REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 60 OF 2018(O.S)

JSL.............................APPLICANT

VERSUS

JKL.......................RESPONDENT

RULING

1. The Applicant JSL filed a Notice of motion dated 4th October, 2018 pursuant to Section 3 and 3A of the Civil Procedure Act, Order 40 rule 1, 2 and 4 of the civil procedure rules and all other enabling provisions of the Law. In her application, she sought an injunctive relief restraining the Respondent by himself or his agents from entering, charging, leasing, wasting, selling obtaining title, transferring constructing or in any way alienating or interfering with the property known as Mvita/[....] Settlement scheme pending the hearing and determination of this application. The applicant also sought injunctive relief orders pending the hearing and determination of the matrimonial cause between the parties herein.

2. The application was supported by the annexed affidavit sworn the Applicant and dated 4th October 2018. It was her case that she was married to the Respondent under the Marriage Act Cap 150 Laws of Kenya on 18th December, 1976 and their union was blessed with one issue. She averred that during the subsistence of the marriage she contributed to the acquisition of the suit property which was a wedding gift from the Late President Jomo Kenyatta 1977 who was well known to her. She stated that her divorce had been finalized vide Divorce cause no 522 of 2014 and that the respondent was in the process of registering the property solely into his name. She was apprehensive that unless restrained, the respondent would alienate and transfer the matrimonial property defeating her rights.

3. On 22nd November, 2018 when the matter came to Court, the court noted that despite service of the application, the respondent had neither filed a response nor appeared in Court to state his side. The application was considered unopposed and an order of interim injunction was granted pending the hearing and determination of her application.

4. Consequently, the respondent filed a notice of motion dated 11th December, 2018 seeking to set aside and/or discharge the orders issued by this Court on 22nd November, 2018. The application was expressed under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 3 and 15 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law. It was grounded on the grounds stated on the face of the application and the annexed affidavit JKL. Essentially the grounds relied upon by the respondent are inter alia that:

i. The orders were granted on the foot of material non-disclosure and fraudulent misrepresentation

ii. That hearing proceeded ex-parte for failure to file a response and non-attendance of the respondent

iii. The application was not served, or the service was improper, defective and concealed

5. Other grounds to the application were annexed in the supporting affidavit dated 11th December, 2018 sworn by the respondent who averred inter alia that he was allocated the suit property by the Settlement fund trustee for valuable consideration of Kshs. 410, 590/= in the form of land and development loans pursuant to which he was required to execute a charge. Further, that he executed the charge in 1991 and began making repayments upto 2017 when he completed. That after completion, he was duly registered as the registered owner of the property known as Uasin Gishu/Mvita Settlement Scheme/[....], the suit property herein and a title deed issued in his name on 6th November, 2018. It was his case that he separated from the Applicant in 1986 who at the time had not contributed in any way to the acquisition of the suit property.

6. The respondent also challenged service of the application which he claims was not proper and was defective. He claimed that he was served through G4S Courier Service Limited which service was received on 22nd November 2018 and not personal service as alleged in the affidavit of service. He accused the deponent of the affidavit of service of not being a process server. He averred that due to the improper and late service he could not be able to appear in court to file a response or seek additional time. He claimed that the effect of the injunctive order maybe construed to strain his farming activities perpetuating unfathomable wastage. The Respondent asserted that unless the orders are set

aside, his right to be heard will be infringed to his prejudice.

7. In response to the application, the applicant in her replying affidavit dated 14th March, 2019 asserted that injunctive relief orders were issued as protective measures pending the final outcome of the application. That since she is now divorced and the property having already been registered in the Respondents name, the Respondent was likely to dispose it off without her knowledge. She claimed to have made a payment of Kshs. 10,000/= towards the acquisition of the suit property in 2014. She further claimed that she and the respondent took possession of the suit property in 1979 when they were married whereupon they cultivated. She asserted that the suit property in dispute is matrimonial property and should be protected.

8. Amos K. Mumo in his replying affidavit dated 14th March, 2019 stated that he was duly licensed court process server who was tasked with serving the application to the Respondent. He denied claims by the Respondent that he was never personally served with the application for injunction insisting that the Respondent was making false statement in an attempt to mislead the Court. He asserted that he served the Respondent at Eldoret Sports Ground and denied claims made that the service was done through G4S Courier Services Limited.

9. The Respondent in a supplementary affidavit dated 20th September, 2019 denied knowledge of any payments made by the Applicant for the acquisition of the suit property. He averred that if any such payment was made, it contradicted the basis on which she received orders of interim injunctive relief. He accused the applicant of giving false information on how the property was acquired by alleging that it was a gift from the Late President Jomo Kenyatta and later changing to the Settlement Fund Trustee where she claims to have paid Kshs. 10,000/=. Further, he averred that the suit property could not have been a gift since he was allotted in 1979 well after her marriage to the Applicant in 1976. He asserted that the Applicant had failed to prove any form of contribution towards the acquisition of the suit property. He also denied claims that he intended to alienate the suit property affirming that he had made tremendous improvements to the property since their separation with the Applicant in 1986. He also denied being served with the application as alleged by the process server. He urged the court to allow his application.

10. The applications were canvassed by way of written submissions. In her submissions, the Applicant reiterated the contents of her affidavits and further submitted that her application had met the test for an injunctive order including the one championed by **Justice Ojwang' Ag in the case of Suleiman Amboseli Resort Limited [2004] eKLR** which emphasizes that the Court should take whichever course appears to carry the lower risk of injustice, if it should turn out to have been wrong. She also relied on the cases of **Brinks – Mat Ltd Vs Elcombe (1988) 3 All ER 188 and Giella v Cassman Brown and Company Limited (1973) EA 358** in support of her case. The respondent on his part relied on the cases of **P N N v Z W N [2017] eKLR and Banca Turco Romana Cortuk [2018] EWHC 662 (comm)** in support of his case.

