



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

HIGH COURT CIVIL CASE NO. E003 OF 2021

JM.....PLAINTIFF/APPLICANT

-VERSUS-

SMK.....1ST DEFENDANT/RESPONDENT

MK.....2ND DEFENDANT/ RESPONDENT

PK.....3RD DEFENDANT/ RESPONDENT

PM.....4TH DEFENDANT/ RESPONDENT

RULING

1. By a Notice of Motion dated 11th November, 2021, the Plaintiff herein seeks the following orders:

1) THAT this application be certified urgent and fit to be heard on priority basis.

2) THAT pending the hearing and determination of this Application inter partes the Respondents be restrained, either by themselves, their agents, family members, relatives and/or any other person acting under their instructions from evicting or denying the applicant and her children access to their matrimonial property on property known as Kangundo/ Isinga/ xxxx at Kwa Kamba, Kangundo, trespassing, entering or otherwise interfering with the applicant's quite occupation and possession of the same.

3) THAT pending the hearing and determination of this application, the Respondents be restrained by way of temporary injunction whether by themselves, their agents, family members, relatives and/or any other person acting under their instructions from transferring, alienating, disposing, selling, encumbering, assigning, or in any other like manner dealing with property known as Kangundo/ Isinga/ xxxx, Motor Vehicle Registration Number KBX xxxx, Rental House at Avenue Park Nairobi and all other properties in the names of GMK (deceased).

4) THAT the 4th Respondent be and is hereby directed to deposit Motor Vehicle Registration Number KBX xxxx at Kangundo Police Station until further Orders by this Honorable Court.

5) THAT pending the hearing and determination of the Summons, the Respondents be restrained, either by themselves, their agents, family members, relatives and/or any other person acting under their instructions from evicting or denying the applicant and her children access to her matrimonial property on property known as Kangundo/ Isinga/ xxxx at Kwa Kamba, Kangundo, trespassing, entering, or otherwise interfering with the applicant's quite occupation and possession of the same.

6) THAT pending the hearing and determination of the Summons, the Respondents be restrained whether by themselves, their agents, family members, relatives and/or any other person acting under their instructions howsoever from transferring, alienating, disposing, selling, encumbering, assigning, or in any other like manner dealing with property known as Kangundo/ Isinga/ xxxx, Motor Vehicle Registration Number KBX xxxx, Rental House at Avenue Park Nairobi and all other properties in the names of GMK (deceased)

7) THAT pending the hearing and determination of this Application all rental proceeds for the rental house at Avenue Park, Nairobi owned jointly by the Applicant and the deceased be deposited in Court or as per the Orders of this Honorable Court.

8) THAT an Order be issued that Respondents do furnish the Applicant with the Original Burial Permit and National Identity Card and/ or Death Certificate of the GMK (deceased) OR the same be deposited in this Honorable Court until further orders of the court.

9) THAT the Commanding Officer Kangundo Police Station do supervise compliance with this Honorable Courts Order.

10) The cost of this application be provided for.

2. According to the Plaintiff/Applicant herein, she was the legal wife and now the widow of the **GMK** (deceased) having solemnized their marriage under Kamba Customary Law in 2017 while the 1st, 2nd and 3rd defendants/ respondents are her mother in law, father in law and brother in law respectively.

3. It was her deposition that their union had two issues, **GNM**, 19 years old and **EMM** who is 9 years old and that they had established our matrimonial home at Kwa Kamba in Kangundo, on property known as Kangundo/ Isinga/ xxxx and had cohabited and lived peacefully as husband and wife. On 27th September 2021 the deceased fell ill and he was rushed to Lifesprings Hospital in Nguluni where he was admitted. However, on 29th September 2021, when the Plaintiff went to visit him at the said hospital she was informed by the Hospital management that the respondents had transferred him from the said Hospital to undisclosed location. When the Plaintiff called the 1st respondent, the mother to the deceased, she declined to disclose to which Hospital the deceased had been transferred to. However, on 6th October 2021, the Plaintiff received a text message from the Deceased's brother in-law, **MM**, that the Deceased had passed on which information was confirmed to her by the 1st respondent but who declined to divulge to her any further information on where his body was being preserved.

