



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL CASE NO. 28 OF 2017**

**EWK.....PLAINTIFF**

**VERSUS**

**JKN.....DEFENDANT**

**RULING**

1. Before me is a Notice of Motion filed on 7<sup>th</sup> December, 2017 and brought under Order 40 Rule 1 & 4 and Order 51 Rule 1 of the Civil Procedure Rules, *inter alia*. The main order sought is that the court be pleased to grant a temporary injunction to restrain the Respondent, his workmen, claimants, servants and/or agents from trespassing on, constructing on, sub-dividing, selling or undertaking any form of developments or otherwise interfering or dealing with Plot Numbers [...] being subdivisions of **Title No. LR. [...]** pending the determination of this suit.
2. The application is premised on the ground that the parties herein got married in 1985, have sired two children as well as acquired matrimonial property which the Respondent has threatened to sell. **EWN** the Applicant herein swore the supporting affidavit. She deposed that she got married to the **JKN** Respondent herein, in 1985 and that they have children together and that the couple jointly acquired the properties listed in the prayers, namely, being Plot Numbers [...] being subdivisions of Title No. LR. [...] but that the Respondent now threatens to alienate the properties, an action that would occasion the Applicant substantial loss and irreparable damage.
3. The Respondent, filed his replying affidavit on 20<sup>th</sup> December, 2017. He deposed that since the celebration of their marriage, he was running separate spousal investment schemes apart from the Applicant whom he used to support financially; that he sold land parcel number Makuyu/Makuyu Block [...] and used the proceeds to purchase the disputed plots number [...] without any assistance from the Applicant and that he developed the same. He contended that it will be unjust to restrain him from developing his plots and that the Applicant has not demonstrated any contribution made by her towards the acquisition of the said plots. In his Supplementary affidavit filed on 19<sup>th</sup> January, 2018, he deposed that the Applicant should be barred from transacting on Land Parcel No. [...] and Plot No. [...] in order to maintain *status quo* pending the hearing and determination of this matter.
4. On 1<sup>st</sup> February, 2018, the Applicant filed a further affidavit in which she averred that both parties herein have the right to acquire property and that her only claim is in regard to Plot numbers [...] as these were acquired with proceeds from the sale of Makuyu/Makuyu Block [...] and indeed the Respondent had earlier consented to transferring two plots i.e no plot [...] to her but later resiled.
6. The Notice of Motion was canvassed by way of written submissions. The Applicant submitted that the granting of an interim injunction is an exercise of judicial discretion. Counsel submitted that the Applicant has satisfied all the conditions for granting of an injunction as set out in case of **Giella vs Cassman Brown & Co. Ltd. (1973) E.A. 359**. It was submitted that the Applicant has proved that she contributed in the acquisition of the suit properties and that unless the Respondent is stopped, the damage to be suffered by the Applicant cannot be compensated by an award of damages.
7. The Respondent in his written submissions filed on 30<sup>th</sup> May, 2018, asserted that he has proved to the court that he single-handedly purchased the suit properties without any assistance from the Applicant. He submitted that the Applicant has not fulfilled the minimum requirements for grant of a temporary injunction. Reliance was placed in the case of **Panari Enterprises Limited vs. Lijoodi & 2 others (2014) eKLR** and asserted that for the court to grant the interlocutory orders would amount to evicting him from the suit properties.
8. The court has considered the material canvassed by the parties and takes the following view. The decision of the Court of Appeal in **Nguruman Ltd v Jan Bonde Nielsen and 2 Others [2014] e KLR** reiterated the principles to be considered with respect to interlocutory injunctions. The Court described the role of the judge to be merely to consider whether the principles for the grant of the interlocutory injunction were met. The court further observed that:

“...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since *Giella* case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already settled by authoritative pronouncements in the precedents they may be conveniently noted in brief 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.

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

9. The Court further stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. Such that, it is not enough that the Applicant establishes a *prima facie* case, he must further successfully establish irreparable injury, that is injury for which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the adequacy of damages, the court will consider the balance of convenience. Conversely, where no *prima facie* case is established, the court need not consider irreparable injury or balance of convenience. The court emphasized that the standard of proof is to *prima facie* standard.

10. Regarding the meaning of “*prima facie* case” the Court stated:

“Recently, this court in *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for “*prima facie* case” in civil cases in the following words:

“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.”

11. There is no dispute that the parties herein solemnised their marriage in 1985 under the Christian Marriage and Divorce Act (now repealed), and cohabited as man and wife until about 2015 when differences arose between them, leading to separation. The couple had two children and were always in gainful employment and acquired several properties during coverture, including land parcel LR No. Makuyu/Makuyu Block [...]. Although the Respondent admits that the sale agreement in respect of the said parcel was executed by the couple as joint purchasers, he claims that the Applicant did not contribute to the purchase of this or other property as she was a junior civil servant earning a low salary, while he had a well-paying job in an international hotel. The Applicant’s case is that the plots No. [...] which are in dispute are matrimonial property, having been purchased using proceeds from the sale of the makuyu land.

12. The Respondent admits that the plots in question were purchased using the said proceeds and his savings. Nevertheless, the Respondent claims that the Applicant had no means and that he also developed the disputed plots alone from his own income and also provided for family single-handedly. In addition, he allegedly helped the Applicant acquire two parcels of land, namely plot LR No. [...] and plot No. [...] in Greenfields Estate, Juja. This the Applicant disputes.

13. The contribution of the respective parties to the acquisition of the disputed plots No. [...] will be determined upon the hearing of the suit. What is not in dispute is that these properties were acquired during the couple’s coverture. Further the Respondent is silent on the contents of annexure EQWK4 to the Applicant’s supporting affidavit, and dated 16<sup>th</sup> November 2015. The annexures are correspondence from the Respondent to **Wamwenda Enterprises** authorizing the company to transfer the share certificate in respect of plots No. [...] to the Applicant. It appears that subsequent to this, the Applicant *vide* a letter dated 12<sup>th</sup> May 2016 notified **Wamwenda Enterprises** that she had released share certificates in respect of plots No. [...] to the Respondent. She has expressed apprehension that the Respondent might dispose of these assets.

14. Considering the rival claims of the parties to the subject property and the fact that these properties were acquired during their cohabitation, and the surrounding circumstances, the court is satisfied that the Applicant has demonstrated a *prima facie* case. Moreover, if the properties are disposed of, which may not be a farfetched fear given the Respondent’s strident assertion of his absolute ownership of the same, the originating summons will be defeated as it may be difficult for the Applicant to recover adequate compensation from the Respondent. All in all, it appears more prudent in the circumstances of this case to preserve the substratum of the originating summons pending the full hearing of the matter.

15. However, as drafted prayer (c) of the motion is too restrictive as it would effectively prohibit the Respondent from even setting foot on the affected properties, and as he has observed, could well amount to eviction therefrom. This court hereby issues an injunction to restrain the Respondent from subdividing, selling or alienating the disputed land parcels or in any way causing waste thereon or interfering adversely with their physical state, pending the determination of this suit. Parties will bear own costs.

**DELIVERED AND SIGNED AT KIAMBU THIS 5<sup>TH</sup> DAY OF MARCH 2020.**

**C. MEOLI**

**JUDGE**

**In the presence of**

No appearance for the Plaintiffs

No appearance for the Defendants

Court Assistant – Ndege/Nancy