opposed by the Defendants through a replying affidavit sworn by the 1st

defendant on 10th March 2015. In his affidavit, the 1stDefendant averred that the parcel of land known as LR No. ***[particulars withheld]*** Riverside Drive Nairobi is owned by him jointly with the 2ndDefendant. The 1stDefendant admitted that following the Plaintiff's purported marriage to A, they came to reside on the suit property which is situated on LR No. ***[particulars withheld***]. The 1st Defendant averred that A was a licensee on the suit property and as such the Plaintiff was his guest. The 1stDefendant averred further that the Plaintiff and A were involved in several court cases that led to the nullification of their purported marriage and that during the pendency of the said court cases, the Defendants relationship with the Plaintiff was not cordial. The 1stDefendant stated that neither the 2nd Defendant nor he promised to give the Plaintiff the suit property. The 1stDefendant stated that they were not aware of the Plaintiff's intention to leave Kenya and did not make any representations to her as alleged or at all. The 1st Defendant stated that the Plaintiff continued to occupy the suit property not as a result of any representations that were made to her by the Defendants but a result of the orders that were made by various courts in the cases she had with A. The 1st Defendant contended that A on whose account the orders aforesaid were made is now over 18 years and resides in the United Kingdom. The 1stDefendant averred that the improvements which the Plaintiff claims to have carried out on the suit property were not approved by the Defendants and that in any event, the much the Plaintiff can claim from the Defendants is the value of such improvements but not the suit property. The Defendants termed the Plaintiff's suit as an extortionist claim. The Plaintiff filed a supplementary affidavit on 23rd March 2015 in which she stated that the cases that she had with A are not relevant to her claim herein. The Plaintiff also denied that she is out to extort a settlement from the Defendants.

The advocates for the parties filed written submissions which they highlighted on 25thNovember 2015. I have considered the Plaintiff's application together with the two affidavits which were filed in support thereof. I have also considered the Defendants' affidavit in reply to the application. Finally, I have considered the written and oral submissions which were made before me by the parties'respective advocates and the various authorities which they relied on. What the Plaintiff is seeking in her application is a temporary injunction pending the hearing of the suit. The principles upon which this court exercises its discretion in granting temporary injunction are now well settled. As was stated in the case of **Giellavs. Cassman Brown & Co. Ltd (1973) EA 358,** an applicant for interlocutory injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR the** court of Appeal adopted the definition of a prima facie case that was given in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125** and went further to state as follows:-

> **"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. …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 threatened with violation…The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."**

The Plaintiff has put forward two main grounds as the basis of her claim herein against the Defendants. The first ground is that her occupation of the suit property is pursuant to the order that was made in her favour by the Court of Appeal on 10th June, 2011 which order has neither been varied nor set aside. It is not in dispute that in its judgment delivered on 10th June 2011, the Court of Appeal ordered among others that the Plaintiff shall continue to reside on the suit property. That order by the Court of Appeal must

however be looked at in context. The Court of Appeal was dealing with an appeal against award of custody of A to A by the High Court. In its decision, the court set aside the award and granted a joint custody of A to the Plaintiff and A. Since the two were staying apart at the material time, the court ordered that the Plaintiff would continue occupying the suit property where A would reside with her whenever he was with the Plaintiff pursuant to the said custody order. I do not think that the Court of Appeal had any intention of conferring title of the suit property upon the Plaintiff or awarding her a life interest in the property. I don't think that the Court of Appeal which did not have **"concrete evidence as to who owns the house"** would have had such intention in mind (See page 91 of the judgment of the Court of Appeal). In any event, if that was the intention of the court, the same would have been stated expressly in the said judgment. I am not persuaded that the plaintiff has a prima facie case against the Defendants based on the said Court of Appeal judgment. I am inclined to agree with the Defendants' contention that the Plaintiff was to occupy the suit property for the duration that she was to have custody of A. A having become an adult and moved to United Kingdom for studies, the Plaintiff's continued occupation of the suit property on the basis of the said custody order is untenable. I have noted from the plaint that the reliefs sought by the Plaintiff are not based on this Court of Appeal order. This supports my view that not much turns out on it as far as the ownership of the suit property is concerned.

The second ground which forms the basis of the Plaintiff's claim is proprietary estoppel. The Plaintiff has claimed that when differences arose between her and A that led to A moving out of the suit property in May, 2007, she considered options available to her and made a decision to go back to the United Kingdom. The Plaintiff has contended that when the Defendants learnt of her decision, they prevailed upon her to stay in Kenya and promised that they would try to reconcile her with A. The Plaintiff has contended that with a view to induce her to stay on, the Defendants represented to her that they would give her the suit property. The Plaintiff has contended that following these promises by the Defendants, she decided to stay on in Kenya and in the process missed job opportunities in Dubai and England and a chance to start a new life. The Plaintiff has also contended that relying on the said promises by the Defendants that they would give her the suit property; she spent time and money improving the suit property. The Defendants have denied that they made any promises to the Plaintiff that they would give her the suit property. The Defendants have denied further that the Plaintiff carried out any improvements to the suit property. They have stated that if any such improvements were carried out, they were not aware of the same and that the same were carried out illegally without the necessary permits and licences. The Defendants have contended further that such improvements if any would only entitle the Plaintiff at most to reimbursement of the expenses that she had incurred but not to the property.