4. It was deposed that on 7th October 2021 the respondents, went to the Plaintiff's home, threatened her and chased her out together with her children on the claims that they no longer recognized her as the deceased's wife. As a result, the Plaintiff left for her paternal home together with her children and when she got there she was informed that a goat had been taken by the respondents to symbolize divorce.

5. According to the Plaintiff, since 7th October 2021 the respondents had denied her and her children access to her matrimonial home and they have nowhere else to go. She however, learnt from the Daily Nation that her husband's remains were to be interred on 13th October 2021 and in a bid to stop the respondents from barring them from participating in the burial arrangements and rites, she approached her advocates on record to write a demand letter to stop and demand of them to allow them participate in the burial arrangements. However, on 11th October 2021, she received news that her husband had been buried in their matrimonial home at the wee hours of the morning of 11th October 2021 without the involvement of the Plaintiff and her children and despite the earlier notice in the Daily nation that he would be interred on 13th October 2021.

6. It was disclosed that the Plaintiff had learnt that the respondents have invited a stranger, the 4th respondent, to live in my matrimonial house hence the Plaintiff was apprehensive that the respondents and the said stranger may have interfered or are likely to interfere with her personal belongings and ownership and title documents. The Plaintiff averred that together with the deceased she had acquired several matrimonial properties and was apprehensive that the respondents were likely to dispose or conceal some of the assets to the detriment of herself and her children.

7. She also deposed that the 4th respondent had taken possession of Motor Vehicle Registration Number KBX xxxx belonging to her late husband and she was apprehensive that unless restrained by this Court, the same would be disposed of, damaged beyond repair before the Court makes its determination in this matter.

8. The Plaintiff averred that her daughter, **GNM**, is awaiting to join college and her son, **EMM** is in Grade 3 at [Particulars Withheld] School and both are in urgent need of school fees and other basic needs. However, both children stand to be chased out of school for lack of school fees as she does not have any regular source of income.

9. Though she was informed by her advocates on record that in order to Petition for Letters of Administration in the Estate of her late husband she needs to obtain his death certificate, the respondents have declined to give her the deceased's burial permit and National Identity Card or his death certificate hence she is unable to Petition for Letters of Administration. Being the wife of the deceased, she asserted that she ranks higher in priority to Petition for Letters of Administration. It was her averment that the deceased was a great supporter of his family and he loved and took care of their children needs inclusive of their education and general welfare hence they stand to suffer irreparable loss and damage unless this Application is allowed as they will be left homeless and destitute, her children are likely to drop out of school for lack of school fees and the Deceased Estate is likely to be wasted away by the respondents.

10. The Plaintiff further deposed that she met the deceased and had been together since the year 2000 and that they formalized our marriage in 2017 under the Kamba Customary Laws. She therefore averred that the 1st, 2nd and 3rd respondents were deceiving this Court by alleging that she was not married to the deceased since they attended and took part in the dowry ceremony which took place at her paternal home in the year 2013 and again in 2017 for the final payment of the dowry. It was her case that the said respondents had always recognized her as the wife to their son, the deceased and that they even attended the funeral of her mother in August 2020 as her in laws

11. The Plaintiff denied the respondents' allegations that the 4th respondent lived with the deceased on Property known as Kangundo/ Isinga/ xxxx and averred that she had lived on the said property with her late husband and her children since the construction of our house in 2017 and at no point had the 4th respondent lived with them. She disclosed that the 4th respondent was given access to her matrimonial home by the 1st, 2nd and 3rd respondents after the death of her husband in a bid to deny her children and herself access to my home. The 4th respondent has now moved in together with his wife and children and efforts to access her house have been fruitless due to threats from the respondents.

12. According to her, for her safety and that of her children it is necessary to obtain the protection of the Commanding Officer, Kangundo Police Station for the safety of my children.