11. From the foregoing, the issues for determination are whether the Respondent has made his case to warrant the setting aside of the Orders of 22nd November 2018 pending the hearing and determination of the Applicant's application dated 4th October, 2018 and whether the said application for an injunction by the applicant has met the threshold set in Giella v Cassman Brown.

12. The applicant's case is hinged on the claim that the property in issue is matrimonial property and that the Respondent intends to alienate it without her involvement to her detriment. Section 2 of the Matrimonial Porperty Act defines matrimonial home as follows:-

> **"Matrimonial home" 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."**

Further in Section 6(1) of the Matrimonial Property Act provides that:

> **For the purposes of this Act, matrimonial property means—**
>
> **(a) the matrimonial home or homes;**
>
> **(b) household goods and effects in the matrimonial home or homes; or**
>
> **(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.**

13. The applicant is seeking orders of injunction. The principles for granting of injunctions are well settled in Kenyan law. These are as was stated in **Giella –Vs- Cassman Brown & Co. Ltd (1973) EA 358** that:-

> **"The Conditions for the grant of an interlocutory injunction are 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 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."**

The court is at this stage required to satisfy itself that there is a prima facie case established. In **Silvester Momanyi Marube –Vs- Guizar Ahmed Motari & Another (2012) eKLR**, Odunga J. held that:-

> **"In determining this application, I am well aware that at this stage 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 and that in an application for injunction although the court cannot find conclusively who is to be believed or not, 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."**

14. The Court of appeal in **Mrao Ltd –Vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** considered what constitutes a prima facie case and held that:

> **"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.**
>
> **We adopt that definition save to add the following conditions by way of explaining it. 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."**

15. **Order 40 Rule 7** of the **Civil Procedure Rules, 2010** as read with **Section 3A and 63(e) of the Act** grants Court powers to issue Orders as may be necessary for the ends of justice to be met. These powers are so given in a bid to enable Courts to further the overriding objectives of the Act and to ensure that it attains its Constitutional mandate of ensuring that justice is done to all.

Order 40 Rule 7 Civil Procedure Rules, 2010 provides:

> **"Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."**

The provision primarily grants the Court discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued.

In **Mobile Kitale Service Station v. Mobil Oil Kenya Ltd & Another (2004) eKLR**, Warsame J held *inter-alia*;

> **"…an interlocutory injunction is given on the court's understanding that the defendant is trampling on the rights of the plaintiff. An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where it is shown that the person's conduct with respect to matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter. The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose- to shield a party against violation of the legal rights a person is seeking. "**

16. From the above, although a court has unfettered discretion pursuant to **Order 40 Rule 7** of the Civil Procedure Rules, it only exercises it when circumstances so require it after considering the position of both parties at that particular instant and as well as when the injunction was given. This is because, before granting an injunction, a Court is usually guided by the principles for granting injunction as stated in **Giella v. Cassman Brown & Co. Ltd. [1973] E.A.**

In **Felista Chemaiyo Sosten v. Samson Mutai Environment and Land Case 942 of 2012**, Munyao J opined:

> **"… I think the discretion under Order 40 Rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is because before issuing the injunction, the court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the court would not have issued the injunction in the first place. However, if the injunction was obtained by concealing facts which if put to the judge in first instance would have affected his judgment on whether or not to give the injunction, then a court can be inclined to vary or vacate the injunction in light of the new facts. So too if the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction..."**

17. From the pleadings, the Applicant's main argument is that she was married to the Respondent in 1976 during which time they acquired the suit property. That during the marriage, they cultivated the property and she also contributed to its acquisition thus should be considered matrimonial property. The parties divorced in 2016 vide Nairobi Divorce Cause 522 of 2014 and the Applicant is apprehensive that the Respondent will alienate the property without her consent.

18. The Respondent argues that the suit property does not constitute matrimonial property and that the Applicant did not in any way contribute towards its acquisition although he was allocated the property during the subsistence of their marriage. Further, that the property is registered in his name and he has proprietary rights as he is in possession and occupation of the property. Further, He asks this Court to discharge the interim injunctive orders issued as they were obtained by concealment of material facts and fraudulent misrepresentation.

19. From the pleadings, there is conflicting evidence by the Applicant on how the property was acquired. In her supporting affidavit dated 4th October,2018 she claimed that the property was a wedding gift to the Couple from the Late President Jomo Kenyatta and in her replying affidavit dated 14th March, 2019 she alleges to have made monetary contributions for its acquisition. However it is not disputed that the

property was acquired during the subsistence of their marriage and that the Respondent is in occupation and use of the suit property.

20. It is my considered view that in the circumstances of this case the court should make orders for the preservation of the property pending the hearing and determination of the suit. The Respondent being in occupation and use of the property will not be prejudiced by the injunctive orders. In view of the provisions of **Section 6 (1) (c)** of the Matrimonial Property Act, the Applicant has established a prima facie case with a probability of success. She has also established that she will suffer irreparable loss if the prayer sought is not granted.

21. The upshot of the above analysis is that this property needs to be preserved to avoid one of the parties becoming a holder of a barren result. Accordingly, the application dated 11th December, 2018 is dismissed. The application dated 4th October, 2018 is allowed in the following terms:-

I. That the Respondent is hereby restrained from selling, transferring, charging or in any way dealing [....], pending the hearing and determination of the suit.

II. Costs shall abide by the outcome of main cause.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF FEBRUARY, 2020.

....

L. A. ACHODE

HIGH COURT JUDGE

In the presence of ....Advocate for the Applicant

In the presence of ....Advocate for the Respondent