



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL NO. 485 OF 2013**

**ELIZABETH NGAYAO NZENGE ..... PLAINTIFF**

**VERSUS**

**DANIEL MAKAU WAITA ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH WAITA MBUVI..... 2<sup>ND</sup> DEFENDANT**

**ANASTACIA MBELE WAITA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

The Notice of Motion application by the Plaintiff dated 20<sup>th</sup> March 2013 is the subject of this ruling. By the application the plaintiff who is the estranged wife of the 1<sup>st</sup> Defendant and the daughter in law to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants seeks temporary and mandatory injunctive orders against the Defendants restraining them. Their agents and servants from entering into or dealing in any manner with title number **Ndalani/Ndalani Block 1/1019** pending the hearing and determination of the suit. The plaintiff further seeks an order that the Defendant do return building materials carried away from the site house being timber, polythene paper generator and irrigation pipes of the plaintiff.

The plaintiff premises her application on the grounds that the Defendants have failed and/or neglected to vacate the plaintiff's premises, that she is the owner of title number **Ndalani/Ndalani block 1/1019**, that the Defendants have entered into the suit property and have started putting up a permanent structure and other structures thereon and tilling and ploughing the suit property, and that the plaintiff needs access to her property as she wants to erect a house on the suit property. By the supporting affidavit the plaintiff avers that she purchased the suit property through a loan from the Equity Bank and that she is now the registered owner as per the annexed copy of title and search certificate marked "**ENN1**". The plaintiff avers that the Defendants have denied her and/or her agents access to the suit land and that the Defendants forcefully harvested her maize and have prevented her from utilizing her parcel of land to her prejudice and on that account she seeks orders that the Defendants vacate and stay away from her property.

The Defendants oppose the application for a mandatory injunction by the plaintiff and have filed a replying affidavit sworn by **Daniel Makau Waita** on 12<sup>th</sup> June 2013 on behalf of all the Defendants. In the replying affidavit the 1<sup>st</sup> Defendant depones that he and the plaintiff were married in the year 2007 and that marriage still subsists. A copy of the marriage certificate is annexed and marked "**DMW1**" which shows the marriage was solemnized on 24<sup>th</sup> February 2007. The 1<sup>st</sup> Defendant in the replying

affidavit depones that he and the plaintiff were purchasing family assets consensually and it is on that basis they purchased a family car and the property the subject matter of this suit. The 1<sup>st</sup> Defendant avers that he made his contribution towards the purchase of the family car and the purchase of the suit property. The 1<sup>st</sup> Defendant depones that he and the plaintiff agreed that the plaintiff, since she was working for Equity Bank they could get a loan from her employer to finance the purchase of the land but since the plaintiff had outstanding loans the 1<sup>st</sup> Defendant would assist her to clear the outstanding loans so that she would be eligible to access the loan from her employer to purchase the suit property which they had jointly identified to be suitable for them. The 1<sup>st</sup> Defendant states that following agreement with the plaintiff he borrowed a sum of Kshs.1,000,000/- from Kenya Commercial Bank which was credited to the plaintiff/Applicant's staff account on 21/3/2011 to offset her loans to facilitate the plaintiff to borrow funds to purchase the suit property.

The 1<sup>st</sup> Defendant further depones he made various other payments towards the purchase of the suit property including a sum of Kshs.100,000/- he paid to the vendor's Advocates on 10/3/2011 and a further sum of Kshs.300,000/- which he paid on 4<sup>th</sup> July 2011 for the purchase of a two (2) roomed house/store that was erected on Title NO. **Ndalani/Ndalani/1/1019** (the suit property). The 1<sup>st</sup> Defendant thus contends the suit property was for the benefit of both himself and the plaintiff and constitutes matrimonial property in which the 1<sup>st</sup> Defendant has an interest and the application for injunction would therefore have no basis. The 1<sup>st</sup> Defendant claims he has spent over Kshs.3,000,000/- effecting developments in the suit property on the basis that he is a beneficiary of the property. The 1<sup>st</sup> Defendant in the filed joint statement of defence paragraph 6 avers that the suit property is a matrimonial property. Paragraph 6 of the defence states:-