13. The Plaintiff insisted that the decision by the respondents to bury the deceased on 11th October 2021 and not on 13th October 2021 was well thought and a well calculated move. She disclosed that on 9th October 2021 she instructed her advocates on record to write a letter to the 1st, 2nd and 3rd respondents to include her and her children in the burial arrangements and also inform them on the burial date and where her husband's body had been preserved since efforts to resolve the issue as a family had failed. Instead on 11th October 2021, which was declared a Public Holiday, she received news from her house keeper that the deceased had been buried in the wee hours of the same day and no mourners had been allowed to attend the same except the respondents and other members of their family.

14. The Plaintiff asserted that their matrimonial home was acquired and constructed with the joint efforts of her late husband and herself hence the 4th respondent has no basis to remain therein. She insisted that **GMK** (deceased) was the father to her two children and he had at all times taken parental responsibility of them by taking care and maintaining them. She also averred that motor vehicle registration number **KBX 513Q** is still registered in the names of the deceased and the respondents have not adduced any evidence that the same had been gifted to the 4th respondent who only took possession thereof upon entering her house as the said motor vehicle was parked in the compound from the time the deceased fell ill.

15. It was her case that the deceased earned his income from rental proceeds from a rental house he acquired at Avenue Park, Phase 2, House No. xxx, in Pipeline, Nairobi which he used to maintain them and cater for his children's needs. Due to the fact that she was denied access to the ownership documents in her house and she was apprehensive that the respondents have interfered with such documents. She reiterated that the 1st, 2nd and 3rd respondents buried her late husband, without her knowledge and in her absence hence they are in possession of his Burial Permit and national Identity Card or his death certificate.

16. She averred that it is the interest of justice and fairness that the applicant's application be allowed.

17. In her submissions, the Plaintiff reiterated the foregoing and relied on Order 40 Rule 1 of the **Civil Procedure Rules** as well as the decisions in **Giella vs. Cassman Brown (1973) EA 358**, **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others CA No. 77 of 2012 (eKLR 2014)** and **Mrao Ltd vs. First American Bank of Kenya and 2 Others (2003) KLR 125**.

18. The Plaintiff relied on the definition of matrimonial property under Section 6 of the **Matrimonial Property Act** and submitted that Motor vehicle registration number **KBX xxxx** which was acquired by the joint efforts of the applicant and her late husband and during the subsistence of their marriage forms part of matrimonial property and therefore the same ought to be preserved pending the hearing and determination of the suit. She also relied on Section 14 of the **Matrimonial Property Act** and Section 29 (a) of **Law of Succession Act** based on the children's birth certificate and Section 107 of the **Evidence Act**, the two children automatically qualify as dependents of the deceased and that proof of dependency by the children is not necessary as the two are the deceased's children whom he acknowledged. Reliance was also placed on Section 24 (2) of the **Children's Act** as read with Section 25 (2) thereof together with Article 53(1) of the Constitution of Kenya.

19. It was therefore submitted that the applicant has established a prima facie case which can only be properly determined at full trial.

20. As regards proof of irreparable injury, the Plaintiff cited **Halsbury's Laws of England, 3rd Edition Volume 21, Paragraph 739 page 352** which defines irreparable injury as;

'injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought is likely to destroy the subjected matter in question.'

21. According to the applicant it was submit that the applicant is likely to suffer irreparable loss as the suit properties were jointly acquired by her and her late husband and therefore she has a great sentimental attachment which cannot be sufficiently compensated by monetary value if the Court finds the main suit in their favor. She based her submissions on **Bob Njoroge Ngarama vs. Mary Wanjiru Ngarama & Another (2014) eKLR**, where the court held that;

'a matrimonial home does not only have fiscal value but also has a great sentimental value to a surviving spouse and children of the deceased which cannot be equated to monetary value.'

22. She also relied on **Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR**, where it was held that as follows by **Warsame J** (as he was then):

"damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction."

23. On the balance of convenience, the Plaintiff relied **Chebii Kipkoech vs. Barnabas Tuitoek Bargoria & Another [2019] eKLR**, where it was held that:

“the meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed.”

24. The Plaintiff also cited the case of **Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 Others [2016] eKLR**, where the Court expressed itself thus:-

"Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right...Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies."

