



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT

AT NAIROBI

ELC SUIT NO. 317 OF 2014

JANE WAMBUI NGERU.....PLAINTIFF

VERSUS

TIMOTHY MWANGI NGERU.....DEFENDANT

RULING

The Plaintiff's Application

The application before the court is a Notice of Motion dated 18th March 2014 filed by the Plaintiff, seeking the following orders:

1. An injunction to restrain the Defendant either by himself, his servants and/or his agents from accessing, entering, and/or interfering with Plaintiff's quiet possession of the suit property, being LR No. NAIROBI BLOCK 79/423, or in any other manner endangering the Plaintiff's occupation of the suit property pending final determination of this suit.
2. That in the alternative, the Defendant to vacate the suit property, pending hearing and determination of this suit.

The grounds for the said application are that the Plaintiff is the registered owner of the suit property situated in Buruburu Estate within Nairobi County, and that until 23rd December 2013 when the Plaintiff was granted a divorce, the Plaintiff and the Defendant were married and lived in the suit property. Further, that while the divorce proceedings were pending, the Defendant constantly issued threats to the Plaintiff forcing her to move out of the matrimonial home. The Plaintiff avers that the Defendant has refused to vacate the suit property despite the fact that a divorce has been granted, and that she stands to suffer a lot of damage and loss to the suit property as well as the household goods, which have on several occasions been threatened with attachment and sale on account of the Defendant's personal debts.

The Plaintiff in her supporting and further affidavits sworn on 18th March 2014 and 24th June 2014 respectively explained that she petitioned for divorce in 2013, and a *decree nisi* was issued by the court on 23rd December, 2013 which was made absolute on 12th May 2014 and which she annexed. Further, that she left her children on the suit property for the reason that she could not afford a bigger house to accommodate all of them, and that she vacated the suit property despite the fact that she was the registered owner of the same and had bought it while working with Barclays Bank through employer's financing.

The Plaintiff stated that after she was granted the divorce, she expected the Defendant to move out from the suit property, so that she could occupy the same and take care of her children whose custody the court granted to her. However, that the Defendant completely refused to vacate the suit property despite numerous requests to do so. She annexed documents showing proof of her ownership of the suit property, the proclamation and warrants of attachment and sale on account of the Defendant's personal debts, and of her two objections to execution of the same.

The Plaintiff alleged that there is no justification whatsoever for the Defendant to remain in the suit premises, and denied that she holds the suit property in trust for the Defendant or that the Defendant contributed to the purchase of the suit property.

The Defendant's Response

The Defendant opposed the Plaintiff's application in a preliminary objection dated 6th May 2014 and a replying affidavit he swore on 5th May 2014. The grounds for his preliminary objection were that this Court lacks jurisdiction in this matter as it falls under the scope of the jurisdiction of the Family Division. Further, that the Plaintiff's application and suit offend the provision of Article 45(3) of the Constitution and section 6 of the Matrimonial Property Act (2013), and is an abuse of the process of the court, vexatious and frivolous.

The Defendant averred in his replying affidavit that his marriage with the Plaintiff had not been dissolved as required by the law, and that they are still married. Further, that they are still living together in their matrimonial home albeit in different bedrooms, and that the Plaintiff has never moved out of the matrimonial home even after she filed the petition for divorce. The Defendant stated that the said home was acquired through joint efforts during the substance of their marriage, and that he also contributed to the purchase and development of the suit property by paying the school fees and related expenses for their children, and shopping for the family during the period the Plaintiff was servicing the mortgage.

Further, that it was true that the Defendant and Plaintiff agreed that the property be registered in the Plaintiff's name, however, that it is not true that they agreed that she be registered as a sole proprietor to hold absolutely in her name. The Defendant averred that the Plaintiff holds the matrimonial home in trust for himself and their children and not as her own property, and that it was registered in her name to protect it from being seized for debts that had been incurred by a company in which the Defendant was a shareholder .

The Issues and Determination

The parties were directed to file written submissions on the Plaintiff's application. The Plaintiff's counsel filed submissions dated 8th September 2014 while the Defendant's counsel filed submissions dated 24th September 2014. I have read and carefully considered the pleadings filed and submissions made by the parties herein. The preliminary question to be determined is whether this Court has jurisdiction to hear and determine the Plaintiff's application and suit. If this question is answered in the affirmative, this Court will then proceed to determine the substantive question as to whether the Plaintiff has met the threshold for the grant of temporary orders of injunction.

On the issue of jurisdiction, it was argued by the Defendant that this matter concerns matrimonial property and should therefore be transferred to the Family Division of the High Court of Kenya. The Defendant relied on Articles 45 of the Constitution, section 28 of the Land Registration Act and sections 4 and 6 of the Matrimonial Property Act on the rights of parties upon dissolution of a marriage and spousal rights to matrimonial property.

The Plaintiff on the other hand submitted that this matter falls within the jurisdiction of this Court as provided by section 13 of the Environment and Land Court Act, and Article 162 of the Constitution. Further, that the issue at hand is one of ownership and use of the suit property, and not about whether the same is matrimonial property.

Article 162(2)(b) of the Constitution states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, section 13 of the Environment and Land Court Act expounds on the jurisdiction of this Court as follows:

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

The dispute herein involves property situated on a parcel of land, and the specific prayers sought by the Plaintiff in the Plaint filed herein dated 18th March 2014 are a declaration that the Plaintiff is the owner of the said property, that the continued occupation of the property by the Defendant is illegal, orders of eviction, and a permanent injunction restraining the Defendant from dealing with the suit property. These are clearly orders relating to the use, occupation and title to land and within the jurisdiction of this Court. In addition the Land Registration Act which provides for certain matrimonial property rights and co-ownership of the matrimonial home as between spouses specifically provides under section 101 thereof that this Court has jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act.

