



**Kinyua v Mosoti (Environment and Land Case Civil Suit  
E158 of 2022) [2023] KEELC 16836 (KLR) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16836 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT E158 OF 2022**

**SO OKONG'O, J  
APRIL 18, 2023**

**BETWEEN**

**FAITH MAKENA KINYUA ..... PLAINTIFF**

**AND**

**OMWANDO ERIC MOSOTI ..... DEFENDANT**

**RULING**

- 1 What is before the court is the Plaintiff's Notice of Motion application dated April 22, 2022 brought under Order 51 of the [Civil Procedure Rules](#), section 3A of the [Civil Procedure Act](#) and Rule 4 (1) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) seeking the following orders;
  - a. An injunction stopping the respondent from further developing the property pending the determination of the case.
  - b. An order barring any sale, lease or further division or transfer of the property pending the determination of the matter herein.
  - c. Any other order as the court may deem fit to grant.
  - d. The cost of the application.
- 2 The application was based on the grounds set out on the face thereof. The Plaintiff (hereinafter referred to only as "the Applicant") averred that she was a teacher by profession living and working within Nairobi County. The Applicant averred that the Respondent and she had been living together as husband and wife until they separated. The Applicant averred that while living together, they purchased a property jointly in respect of which she contributed Kshs 860,000/- towards the purchase price. The Applicant averred that the said property was matrimonial property and that upon their separation, the Respondent took full control of the property. The Applicant averred that her



contribution towards the purchase of the suit property was from a loan that she borrowed in respect of which interest had accrued to the tune of Kshs 471,255/= as at March 3, 2022.

- 3 The Applicant averred that the Respondent who had since married another wife was developing the suit property and had prevented her from deriving any benefit therefrom. The Applicant averred that the Respondent had continued to use the suit property without regard to the fact that she contributed towards the purchase of the property and that her salary was being deducted towards the repayment of the loan that she borrowed. The Applicant averred that she was straining to provide shelter, medical treatment, food, education and clothing to the children that she had with the Respondent who were in her custody. The Applicant averred that the Respondent was not providing any support to the said children. The Applicant averred that with what was left from her salary after the loan deduction, it was increasingly becoming difficult for her to support herself and the children.
- 4 The Applicant averred that she needed her share of the property to offset the loan and use the rest to support the children as part of her parental responsibility. The Applicant averred that it was in the best interest of the said children, justice, fairness and equity that the orders sought be granted.
- 5 The Defendant (hereinafter referred to only as “the Respondent”) opposed the application through a replying affidavit and grounds of opposition both dated June 27, 2022. The Respondent averred that the Applicant’s application was not supported by an affidavit as required under Order 51 Rule 4 of the *Civil Procedure Rules* and as such the same was not backed by any evidence. The Respondent averred further that the application raised family issues and children’s matters which did not fall within the purview of the jurisdiction of this court. The Respondent contended that the orders sought were untenable in the circumstances.
- 6 The Respondent contended further that the orders sought by the Applicant were vague and ambiguous since the Applicant did not specify the property with respect to which she was seeking an injunction. The Respondent admitted that he had children with the Applicant whom he claimed to be maintaining. The Respondent denied however that he lived with the Applicant as a husband and a wife.
- 7 The Respondent averred that the application and the grounds relied on in support thereof did not meet the threshold for the grant of the injunctive orders sought. The Respondent averred that since the Applicant did not place any evidence before the court in support of the application, the Applicant had not demonstrated that she had a prima facie case with a probability of success against the Respondent.
- 8 The Respondent averred that the Applicant had not presented any evidence to demonstrate that the property in respect of which the suit had been brought was owned jointly with the Respondent. The Respondent averred further that there was no evidence placed before the court in proof of the Applicant’s alleged contribution towards the purchase of the suit property.
- 9 The Applicant filed a supplementary affidavit sworn on July 4, 2022. In the affidavit, the Applicant contended that her claim related to use, occupation and title to land and as such, the same was properly before the court. The Applicant averred that the reliefs that she had sought against the Respondent in her plaint did not concern her marriage to the Respondent or the upkeep of the children of the said marriage. The Applicant averred further that she had provided evidence in the form of a sale agreement which showed that the suit property was jointly owned with the Respondent. The Applicant averred that the said agreement of sale showed that the property in dispute was Plot No 4 on LR No Nairobi/Block 118/45. The Applicant averred that she had also produced in court a bank statement that showed that she contributed Kshs 860,000/- towards the purchase of the suit property. The Applicant averred that the title for the suit property was still being processed and that explained why she did not produce the same in court.