25. It was submitted that the balance of convenience tilts in favor of the applicant for the reason that the applicant and her children stand to suffer irreparable harm as they stand to be evicted from their home which the applicant and her late husband worked effortlessly to provide for their family which is their matrimonial home on property known as Kangundo/ Isinga/ xxxx. Further, the applicant's children have known the said property as their home and unless an Order of injunction is issued against the respondent, the applicants children may be left homeless and destitute before the matter is heard on merits which may greatly affect the children and they may never recover from the impact of such even if this Court reinstates them into their matrimonial home upon full determination of the suit. The respondents on the other hand, it was submitted, stand to suffer no prejudice or loss if the injunctive orders are issued since they have not been residing on property known Kangundo/ Isinga/xxxx. Secondly, the respondents have not proved that they depended on the deceased prior to his demise.

26. It was therefore submitted that it is in the interest of justice and the best interest of the applicant's children if the injunctive Orders are issued restraining the respondents from evicting or denying the applicant and her children access to her matrimonial property on property known as Kangundo/ Isinga/ xxxx and in other manner dealing with Motor Vehicle Registration number KBX xxxx, Rental House at Avenue Park Nairobi and all other properties in the names of GMK (deceased).

27. On the issue whether the Court should order to the Respondents to furnish the Applicant with the deceased's Original Burial Permit, National ID and/or Death Certificate, it was submitted that the applicant cannot petition for special limited grant *Ad Colligenda Bona* or Letters of Administration of the deceased's estate without the deceased death certificate. Therefore, it is prudent that this Court make this Order first so as to avoid a situation whereby the deceased's two children from dropping out of school due to fees arrears. There is no doubt that issues pertaining to the education of children is of urgency as it touches on their constitutional right to education entrenched in Article 53(1) of the Constitution of Kenya as the same cannot wait full determination of the suit.

28. Upon issuing of the Order, the applicant will be able to get the deceased's death certificate which will facilitate for the application of grant *Ad Colligenda Bona* of the deceased's estate which will prevent the children from dropping out of school pending full determination. According to the Applicant, the fact that there is no contention that it was the respondents who conducted the deceased's burial, it is only reasonable to infer that they are the ones in custody of the deceased's original burial permit, national ID and/or Death Certificate.

29. It was submitted that unless the said properties are preserved, the same will be wasted away, disposed of or otherwise interfered with to the detriment of the beneficiaries of the Estate of GMK (deceased) and to defeat the decree of this Court if the same is decided in favour of the applicant. This would be to maintain the status quo based on Section 45 of the **Law of Succession Act** as read with Section 82 (b) (ii) thereof which are to the that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence. Reliance was placed on **Samuel Kimiri Crispoh vs. John Njeru Kahihu (2015) eKLR** and **Rex vs. Sussex Justices [1924] 1KB 256** and it was sought that the Amended Notice of Motion dated 11th November 2021 be allowed with costs.

30. In response to the Application, the Respondents relied on a replying affidavit sworn by **PK**, the 3rd Respondent and the deceased's younger brother, the gist of which was that the deceased did not die a sudden death but that it was caused by persistent alcohol abuse resulting into his admission to a rehabilitation centre. It was deposed that the deceased was originally staying with one **BMM** from 1990 and with whom they were blessed with two children and that the said Philip, who was born On 23rd December, 1990 had been staying with the deceased on the suit land where the deceased was staying and was buried.

31. According to the deponent, the deceased was never married to the Plaintiff and that the Plaintiff has never stayed on the suit and at any given time. It was also denied that the deceased and the Plaintiff had any children together and that the attached birth certificates were fake and forgeries since one of the alleged children is purported to have been born on 23rd March, 2002 yet it is alleged that the two were married between 2013 and 2017. The fact that both certificates were made on the same day, it was deposed, was meant for purposes of claiming interest in the deceased's estate.

