



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO 22 OF 2016

AGNES WANJIRU KAIRU PLAINTIFF/APPLICANT

-VERSUS-

GERALD KAIRU GICHERU DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant filed the Notice of Motion dated **24th February, 2016** seeking an order of injunction against the defendant/respondent to restrain him, his servants and/or agents from collecting rent and interfering with the defendant's use of half of the premises on the parcel of land known as **Tetu/Unjiru/1657** (the suit property) pending the hearing and determination of the suit. She also prays that she be allowed to collect rent from two of the premises as agreed by the parties and that a restriction be placed on the suit property.
2. The application is premised on the grounds on the face of the application and is supported by the affidavit sworn by the applicant on **24th February, 2016**. She depones that she is the wife of the respondent with whom they have had a marital dispute; that whereas the respondent is registered as proprietor of the suit property, the applicant is entitled to collect rent from two of the residential rooms erected thereon, pursuant to an agreement between them dated **4th August, 2007**. It is her contention that the respondent has breached the terms of this agreement and started collecting all the rent from the tenants himself, which has left her destitute.
3. The application is opposed. The respondent filed a replying affidavit on **4th March, 2016**. He admits being the applicant's husband but states that the applicant lives elsewhere and collects rent from another family property (**Nyeri/Municipality Block 1/393**); that the applicant's assertion that the respondent intends to sell the suit property is not true. He contends that the applicant's suit is an abuse of the court process as there is no cause of action considering that the parties are still married.
4. In her further affidavit sworn on **29th March, 2016** the applicant's states that she is the one who financed the bulk of the construction on the suit property by taking out loans which she has continued to pay with a lot of difficulty. It is her contention that although the suit property is registered in name of the defendant, this was not meant to deny her access to the family property.
5. In a further affidavit sworn on **28th June, 2016** by the respondent, he denies that the plaintiff financed the acquisition and development of the suit property, stating that her salary of Kshs.10,000 at that time, was too little to enable her to contribute to its purchase and/or development.

6. The matter was heard on 4th November, 2016 with Mr Ndirangu appearing for the applicant while the respondent appeared in person.
7. Mr. Ndirangu chose to rely on the application, its grounds and the affidavits sworn by the plaintiff. He placed emphasis on the agreement dated **4th August, 2007** and letters to the tenants by the respondent. He submitted that the respondent had not denied that the letters to the tenants were authorised by him and was only bringing extraneous issues to frustrate the conduct of the suit.
8. The respondent also relied on his pleadings. In addition he stated that the said agreement dated **4th August, 2007** was drawn by the applicant and her relatives and that he signed the same under duress. He maintained that the suit property belongs to him.
9. This being an application seeking orders of injunction, I am guided by the Principles laid down in the case of **Giella v Cassman Brown & Company Limited** [1973] E.A 358 that the applicant must show they have a *prima facie* case with a probability of success; the applicant, must demonstrate that he/she might suffer irreparable injury if the injunction is not issued which cannot be compensated by damages and finally, should the court be in doubt, it will decide the application on a balance of convenience.
10. In support of the application, the applicant has annexed an agreement dated **4th August, 2007** wherein she and the respondent agreed to share the rental proceeds from two properties namely; **Kamakwa Nyeri Municipality Block Tetu(najiru) plot 1657 and plot No. 393 near Green Hills Hotel**. The two properties have a total of ten(10) houses. Of interest is the suit property (plot 1057) which has 4 houses. In the agreement dated 4th August, 2007 the parties agreed as follows:
- “That the two rental properties to be subdivided equally into two i.e Kamakwa Nyeri Municipality Block Teru (Unjiru) plot No. 1657 and plot No. 393 Block T near Green Hill Hotel.**
- The two plots has ten houses ie Kamakwa 4 houses and Nyeri Municipality houses. Each person should collect his on her own rent.”**
11. The respondent has not denied that he executed the aforesaid agreement but only says that he did this under duress. He has not tendered any evidence to support this allegation.
12. The question before the court therefore is whether the Plaintiff has established a *prima facie* as defined by **Bosire JA** in the case of **Mrao Limited Vs First American Bank Kenya Ltd & 2 others** [2003] KLR 125 that;
- “...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”**
13. From the evidence placed before me particularly the agreement dated 4th August, 2007, entered into by the applicant and the respondent and whose contents are admitted by the respondent, I am satisfied that the applicant has met the threshold as set in the Mrao case and I see no reason to deny her the orders sought pending the hearing and determination of the suit.
14. The subject matter of the suit being land, I find and hold that damages may not be an adequate remedy to the plaintiff.
15. Though not in doubt concerning the foregoing determination, from the agreement executed between the parties to this dispute, I find and hold that the balance of convenience tilts in favour of the plaintiff.
16. Since the defendant has already filed his defence, parties are directed to comply fully with **Order 11** of the Civil Procedure Rules and take a date for pretrial within 90 days from the date hereof.

Orders accordingly.

Dated, signed and delivered in open court this 16th day of December, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Ndirangu for the applicant/plaintiff

Mr. Gerald Kairu Gicheru – respondent

Court clerk – Esther