



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1010 OF 2014

WILLIS ODEDE NYENDE.....PLAINTIFF

VERSUS

MARY WAMAITHA NDERITU.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 31st July 2014 in which the Plaintiff/Applicant seeks for orders of interim injunction and prohibitory orders restraining the Defendant from selling, alienating, disposing or in any manner dealing with the properties known as Dagoretti/Riruta/4608 Apartment No. 1A and Dagoretti/Riruta/4605 Apartment No. D9 (hereinafter referred to as the “suit properties”) pending the hearing and determination of this Application and suit.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Willis Odede Nyende, sworn on 31st July 2014 in which he averred that the Defendant is his wife, having cohabited with her in a relationship since the year 2007 and that they are blessed with two children. He further averred that in the course of their living together, they jointly purchased the suit properties for Kshs. 8 million each out of which he contributed Kshs. 12 million towards the purchase price and Kshs. 1 million for renovations. He also averred that the Defendant contributed Kshs. 6 million towards the purchase price. He stated that he and the Defendant agreed that the suit properties be registered in the sole name of the Defendant to hold the same as a trustee for their joint interest and ownership. He further stated that he holds an equitable beneficial proprietary interest in the suit properties by reason of direct contributions to the purchase price, renovations and as matrimonial property. He added that they moved into one of the suit properties and rented the other out until the month of May 2014 when relations between him and the Defendant became strained resulting in his moving out. He also stated that since moving out he has come to learn that the Defendant is in the process of selling, alienating and /or disposing off the suit properties without his knowledge as a beneficial co-owner. He further added that unless restraining orders are issued to preserve the suit properties, they will be disposed of to his detriment and that will render this suit nugatory.

The Application is contested. The Defendant, Mary Wamaitha Nderitu, filed her Replying Affidavit sworn on 23rd October 2014 in which she averred that she has no intention of selling Dagoretti/Riruta/4608 Apartment No. 1A as that is where she lives with her two children and further that she has no interest whatsoever in Dagoretti/Riruta/4605 Apartment No. D9. She added further that she is the one who provided the entire purchase price for Apartment No. 1A in which she lives having sourced

the same from a loan taken from her current employer and pension dues paid to her by her previous employer. She also clarified that the Plaintiff only acted for her as her Advocate in the transaction to purchase Apartment No. 1A.

In response thereto, the Plaintiff filed his Supplementary Affidavit sworn on 5th November 2014 in which he emphasized that the suit properties were acquired through joint contributions by both himself and the Defendant. He emphasized that he contributed funds from professional fees paid to his law firm Nyende & Co. Advocates and from sale proceeds of his two plots in Kitengela.

The issue that I am required to determine in this Application is whether or not to grant the Plaintiff orders of a temporary injunction restraining the Defendant from disposing off the suit properties without taking into account the Plaintiff's interest therein. In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”

It is an undisputed fact that Apartment No. 1A is registered solely in the name of the Defendant. A Certificate of Lease to prove that was produced by the Plaintiff/Applicant. The Defendant stated that she lives in this apartment together with her two children. No title document was produced in respect of Apartment No. D9. The Defendant has asserted that she has no interest in Apartment No. D9. However, there is a copy of a sale agreement dated 29th October 2013 in respect to Apartment No. D9 which shows the parties as the Defendant as the purchaser and Junction Apartments Limited as the vendor. There was also correspondence between the advocates handling the conveyance of the same which indicate that the registered owner of Apartment No. D9 was the Defendant. The Plaintiff/Applicant averred that Apartment No. D9 is also registered solely in the Defendant's name. To that extent, I am convinced that the Defendant is the sole registered proprietor of the suit properties. The Plaintiff/Applicant however asserts that even though the suit properties are both registered in the sole name of the Defendant, they are held in trust for him owing to the contributions of Kshs. 13 million he contributed towards their purchase and renovation. He maintains that the Defendant only contributed Kshs. 6 million towards the purchase of the suit properties. On that basis, he claims to have a beneficial interest in the suit properties which should be protected by this court through the issuance of a temporary injunction.

What does the law say on this point? **Section 93(2) of the Land Registration Act, 2012**, 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 name 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 spouse shall be recognized in all cases as if they were registered.”

This legal provision seems to cater for contribution by a spouse in the form of labour or other means to the productivity, upkeep and improvement of the land. In this suit, the Plaintiff has asserted that he not only contributed towards the renovations carried out on the suit properties but went even further to contribute the bulk of the purchase price of the suit properties. It would appear to me that this is also envisaged in the legal provision cited above and by virtue of this, the Plaintiff/Applicant is entitled to be recognized as a co-owner of the suit properties as if he is a registered owner thereof.

Further, “matrimonial home” is defined in **section 2 of the Matrimonial Property Act, 2013** as follows:

“means 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.”

Section 6(1) of the same statute defines “matrimonial property” to include the matrimonial home or homes. Section 7 of the same statute provides that ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouse if they divorce or their marriage is otherwise dissolved. Section 14 of the same statute provides as follows:

“Where matrimonial property is acquired during marriage-

- a. In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.”**

In this matter, the Plaintiff/Applicant fears that the Defendant is going to dispose of the suit properties without his consent. It is admitted by both parties that they lived in Apartment No. 1A as their matrimonial home and leased out Apartment No. D9. Albeit on a preliminary basis, I find that Apartment No. 1A is the matrimonial home and that it vests in the parties to this suit to the extent of their contributions towards the purchase price. I also find on a preliminary basis that the Defendant has not rebutted the presumption that she holds the suit properties in trust for the Plaintiff/Applicant.

On the basis of the foregoing, I am satisfied that the Plaintiff/Applicant has demonstrated that he has a genuine and arguable case and has a prima face case with high chances of success at the main trial.

An interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Does an award of damages suffice to the Plaintiff? Land is unique and no one parcel can be equated in value to another. Though the value of the suit properties can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

The third limb I must determine is in whose favour the balance of convenience tilts. As mentioned before, it is an undisputed fact that the Defendant lives in Apartment No. 1A together with her two children and that Apartment No. D9 is leased out to a tenant. I am inclined to maintain that status quo but prohibit the Defendant from disposing of the suit properties pending the hearing and determination of this suit.

Arising from all of the above reasons, I find that the Plaintiff has reached the threshold for grant of an interlocutory injunction subject to the Defendant being permitted to continue residing in Apartment No. 1A and letting out Apartment No. D9. Costs shall be in the cause.

It is so ordered.

SIGNED AND DELIVERED IN NAIROBI THIS 20TH

DAY OF FEBRUARY 2015.

MARY M. GITUMBI

JUDGE