**6. The 1<sup>st</sup> Defendant admits that the plaintiff is the registered owner of the suit property but avers that he has personally invested more than Kshs.300,000/- into the suit property which is the matrimonial property, the same having been acquired through contributions of the plaintiff and the 1<sup>st</sup> Defendant who are spouses having entered into marriage union on 24<sup>th</sup> February 2007.**

The plaintiff and the 1<sup>st</sup> Defendant have filed supplementary and further affidavits following their initial filings. The plaintiff through a supplementary affidavit sworn on 24<sup>th</sup> June 2014 admits being married to the 1<sup>st</sup> Defendant but reiterates that the 1<sup>st</sup> Defendant did not have any hand in the purchase of the car referred to in the 1<sup>st</sup> Defendant's affidavit and insists she bought the car from a bank loan that she procured from her employer. The plaintiff disputes the other payments the 1<sup>st</sup> Defendant claims to have made stating that the structure the 1<sup>st</sup> Defendant claims to have paid Kshs.300,000/- for was in terms of the agreement with the vendor supposed to have been removed from the suit premises at the vendor's cost. The Plaintiff further deponed in the supplementary affidavit that she infact was the one who funded the construction of the house in the suit premises and not the 1<sup>st</sup> Defendant and in this respect exhibited a statement of her Bank account marked "**ENN2b**" to illustrate she made funds transfer to the contractor amounting to **Kshs.781,550/-**.

The 1<sup>st</sup> Defendant in response to the plaintiff's supplementary affidavit filed a supplementary affidavit sworn on 8<sup>th</sup> November 2013. The 1<sup>st</sup> Defendant through the supplementary affidavit deponed that there is a pending case before the children's court being **Cause NO. 314 of 2013** brought by the plaintiff where he is named as the Defendant and further that the plaintiff has petitioned for divorce in petition **NO. 293 of 2013** where the 1<sup>st</sup> Defendant has filed an answer and also cross petitioned. Further the 1<sup>st</sup> Defendant states that the plaintiff has filed a complaint that he did steal her motor vehicle KBK 474 E which resulted in the 1<sup>st</sup> Defendant being charged before the Chief Magistrate's Court vide criminal case NO. 648 of 2013 as per the copy of charge sheet annexed and marked "**DMW2**".

The 1<sup>st</sup> Defendant contends that all the matters and issues raised by the plaintiff relate to property/assets acquired by both the plaintiff and the Defendant during the subsistence of their marriage and consequently they are matrimonial matters/issues that ought to be dealt with by the Family Division of

this Honourable court. The plaintiff in yet a further supplementary affidavit sworn on 15<sup>th</sup> November 2013 while acknowledging the pendency of the cases before the children's court the criminal court and the divorce petition argues that the cases are different and not related and should be handled independently by the courts where they have been instituted.

The parties filed written submissions on the directions of the court. The plaintiff filed her submissions on 5<sup>th</sup> December 2013 and the Defendants filed their submissions on 27<sup>th</sup> May 2014 in which they inter alia restate the facts as set out in the various affidavits. I have considered the pleadings, the affidavits and annexures thereto, and the submissions made by the parties and the issues for determination is whether the land the subject matter of the suit is matrimonial property and whether having regard to all the material placed before the court the plaintiff has established a prima facie case with a probability of success to entitle her to an order of interlocutory injunction and in particular whether the conditions for grant of a mandatory injunction at the interlocutory stage have been satisfied.