32. According to the deponent, at the time of his death, the deceased was unemployed and had no source of income and that the house where he stayed was constructed by the 2nd Defendant who also bought the subject motor vehicle for the deceased but which the deceased had given to his father who was in possession thereof. Accordingly, the deceased had no source of income and could not have maintained the Plaintiff and the children. The deponent averred that the averments of the participation in the dowry payments were alien to the Respondents as they never participated therein and the Plaintiff was never introduced as a wife.

33. It was explained that due to the fact that 11th October, 2021 was declared a holiday, the burial was brought forward in order to

accommodate the request by the mourners who requested that the same be held on the said day in order to take advantage of the holiday.

34. It was further contended that in the absence of the letters of administration, this suit is incompetent and an abuse of the court process. To the deponent, this suit is meant to simply force the eviction against the deceased's children living in the said house yet the Defendants have not chased the Plaintiff therefrom and have no interest in the deceased's estate. It was averred that there is no evidence that the Defendants have the deceased's death certificate, the burial permit or ID Card hence that order cannot be granted.

35. It was reiterated that since the deceased left children who are staying in the suit property, it would be unconscionable for an order to be issued against them.

36. In the submissions filed on behalf of the Respondents, the averments in the replying affidavit were reiterated and it was contended that the matter before the court is not a commercial case but a succession cause. It was contended that the Plaintiff had not established a prima facie case as she had not proved her marital status to the deceased as well as her entitlement to the estate of the deceased.

Determination

37. I have considered the issues raised in this application. It is contended that the Plaintiff has no locus to institute these proceedings in the absence of letters of administration. The suit herein, it is true, is not brought by the Plaintiff, in her capacity as the administrator of the estate of the deceased, but in her capacity as the wife of the deceased.

38. In this case it is clear this this suit which is commenced by way of originating summons is premised on section 17 of the *Matrimonial Property Act, 2013*. The said section provides as hereunder:

17. (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.

39. Rule 4 of the *Matrimonial Property Rules* provides that:

Any person, including the following persons, may institute civil proceedings claiming any right or relief in relation to matrimonial property—

(a) a spouse;

(b) any person against whom a spouse has made a conflicting claim in respect of property; and

(c) a trustee in bankruptcy, an executor under a will or other testamentary grant, an administrator or a personal representative, of the estate of a spouse for an order or declaration relating to the status, ownership, vesting, or possession of any specific property by, or for the beneficial interest of, a spouse or former spouse.

40. It is therefore arguable that where a claim is based on the right of the claimant as a wife and co-owner of properties acquired jointly by the husband and the wife, the wife may well seek orders as regards her part of the estate. In other words, where it is alleged that the husband and the wife have separate estates which are capable of being determined by the Court, nothing bars the Court from determining the same whether or not the husband and the wife are still married or are divorced.

41. Section 17 aforesaid, in my view, deals with properties which are in contest between a husband and a wife. It therefore deals with determinations as to who, as between the wife and the husband, is the true owner of the property in dispute but does not permit the severing of the property unless and until section 7 of the Act comes into play. This section was dealt with by **Muchelule, J** in **N.C.K vs. G.V.K [2015] eKLR**, where it was held at paragraphs 12 and 13 that:

“12. In England, under the Matrimonial Causes Act 1973, in instances where parties, for religious or other reasons, do not want to divorce, and if a couple chooses not to bring matrimonial proceedings, the court will resolve any questions about the beneficial entitlement to their property without using the divorce court's adjustive power. The Family Law Act 1996 at section 33(4) provides for declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. In the case of *Arif v Anwar [2015] EWHC 124 (FAM)* the parties filed divorce proceedings but the same was yet to be determined. The court proceeded to declare each party's beneficial interest in the matrimonial property without severing the same. Further in *L (Children), RE [2012] EWCA CIV 721* where a married couple were having considerable differences to the point of not being able to cohabit together, the judge issued an occupation order pursuant to section 33 of the Family Law Act 1996 requiring the husband to vacate the matrimonial home forthwith and to remain from it until a certain period, and gave a shared residence order.