It is however notable in this regard that this Court shares concurrent jurisdiction with the High Court in certain matters relating to land, and these matters have been described in the **Practice Directions On Proceedings In The Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts** dated 25th July 2014 and published in Gazette Notice No. 5178 as cases touching on inheritance, succession and distribution of land under the Law of Succession Act. These cases shall continue to be filed and heard by the High Court or the Magistrates Courts of competent jurisdiction.

In addition if rights to matrimonial property are in dispute, section 17 of the Matrimonial Property Act of 2013 provides as follows:

“(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)—

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

No particular Court is identified by the Act, and can therefore be any Court that has been given jurisdiction to hear matrimonial disputes. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3). The Marriage Act of 2014 in addition provides that the courts that will hear matrimonial causes arising under the Act are resident magistrate's courts and within the limits provided under the law as to their jurisdiction.

It is thus the current legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this Court. The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to land.

Coming to the substantive issue for determination, the principles of law on the grant of temporary and mandatory injunctions are settled. The requirements for the grant of temporary injunctions are stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, and these are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

For the grant of mandatory injunctions, the principles were set out by the Court of Appeal in **Kenya Breweries Ltd and Another v Washington Okeyo (2002) 1 E.A. 109** wherein it was held that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

Lastly, as to what constitutes a *prima facie* case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** stated as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”

The Plaintiff submitted in this regard that she is the rightful and absolute owner of the suit property, and relied on sections 24(a), 26(1) and 30(3) of the Land Registration Act, and the decision in **Zacharia Onsongo Momanyi vs Evans Omurwa Onchagwa (2014) e KLR** for the position that registration as owner of the suit property was *prima facie* proof of absolute ownership of the same. Further, that being the registered proprietor of the suit property she deserves to enjoy quiet possession and the Defendant is a trespasser. The Plaintiff cited the decision in **Joyce Nyansiaboka Onchmba vs Joseph Kenyanya & 2 Others (2013) e KLR** in this regard. Lastly, the Plaintiff citing the decision in **SWM vs MKK (2007) e KLR** submitted that she will suffer irreparable harm if the Defendant stays on in the suit property and carries out his unspecified threats which pose a danger to her.

The Defendant on his part submitted that the Plaintiff had not tendered any evidence of the Defendant's threats to her or their children, which remain mere allegations, and relying on sections 4 and 6 of the Matrimonial Property Act as well as the decision in **Agell vs Richard Mbole Kimuyu (2013) e KLR**, argued that the suit property is matrimonial property. Further, that the Plaintiff is holding the suit property in trust for the Defendant who has contributed to the acquisition of the same. Lastly, it was submitted that the balance of convenience lies in favour of the Defendant as the suit property is the only place he has known as home.

This Court notes that both prayers sought by the Plaintiff in her Notice of Motion will result in an eviction of the Defendant, and are therefore both in the nature of mandatory injunctions. The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff brought evidence of a certificate of lease issued to her on 30th July 2013 with respect to the suit property, which she relies upon for her entitlement to the suit property. The Defendant did not dispute that the Plaintiff bought the suit property through a mortgage facility that she got from her employer. The Defendant however claims that the said property is matrimonial property and that he contributed to its purchase.

The applicable law as regards matrimonial property is the Matrimonial Property Act of 2013, which in section 6 defines matrimonial property as follows:

- (a) the matrimonial home or homes;
- (b) household goods and effects in the matrimonial home or homes; or
- (c) any other immovable and movable property jointly owned and acquired during the subsistence of a marriage.

A matrimonial home is in addition defined under section 2 of the said Act to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.

In addition section 93(2) of the said Act states as follows:

“If land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered .”

Section 14(a) of the Matrimonial Property Act similarly provides that where matrimonial property acquired during marriage is registered in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.

It is in this regard not disputed that the suit property was the matrimonial home when the marriage between the Plaintiff and Defendant was subsisting. This Court however notes that the Defendant has not brought evidence of any petition or claim that he has made with regard to his rights to the suit property. He brought evidence of payments he made through credit card statements to show his contribution to the acquisition of the suit property, however such evidence is only relevant in the context of a claim for matrimonial property rights. In the circumstances, and in light of the prayers that are sought in the Plaint filed herein as noted hereinabove, it is the finding of this Court that the Plaintiff has shown a *prima facie* case.

The fact of the suit property being registered in the Plaintiff’s name, coupled with the fact that a decree absolute has been granted by a competent court of law irrevocably dissolving the marriage between the Plaintiff and Defendant, in my view makes this a clear case for the mandatory injunctions sought to issue. In addition, the Defendant still has the opportunity to canvass his position as regards his rights to the suit property by instituting the relevant proceedings, but until that determination is made it is the opinion of this Court that it cannot in the circumstances of this case force the Plaintiff to cohabit with the Defendant.

The Plaintiff’s Notice of Motion dated 18th March 2014 is accordingly allowed only to the extent of the following orders pursuant to the provisions of section 3A and 63(e) of the Civil Procedure Act:

1. That the Defendant shall vacate the property known as LR No. NAIROBI BLOCK 79/423 within 60 days after service by the Plaintiff of the orders granted herein.
2. That the Defendant shall thereafter be restrained either by himself, his servants and/or his agents from accessing, entering and/or interfering with Plaintiff’s quiet possession of the property known as LR No. NAIROBI BLOCK 79/423 pending final determination of this suit or until further orders.
3. The costs of the Plaintiff’s Notice of Motion dated 18th March 2014 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____29th____ day of ____January____, 2015.

P. NYAMWEYA

JUDGE