It is admitted that the plaintiff and the 1<sup>st</sup> Defendant are husband and wife having been married in February 2007. The suit property was purchased pursuant to an agreement of sale (undated) and annexed and marked "ENN2" together with other documents. The Agreement for sale indicates the plaintiff as the purchaser and the 1<sup>st</sup> Defendant witnessed the signing of the Agreement for sale by the plaintiff. The 1<sup>st</sup> Defendant has stated that he and the plaintiff mutually agreed to purchase the suit property as a family property and to construct their home thereon. This fact is borne out by the 1<sup>st</sup> Defendant having been a witness to the execution of the agreement. The 1<sup>st</sup> Defendant and the plaintiff do not agree on the contributions made by each of them towards the purchase. The plaintiff would want the court to believe that the 1<sup>st</sup> Defendant made no contribution as the purchase money was loaned to her by her employer Equity Bank Ltd. On his part the 1<sup>st</sup> Defendant states that was the agreement and to enable his wife to access the loan he provided upto Kshs1,000,000/- that was deposited in his wife's staff account to enable her to get the loan of Kshs.2,300,000/-. The plaintiff disputes this. Be it as it may be, the loan was availed and the property was transferred to the name of the plaintiff on 26<sup>th</sup> July 2011 as per the annexed certificate of official search and Title Deed dated 26<sup>th</sup> July 2011.

The 1<sup>st</sup> Defendant states he paid Kshs.300,000/- for the 2 roomed structure that was on the property. The plaintiff states these were to be removed by the vendor but a look at the photographs annexed to the 1<sup>st</sup> Defendant's affidavit shows this structure to still be there and there is an acknowledgement for the payment of Kshs.300,000/- to the vendor or the vendor's representative. I accept that the 1<sup>st</sup> defendant made this payment for the 2 roomed house as they can clearly be seen. The parties also agree the intention was to construct a home on the suit property. The building plan annexed to the 1<sup>st</sup> Defendant's affidavit identifies the suit property Title NO. **Ndalani/Ndalani Block 1/1019** to be the site where the residential house was to be constructed and the client is identified as **Daniel Makau Waita**, the 1<sup>st</sup> Defendant herein. The payment to the architects, "**Bonus Consult & Plan Printers**" for Kshs.150,000/- was paid by the 1<sup>st</sup> Defendant on 29/7/2011 as per the copy of receipt attached to the plan. This points to the fact that indeed the 1<sup>st</sup> Defendant and the plaintiff were carrying out the purchase and construction of the family home as a joint project which was to be expected as the two were and still are husband and wife.

The purchase of the suit property in July 2011 quite clearly was during the subsistence of the marriage between the plaintiff and the 1<sup>st</sup> Defendant. Whether or not the suit property constitutes matrimonial property is contested. Black Law Dictionary 9<sup>th</sup> Edition defines marital property thus:-

**“ Property that is acquired during marriage and that is subject to distribution or division at the time of marital dissolution. Generally, it is property acquired after the date of the marriage and before a spouse files for separation or divorce”.**

The **Land Act NO.6 of 2012** defines matrimonial home as **“any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.”**

It is unclear whether the parties have at any time used the suit premises as their family home but having regard to all the facts and circumstances I am satisfied that the suit property would qualify as marital property the same having been acquired by the parties during the subsistence of their marriage and would therefore be property that would stand to form part of the property that would be subject to division and distribution upon the dissolution of the marriage. This court therefore would not be the appropriate forum to determine the question of distribution or otherwise. The division and distribution of marital property is a matter for the Family Court to determine and that is where the parties herein should resort to ventilate their issues.

Even if I had found their suit property was not marital property I am not persuaded the plaintiff has established a case for grant of what amounts to a mandatory injunction at this interlocutory stage. A court will not grant a mandatory injunction at the interlocutory stage unless there are no disputed facts and issues and the case is plain and obvious and there are special circumstances that render it appropriate to grant a mandatory injunction at the interlocutory stage.

