



**REPUBLIC OF KENYA**

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

**ELC NO. 317 OF 2014**

**JANE WAMBUI NGERU.....PLAINTIFF**

**VERSUS**

**TIMOTHY MWANGI NGERU.....DEFENDANT**

**RULING**

Together with the plaint filed herein on 18<sup>th</sup> March 2014, the Plaintiff brought an application by way of Notice of Motion dated 18<sup>th</sup> March 2014, in which she sought among others, an order that the Defendant be restrained by an interim injunction from accessing, entering and/or interfering with the Plaintiff's quiet possession of all that parcel of land known as LR. No. Nairobi/Block 79/423 ("the suit property") pending the hearing and determination of the suit herein and in the alternative, an order that the Defendant do vacate the suit property pending the hearing and determination of the suit. The Plaintiff's application was brought on among other grounds that, the Plaintiff was the registered owner of the suit property and that the Defendant and the Plaintiff lived on the suit property as husband and wife until 23<sup>rd</sup> December 2013 when they divorced. The Plaintiff stated that the Defendant refused to vacate the suit property despite the fact that there was no longer husband and wife relationship between them. The Plaintiff averred that she acquired the suit property single handedly through a mortgage that she obtained from her employer Barclays Bank Limited. The Plaintiff averred that when she finished paying the mortgage, she decided to register the suit property in her name jointly with the Defendant. The Plaintiff stated that in the year 2013, the Defendant transferred the suit property to her to hold as a sole proprietor.

The Defendant opposed the Plaintiff's application through a replying affidavit sworn on 5<sup>th</sup> May 2014. In his affidavit, the Defendant stated among others that, the Plaintiff's application and affidavit in support thereof were full of lies, misrepresentation, misinformation and non disclosure of material facts and were intended to mislead the court. He stated that the Plaintiff held the suit property in trust for him and their children. The Defendant averred that he contributed to the purchase and development of the suit property by meeting household expenses and paying school fees for the children when the Plaintiff was servicing the mortgage. The Defendant averred that he transferred the suit property to the Plaintiff's sole name to hold in trust for him so that it is not seized to recover debts which were owed by a company in which he was a director. The Defendant also took issue with the jurisdiction of the court to grant the orders that had been sought by the Plaintiff. The Plaintiff filed a supplementary affidavit on 2<sup>nd</sup> June 2014 in which she denied that her application was full of lies, misrepresentation, misinformation and non disclosure of material facts. The Plaintiff reiterated that she is the proprietor of the suit property and that she was not holding the same in trust for the Defendant.

The Plaintiff's application was heard by Nyamweya J. In a detailed and well reasoned ruling delivered on 29<sup>th</sup> June 2015, she allowed the Plaintiff's application and ordered the Defendant to vacate the suit property within 60 days from the date of the ruling and thereafter not to access, enter or interfere with the

Plaintiff's quiet possession of the suit property pending the hearing and determination of this suit. In her ruling, Nyamweya J. considered all the issues that were raised before her by both parties and made a finding that the Plaintiff had established a prima facie case against the Defendant. Nyamweya J.'s ruling was made in the presence of the advocates for both parties.

What I now have before me is a Notice of Motion application by the Defendant dated 16<sup>th</sup> April 2015 in which he is seeking several prayers. The application was filed after more than two months from the date of the ruling by Nyamweya J. In this application which has been filed by the Defendant's new advocates, the Defendant has sought the following reliefs:

1. That the application be certified urgent and be heard ex-parte in the first instance.
2. That pending the hearing and determination of the application, this Honourable Court be pleased to grant a stay of the Orders made on 29<sup>th</sup> January 2015 by the Honourable Lady Justice Nyamweya.
3. That pending the hearing and determination of the Application this Honourable Court be pleased to review and/or vary and/or modify the Order made on the 29<sup>th</sup> January 2015 by the Honourable Lady Justice Nyamweya and allow the applicant to remain in the matrimonial home namely L.R No. Nairobi Block 79/423.
4. That pending the hearing and determination of this suit this Honourable Court be pleased to review and/or vary and/or modify the Order made on the 29<sup>th</sup> January, 2015 by the Honourable Lady Justice Nyamweya and allow the applicant to remain in the matrimonial home namely L.R No. NAIROBI BLOCK 79/423.
5. That pending the hearing and determination of the application this Honourable Court be pleased to grant an interim injunction restraining the respondent either by herself, her servants and/or her agents from selling, transferring, disposing or otherwise dealing in the property known as L.R No. NAIROBI BLOCK 79/423.
6. That pending the hearing and determination of this suit this Honourable Court be pleased to grant an interim injunction restraining the respondent either by herself, her servant and/or her agents from selling, transferring, disposing or otherwise dealing in the property known as L.R No. NAIROBI BLOCK 79/423.
7. That in the alternative and without prejudice to the foregoing, the property known as L.R No. NAIROBI BLOCK 79/423 be sold and the proceeds of the sale be shared equally.
8. That the Defendant's Statement of Defence and Counterclaim filed herewith be deemed as properly on record, upon payment of the requisite court fees.
9. That the costs of this Application be provided for.

The Defendant's application was brought on several grounds. The Defendant averred that he was aggrieved with the decision of Nyamweya J. and that his hitherto advocates did not advise him to seek declaratory rights over the suit property. He averred that he contributed to the acquisition of the suit property a fact which the Plaintiff failed to disclose to the court. He averred that he was threatened with eviction from the suit property and that due to his financial difficulties he could not afford alternative accommodation. The Defendant also contended that since the suit property is registered in the name of the Plaintiff, he was apprehensive that the Plaintiff may dispose of the same an act that would prejudice his interest in the property.