13. It would appear to me that a spouse can, under section 17 of the Matrimonial Property Act 2013, either where there is a divorce matter that is pending, or where, for whatever reason, he can no longer live together with the other spouse but is not seeking to divorce, come to court to resolve any questions about the beneficial entitlement to their property. He can seek declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. The court will declare each party's beneficial interest in the matrimonial property without severing the same. Such a declaration is not, in my view, inconsistent with Article 45(3) of the Constitution of Kenya 2010. In other words, both sections 7 and 17 of the Matrimonial Property Act 2013 are consistent with, and seek to reinforce, Article 45(3). One deals with the distribution of matrimonial property upon divorce and the other protects the rights of spouses in relation to matrimonial property where the marriage is still in existence. Once again, the court is not dealing with an application under section 17 of the Matrimonial Property Act 2013."

42. Therefore, without determining the issue with finality, I am not prepared to find. At this stage, that the Plaintiff had no locus to bring these proceedings.

43. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in East African Industries vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court restated the law as follows:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a *prima facie* level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "*leap-frogging*" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

44. The Court of Appeal in the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR further opined that:

"...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration."

45. While reiterating the said principles, Ringera, J (as he then was) in Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002 stated that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. That was the same position adopted in the dicta in Nairobi High Court Civil Case No. 517 of 2014 – Lucy Nungari Ngigi & 4 Others -vs- National Bank of Kenya Limited & Anor (eKLR) where it was stated:

"...I am also aware that the 1st Defendant has raised issues in respect of the mortgage herein, their right to exercise the statutory power of sale, breach of the addendum, default of repayment of the loan etc. They have also raised some accountability issues from the 2nd Defendant on the purchase price. But even these queries should be reserved for and determined at the trial. These issues are in direct conflict with issues raised by the Plaintiffs and the 2nd Defendant. At this stage I should not make any comments or findings, or express opinions on the substantive issues in controversy in order to avoid hurting the trial herein..."

46. However, the Court is not excluded from expressing a *prima facie* view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true. It was therefore held by Ringera, J (as he then was) in Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001:

“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a *prima facie* case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.”

47. According to the Court of Appeal in Esso Kenya Limited. vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991:

“The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff’s alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.”

48. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of section 1A(2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A(1) of the said Act in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

49. What then constitutes a *prima facie* case? In the case of Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, the Court of Appeal held as follows:

“The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be 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...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “*prima facie* case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “*prima facie*” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “*prima facie*” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a *prima facie* case, the former being the lesser standard of the two...In civil cases a *prima facie* case is a case in 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but 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.”

50. While adopting the same position the Court of Appeal in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR added that:

“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. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not

examine the merits of the case closely. 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 or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. 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."

51. Rule 20(2) of the Matrimonial Properties Act provides that:

A party to the proceedings may, before or after commencement of the proceedings under these Rules, but before the final determination of the respective claims, apply for temporary injunctions or other interlocutory orders in accordance with Order 40 of the Civil Procedure Rules, 2010, and the court may grant the orders sought on such terms or conditions as may be just in the circumstances

52. In this case, the Plaintiff alleges that she was the wife of the deceased. This allegation is denied by the Defendants. The Plaintiff has averred on oath that after she was forcefully removed from her matrimonial home, she went back to her maternal home only to find that the 1st to 3rd Respondents had purported to terminate the marriage between the Plaintiff and the Deceased by returning a goat. This damning averment is not expressly denied by the Defendants. Further, the Plaintiff exhibited photographs in which she identified the same Defendants when the Deceased allegedly went to pay her dowry. Nothing cogent has been said about the same by the said Defendants apart from bare denial that the dowry was paid.

53. Based on the material placed before the Court, I find that the Plaintiff has established on a *prima facie* basis, that she was married to the Deceased. However, a final determination of the matter must await the hearing of the suit. Similarly, based on the birth certificates exhibited, which the Defendants claim to be forgeries, the Plaintiff has put forward *prima facie* case that she had children with the deceased.

54. Having considered the issues raised by the Plaintiff, I find that she has established a *prima facie* case for the purposes of the grant of an injunction pending the hearing and determination of the suit. That does not necessarily mean that the Plaintiff will succeed. What it means is that there is a basis upon which this Court can restrain the Defendant from disposing of the said properties.