In the present case it is apparent that the Defendants are in actual occupation and possession of the suit premises. The order of injunction sought by the plaintiff under prayer 'C' of the notice of motion is in the following terms:-

**That there be a mandatory injunction restraining the Defendants their employees, servants, agents, or anyone acting in their name from entering into, or dealing in any manner with Ndalani/Ndalani Block 1/1019 measuring 0.030 Ha. land until hearing and determination of this case.**

The land the subject matter of the suit as per the copy of the title and copy of certificate of search is stated to be 3.234 Ha and it is unclear whether the order sought was to be restricted to a portion of 0.030Ha of the land. Be it as it may be, the 1st Defendant contests the ownership of the suit property by the plaintiff arguing that the property is marital property to which he has an interest and implicitly therefore cannot be in trespass. Granting the order of injunction sought would necessarily amount to having the Defendants ejected from the suit land and barring them from in any manner using and/or dealing with the suit land.

Courts in this country have been cautious in granting orders of mandatory injunction in interlocutory applications and the preponderance has been to deny them at the interlocutory state unless there special and exceptional circumstances. My brother **Hon. Okongo Judge**, in the case of **GRACE KERUBO OMANGA –vs- ERICK MOMANYI ONGAU & ANO. (2013) eKLR** while declining to grant an order for mandatory injunction relied on the decision in the case of **Shepherd Homes Ltd –vs- Shadalu (1971) Ich 34** where **Meggary Judge** stated as follows:-

**“it is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted even if it is sought in order to enforce a contractual obligation. If of course, the defendant has rushed on with his work in order to defeat the plaintiffs----- attempts to stop him, then upon the plaintiff promptly resorting to the court for assistance, that assistance is likely to be available, for this will in substance be restoring the status quo and the plaintiff’s promptitude is a badge of the seriousness of his complaint”.**

The court of Appeal in the case of **Magnate Ventures Ltd –vs- Eng. Kenya Ltd (C.A NO. 28 of 2009)** while considering whether a mandatory injunction can be granted at the interlocutory stage referred to their decision in the case of **Kenya Breweries Ltd & Tembo Co-operative Savings & Credit Society Ltd – vs- Washington O. Okeyo (Civil Appeal NO. 332 of 2000)** where the court quoted excerpts from Vol. 24 **Halsbury’s Laws of England 4<sup>th</sup> Edn para. 94 8**, which reads thus:-

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted.**

**However if the case is clear and one which the court thinks it ought to decide once or if the act done is simple and summary one which can be easily remedied or if the defendant attempted to steal a match on the plaintiff---- mandatory injunction will be granted on an interlocutory application”.**

The court in the Magnate Ventures Ltd case (supra) went on to observe as follows:-

**“Generally the paramount consideration before the court can grant a mandatory injunction at interlocutory stage is the existence of special circumstances and in clear case. All in all it is a decision dependent on the discretion of a judge and each case must be decided on the basis of its own peculiar facts and circumstances”.**

The above cases illustrate the principles in regard to grant of mandatory injunctions and applying the principles to the present case I find myself unable to hold that the plaintiff herein would be entitled to the order of mandatory injunction that she seeks. I have expressed my view that the suit property herein could qualify to constitute marital property and the 1<sup>st</sup> Defendant could quite probably be found to have an interest when it comes to division and distribution of matrimonial property which it is the Family Court that has jurisdiction to handle. The facts and issues in this suit are disputed by the parties and it is far from being plain and clear. There are no special circumstances and in the premises it is my view that a mandatory injunction would be unavailable to the plaintiff at this interlocutory stage.

I have reviewed the authorities referred to the court by the parties in this matter and with respect I am of the view that the facts and circumstances in those cases are distinguishable from the facts and circumstances in the present case. In the result and for the reasons that I have given in this ruling it is my finding and holding that the plaintiff’s Notice of Motion dated 20<sup>th</sup> March 2013 lacks any merit and the same is ordered dismissed with costs to the Defendants.

Ruling dated, signed and delivered this...**28<sup>th</sup>**.....day of...**October**.....2014.

**J. M. MUTUNGI**

**JUDGE**

**In presence of:**

..... for the Plaintiff

..... for the Defendants