The application was opposed by the Plaintiff through a replying affidavit sworn on 4<sup>th</sup> May, 2015. The Plaintiff stated that the Defendant had not put forward good grounds that would justify the review of the

orders of Nyamweya J. aforesaid. The Plaintiff stated that the prayer for stay of execution had been overtaken by events because the Defendant had voluntarily moved out of the suit property. On the Defendant's prayer for injunction, the Plaintiff contended that the Defendant had not satisfied the conditions for granting such order. The Plaintiff contended further that no reasonable explanation had been given by the Defendant for his delay in filing a statement of defence in respect of which leave was sought.

I have considered the Defendant's application together with the affidavit filed in support thereof. I have also considered the affidavit in reply to the application and the written submissions by the advocates for the parties. The Defendant has sought five (5) Principal prayers which I will consider separately. The first prayer is seeking stay of the order that was issued by Nyamweya J. on 29<sup>th</sup> January 2015. This order was sought pending the hearing and determination of this application. There is consensus that the Defendant vacated the suit property or was evicted therefrom. Since the Defendant is no longer in occupation of the suit property, the stay order sought by the Defendant has been overtaken by events.

The second prayer sought by the Defendant is review and/or variation of the order that was made by Nyamweya J. on 29<sup>th</sup> January, 2015. I am in agreement with the submissions by the Plaintiff that the Defendant has not satisfied the conditions for granting a review set out in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. The Defendant has not pointed out any new matter or evidence which has come into his knowledge that he could not produce before the court when the Plaintiffs application for injunction was being heard. I don't think that the Defendant's failure to file a defence and counter-claim in time amounts to a new matter or evidence. The Defendant has also not pointed out any error apparent on the face of the record or any other sufficient reason which would justify the review of the order of 29<sup>th</sup> January, 2015. All the issues which have been put forward by the Defendant in support of this prayer for review were raised before Nyamweya J. and were considered in her ruling made on 29<sup>th</sup> January 2015. These issues cannot again form grounds for review of the order of 29<sup>th</sup> January 2015. It is my finding in the circumstances that a case has not been made for the review of the orders of Nyamweya J. made on 29<sup>th</sup> January, 2015.

The Defendant's third prayer is seeking injunction to restrain the Plaintiff from selling, transferring, disposing of or otherwise dealing with the suit property pending the hearing of this suit. Having held that there is no basis for reviewing the orders made by Nyamweya J. on 29<sup>th</sup> January, 2015, the Defendant's application for injunction against the Plaintiff is untenable. Nyamweya J. had found that the Plaintiff had established a prima facie case against the Defendant and granted the Plaintiff an injunction restraining the Defendant from interfering with her quiet enjoyment of the suit property pending the hearing of this suit. The Defendant has not placed any new material before this court that would make the court change its mind on the strength of the parties' respective cases. I am of the view that the injunction sought if granted as prayed would be inconsistent with the orders that were granted in favour of the Plaintiff by Nyamweya J. That said, I think that justice would demand that the suit property be preserved pending the hearing of the parties' respective claims. I am persuaded by the decision in the case of **E. Muiru Kamau & Another vs. National Bank of Kenya Ltd. [2009]eKLR** that was cited by the Defendant in which it was held that;

**“.....some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality for all is maintained and that as far as practicable to place the parties in equal footing.”**

I am of the view that if the suit property is not preserved and the Plaintiff proceeds to dispose of the same while this suit is pending, the parties would not be on equal footing at the trial of the suit. I don't think that the Plaintiff would be prejudiced if an order is made whose effect is only to preserve the suit property.

The Defendant has sought an alternative prayer that the suit property be sold and the proceeds thereof

shared equally. I am in agreement with the Plaintiff's submission that this prayer cannot be granted at this interlocutory stage. The last prayer sought by Defendant is that the Defendants statement of defence and counter-claim attached to the present application be deemed as properly on record upon payment of the requisite fees. I have noted that the statement of defence and counter-claim referred to by the Defendant is in draft. The same is not signed. The same cannot therefore be deemed as being properly on record. What the Defendant has sought is leave to file a defence and counter-claim out of time. Whether or not to allow a defendant to file a defence out of time is at the discretion of the court. In the circumstances of this case, I don't think that the Plaintiff would suffer any prejudice if the Defendant is granted leave to file his defence out of time. I am inclined to exercise my discretion in favour of the Defendant.

In conclusion, the Defendants Notice of Motion dated 16<sup>th</sup> April, 2015 succeed in part and is allowed on the following terms;

1. Pending the hearing and determination of this suit or further orders by the court, there shall be an inhibition inhibiting the registration of any other or further dealings with all that parcel of land known as LR No. Nairobi/Block 79/423.
2. The Defendant is granted leave to file a statement of defence and counter-claim within 14 days from the date hereof.
3. The Plaintiff shall be at liberty to file a reply to defence and defence to counter-claim within 14 days from the date of service of the defence and counter-claim.
4. The costs of the application shall be in the cause.

**Delivered and Dated at Nairobi this 4<sup>th</sup> day of November, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

N/A for the Plaintiff

Mr. Benji h/b for Thongori for the Defendant

Kajuju Court Assistant