10 On the issue of the supporting affidavit, the Applicant averred that her application was supported by the same affidavit that accompanied the plaint. The Applicant averred that the objection taken by the Respondent regarding the lack of an affidavit in support of the application was a technicality that the court should ignore for the sake of substantive justice. The Applicant averred that since she was acting in person and was a woman, she deserved protection from the court against the technicalities of procedure raised by the Respondent.

#### **The submissions:**

11 The application was argued by way of written submissions. The Applicant filed her submissions dated July 13, 2022 while the Respondent filed his submissions dated September 20, 2022. In their submissions, the parties reiterated their respective cases as set out in the affidavits in support of the application and the replying affidavit and grounds of opposition filed in opposition to the application. Both parties cited several authorities in support of their respective submissions.

#### **Analysis and Determination:**

12 I have considered the Applicant's application together with the supporting affidavits. I have also considered the replying affidavit and grounds of opposition filed by the defendant in opposition to the application. Finally, I have considered the written submissions by the parties and the authorities cited in support thereof.

13 In her application, the Applicant sought a temporary injunction restraining the Respondent from engaging in certain activities pending the hearing and determination of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now settled. In *Giella v Cassman Brown & Co Ltd [1973] EA 358*, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer an irreparable injury that cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

14 In *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR*, the Court of Appeal stated as follows:

The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."

15 From the material before me, I am not satisfied that the Applicant has established a prima facie case with a probability of success against the Respondent. The Applicant's application was brought under Order 51 of the *Civil Procedure Rules*. Order 51 Rule 4 of the Civil Procedure Rules provides as follows:



4. Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

16 As stated above, for an applicant for a temporary injunction to succeed, he must demonstrate that he has a *prima facie* case against the respondent and that he stands to suffer irreparable harm unless the injunction is granted. The existence or not of a *prima facie* case is a matter of fact and must be established through evidence. The same with whether or not one stands to suffer irreparable harm unless an injunction is granted. In interlocutory applications, evidence is adduced through affidavits unless the court orders otherwise. Whereas it is not mandatory to support an application with an affidavit, an affidavit is necessary where a party wishes to rely on evidence in support of the application. I am in agreement with the Respondent that the Applicant’s application before the court is not supported by an affidavit. The affidavit is not on the court record; both manual record and in the Judiciary Case Tracking System(CTS). This fact was brought to the attention of the Applicant very early in the proceedings and the Applicant even filed “a supplementary affidavit”. In my view, the Applicant should have used this “supplementary affidavit” to cure her failure to file an affidavit in support of the application. Instead of doing that, the Applicant maintained in her “supplementary affidavit” that she had already adduced evidence in proof of her interest in the suit property. In her submissions, the Applicant suggested that her application was supported by the verifying affidavit that accompanied the plaint.

17 I have noted from the record that the Applicant filed a list of documents to which she attached among others, an agreement for sale dated June 11, 2019 in respect of Plot No 4 on LR No Nairobi/Block 118/45 and a bank statement. This court appreciates the fact that the Applicant is acting in person. However, failure to support an application for a temporary injunction with an affidavit is not a procedural technicality. It is a requirement of the law. The court cannot take a verifying affidavit that was limited strictly to verifying the contents of the plaint or a list of documents as an affidavit in support of an injunction application. It is my finding that the agreement for sale dated June 11, 2019 through which the Applicant and the Respondent were said to have purchased the suit property and the bank statement showing the Applicant’s contribution towards the purchase price for the suit property were not produced before this court as evidence. It follows therefore that the Applicant did not place evidence before the court in proof of her claim against the Respondent. While I am in agreement with the Applicant that this court has jurisdiction to determine her claim against the Respondent, I have no evidence before me from which I can determine at this stage whether the Applicant has a *prima facie* case against the Respondent.

#### **Conclusion:**

18 I have come to the conclusion that the Applicant’s application dated April 22, 2022 is procedurally defective. The Application is struck out with costs to be in the cause. The Applicant is at liberty to file a proper application for a temporary injunction.

**DELIVERED AND DATED AT KISUMU ON THIS 18<sup>TH</sup> DAY OF APRIL 2023**

**S OKONG’O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

The Plaintiff in person

Mr Meso for the Defendant



Ms J Omondi-Court Assistant