55. However, as was held in the case of **Kenya Commercial Finance Co. Ltd vs. Afraha Education Society [2001] Vol. 1 EA (quoted in the Nguruman Limited case (supra))**, the triple requirements in an interlocutory injunction application are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent and all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.

56. As regards the second condition, whether the Plaintiff stands to suffer irreparable loss, it was held in **Nguruman Limited case (supra)** expressed itself as hereunder:

"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

57. In this case the Plaintiff's case is that she and her children have nowhere else to go as they have no other home. If that is true then it is clear that in the event that she continues staying out of the alleged matrimonial property, she may find herself and her children under the mercy of the vagaries of nature. Accordingly, I agree that the Plaintiff has surmounted the second condition.

58. As regards the issue of balance of convenience, I associate myself with the decision in **Pius Kipchirchir Kogo vs. Frank Kimeli Tenai [2018] eKLR** where it was held as follows:

"The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

59. In light of my findings above, I am satisfied that the Plaintiff has satisfied the conditions necessary for the grant of the injunctory orders sought.

60. As regards the issue of Burial Permit, Death Certificate and ID Card, since the Respondents have not expressly denied that they have the same and as their position is that they are not interested in the estate of the deceased, no prejudice will be suffered if the Plaintiff was issued with the death certificate of the deceased to enable her process the administration of the deceased's estate.

61. Since the Plaintiff's case is that she was forcefully evicted from her matrimonial home as was held by the Court of Appeal in **Kenya**

“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 be decided at once, or if the act done is a simple and summary one which can be easily remedied, *or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application...A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff.*”
[Emphasis added]

62. In the *locus classicus* case of Kamau Mucuha vs. The Ripples Ltd. Civil Application No. Nai. 186 of 1992 [1990-1994] EA 388; [1993] KLR 35 the Court of Appeal (Hancox, JA, as he then was) expressed himself as hereunder:

“In the instant case, it is of course possession rather than the destruction that the plaintiff was seeking. The statements contained in the above passages, however, leave out of account, the situation when, as it is alleged that the defendant has taken the law into his own hands and taken direct action instead of going through the legally prescribed procedure. In other words he has, by his own act, disturbed the *status quo*. Is it to be said that the plaintiff may not go to the Court to seek an order which is mandatory in the sense that it compels the other party to do some act which restores the *status quo* ? It is fallacious for a person who forcibly and riotously enters premises to maintain that his occupation of these premises is the *status quo* which must be maintained, and not disturbed, which of course in very many cases is the object of a temporary injunction – to keep things in *status quo* so that the property in question is maintained, as far as possible, intact until a final determination of the suit. The *status quo* is not that which existed after the intruder’s illegal acts, but that which existed beforehand... If the defendant has rushed on with his work in order to defeat the plaintiff’s 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 *status quo* was the state of affairs subsisting before the applicant entered the premises, evicted the respondent and installed another tenant. The learned Judge recognised the seriousness of a temporary mandatory injunction but nevertheless decided to grant it and thereby restore the *status quo* and he was right.”

63. On his part, Kwach, JA held that:

“In the instant case the applicant is in flagrant disobedience of the order of the Judge and now comes to the Court of Appeal for temporary dispensation. He should not be allowed to use the process of the court for such a patently mischievous purpose. Having got back into the house with strong hand and with multitude of people, he has established himself in the house, and then says “I ought not to have an injunction given against me to make me go out because I got back here and got my boys back, and therefore, I want the *status quo* preserved”. The *status quo* that could be preserved was the *status quo* that existed before these illegal and criminal acts on the part of the defendant. It is a strange argument to address a court of law that we ought to help the defendant, who has trespassed and got himself into these premises in the way in which he has done and say that would be preserving the *status quo* and that it would be good reason for not granting an injunction.”