Proprietary estoppel is a doctrine of equity. It is an equity created by estoppel. In the case of **Inwards and others vs. Baker (1965) 1 AIIER 446, Lord Denning MR** stated as follows with regard to the equity;

> **"It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there. It is for the court to say in what way the equity can be satisfied."**

In that case it was held that;

> **"Since the defendant had been induced by his father to build the bungalow on his father's land and had expended money for that purpose in that expectation of being allowed to remain there, equity would not allow that expectation so created to be defeated, and accordingly the defendant was entitled to remain in occupation of the bungalow as against the trustees (of the will of his father)."**

From the various authorities that were cited by the parties namely; **Halsbury's Laws of England, 4th Edition, Volume 16(2), Kenya National Capital Corporation Ltd. vs. Albert Mario Cordeiro & Another (2014) eKLR** and **Tailors Fashions vs. Liverpool Victoria Trustees (1982) QB 133,** proprietary estoppel is established by showing that:-

(i) The person claiming the equity believed that he had or was going to have a right in or over the

property of the person against whom the equity is claimed.

(ii) The person against whom the equity is claimed was aware of the mistaken belief or created the belief or encouraged the belief.

(iii) The person claiming the equity acted in reliance on the belief.

As I have stated above, the Defendants have denied that they had represented to the Plaintiff that they would allow her to continue occupying the suit property. The Defendants have contended that when differences arose between the Plaintiff and their son A, their relationship with the Plaintiff was not cordial and as such they could not have promised the Plaintiff that they would give her the suit property. The Defendants have stated that the Plaintiff has not stated when the alleged promise was given and by whom as between the 1st and 2nd Defendants. The Defendants have contended that in the circumstances that prevailed between the years 2004 and 2007 when the Defendants are alleged to have made promises to the Plaintiff, it is not likely that any such promises could have been made. The Defendants have stated that the Plaintiff had been evicted from the suit property in 2006 and was only returned thereto by a court order. The Defendants have contended that in the custody case, the Plaintiff had sought maintenance from A and the cost of alternative accommodation at Kshs.200,000/=. The Defendants have wondered why the Plaintiff would have made such a claim when the Defendants had already given her a promise in 2007 that they will give her the suit property. The Defendants have also taken issue with the improvements which the plaintiff claims to have made to the suit property. They have contended that they were not aware of the alleged improvements and that in any event, the improvements which are said to have involved creating an extension on the building would have required approval from the relevant authorities and a licence from National Environmental Management Authority (NEMA). The Defendants have argued that since no such approval or license is exhibited,the alleged improvements are illegal and as such it is not open to the Plaintiff to base her claim thereon. The Defendants cited a number of authorities in support of this submission.

I am in agreement with the Defendants that the Plaintiff has not come out clearly on this issue of the promise that was made to her by the Defendants. The Plaintiff has not stated when the promise was made and whether the promise was made by the 1st or 2nd Defendant or by them jointly. I have perused the invoices and receipts annexed to the Plaintiff's affidavit in proof of the improvements to the suit property. I have also perused the photographs annexed to the said affidavit for the same purpose. The impression that I get from the said invoices and receipts is that the same are for various repairs that were carried out to the suit property between the year 2012 and 2015. There is no evidence of the extension said to have been added to the suit property. As rightly submitted by the Defendants, such undertaking should have required approval from the Nairobi City County Government and NEMA. No such approvals have been exhibited. The plaintiff has also not placed before the court any evidence that the Defendants were aware of the said improvements and kept silence or encouraged the same. I am cognizant of the fact that at this stage of the proceedings, I am not supposed to make any final conclusions on the merit of the parties' respective cases. The many issues that I have raised above can only be determined conclusively at the trial. What I can say from the observations I have made above is that, I am doubtful if the Plaintiff has a case with a probability of success against the Defendants based on proprietary estoppel.

The next issue which I need to consider is whether the Plaintiff would suffer irreparable injury which cannot be compensated by an award of damages. Having expressed doubt as to the nature of the improvements which the plaintiff has carried out on the suit property and whether or not a promise was made to her that she would occupy the suit property for life, I am equally doubtful if the plaintiff stands to suffer injury if the orders sought are not granted.

In view of the findings that I have made above, the plaintiff's application falls for consideration on a balance of convenience. It is not disputed that the Plaintiff is in occupation of the suit property and that she has been in such occupation for the last 21 years. There is no evidence that the Plaintiff has alternative premises to which she can move if evicted by the Defendants from the suit property. The Plaintiff's averment in her affidavit in support of the application that the suit property is the only home

that she knows has not been denied by the Defendants. There is no evidence that the Defendants would suffer inconvenience if the Plaintiff is allowed to continue occupying the suit property pending the hearing of the suit herein. Due to the foregoing, I am persuaded that the balance of convenience tilts in favour of the Plaintiff.

The upshot of the foregoing is that the Plaintiff's application dated 24th February 2015 is for granting. The application is allowed on the following terms:

(i) An Injunction is issued for a period of eight (8) months or until the hearing and determination of this suit whichever comes earlier restraining the Defendants, their agents and/or servants from evicting and/or interfering with the Plaintiff's peaceful possession of the house on L.R No. ***[particulars withheld]*** Riverside Drive, Nairobi.

(ii) The cost of the application to be in the cause.

**Dated and Delivered at Nairobi this 27th day of May, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

Mr. Gamba for the Plaintiff

Mr. Ouma for the Defendants

C. Kajuju Court Assistant