64. In this case, the Plaintiff contends that the 1st, 2nd and 3rd Respondents forcefully removed her from the suit premises and installed the 4th Respondent therein. When she attempted to halt the intended burial, they said Respondents changed the burial date and moved it forward and interred the deceased in the wee hours of the morning in order to lock her from participating in the burial. At this stage, I cannot conclusively determine these allegations. However, though the said Respondents have contended that the 4th Respondent, PM, is a son to the deceased staying in the suit property, the said PM has not on her part sworn any affidavit in support of the said averments and the deponent of the replying affidavit has not stated that he was authorized to and did swear his affidavit on behalf of the 4th Defendant as well. In the premises there is no basis upon which I can find that the orders sought, if granted, will have the effect of evicting the 4th Defendant from the suit premises.

65. As regards the motor vehicle, it is clear that the same was registered in the name of the deceased whether he bought it or his father bought it for him. As of now, it prima facie belongs to the deceased’s estate and no one has the right to intermeddle with the estate of the deceased.

66. Regarding the prayer that the compliance of the order be supervised by the Commanding Officer, Kangundo Police Station, in Kenya Commercial Bank vs. N J B Hawala Civil Application No. 240 of 1997, the Court of Appeal held that the Police have no legal basis for participating in an attachment. A similar view was taken in Khaminwa & Khaminwa vs. Jubilee Insurance Co. Ltd. Nairobi HCCC No. 1304 of 1995 where the Court held that Police should not be involved in eviction. In Kamau Mucuha vs. The Ripples Ltd. Civil Application No. Nai. 186 of 1992 [1990-1994] EA 388; [1993] KLR 35, Kwach, JA expressed himself as follows:

“The only valid criticism of the order of the Judge as of now, but which does not swing the scale one way or the other in this application is the direction that the assistance of the police should be enlisted to secure compliance by the applicant. The police should never be involved in securing compliance with court orders as there is specific provision for the enforcement of an injunction under Order 21 rule 28 of the Civil Procedure Rules.”

67. Whereas in exceptional cases, the Court may be entitled to direct that police to provide security in order to maintain law and order during the execution of its decisions or processes, it is clear that the police have no role otherwise in the execution of civil process. That role is simply restricted to overseeing that peace, law and order is maintained during the process of execution which process is to be undertaken by a duly authorised court officer. It is however my view that such exceptional order ought to be granted only where there is satisfactory evidence of the likelihood of a resistance to the execution of the said decisions and ought not to be dishd as a matter of course or simply for the asking. In this case, apart from bare averments, I have no material on the basis of which I can find that police assistance in complying with

this Court's orders is necessary. Should the Respondents obstruct the Plaintiff from access to the house, this Court, if moved, will issue appropriate orders.

68. As regards the alleged premises at Avenue Park, Nairobi, in the absence of its particulars, I am unable to make orders in respect thereof.

69. In the premises I grant the following orders:

(a) Pending the hearing and determination of the Summons, the Respondents are hereby restrained, either by themselves, their agents, family members, relatives and/or any other person acting under their instructions from evicting or denying the applicant and her children access to her matrimonial property on property known as Kangundo/ Isinga/ xxxx at Kwa Kamba, Kangundo, trespassing, entering, or otherwise interfering with the applicant's quite occupation and possession of the same.

(b) Pending the hearing and determination of the Summons, the Respondents are hereby restrained whether by themselves, their agents, family members, relatives and/or any other person acting under their instructions howsoever from transferring, alienating, disposing, selling, encumbering, assigning, or in any other like manner dealing with property known as Kangundo/ Isinga/ xxxx, Motor Vehicle Registration Number KBX xxxx.

(c) I direct that in the event that the Plaintiff is unable to get the Deceased's ID Card, once access to the suit premises are given to her, she be at liberty, either alone or together with the Defendants to apply for the deceased's death certificate vide the photocopies of the deceased's ID Card, as long as none has been issue to anybody else to enable her either alone or together with the Defendants apply for the administration of the estate of the deceased. Such administration does not necessarily confer on them the status of dependency as that is an issue to be determined in the Succession Cause.

70. The costs of this application will be in the cause.

71. Orders accordingly.

RULING READ, SIGNED AND DELIVERED AT MACHAKOS THIS 21ST DAY OF FEBRUARY, 2022.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Miss Mbulukyo for the Plaintiff/Applicant

CA Susan