



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL CASE NO. 6 OF 2019

DWN.....APPLICANT

VERSUS

JNN.....1ST RESPONDENT

MGN.....2ND RESPONDENT

RMN.....3RD RESPONDENT

MMN.....4TH RESPONDENT

RULING

The application pending before this court is the one dated 16th September, 2019. The application is brought under chapter 4 Art 45 (3) of The Constitution of Kenya 2010, Sections 2, 6, 12 and 17 of the Matrimonial Properties Act and Section 68 (1) of The Land Registration Act 2012)

It Seeks orders that;

1 Spent

2 Spent

3 That the court do issue an order inhibiting any dealings with parcel of land No. No. **Ngariama/ Rung'eto/ xxx** and **Donholm Plot No. xxx** (Nairobi Block xx/xxxx) pending the hearing and determination of the Application herein interparties.

4 That the 1st, 2nd, 3rd and 4th Respondents either by themselves, agents and/or servants be restrained from interfering with the Applicant's peaceful occupation and use of parcel of land No. No. **Ngariama/ Rung'eto/xxx** pending the hearing and determination of the suit herein.

5 The costs of the application be provided for.

The application is based on the following grounds;

1. That the applicant got married to the 1st Respondent on 19th September, 1955.

2. That during the subsistence of their marriage the Applicant and 1st Respondent acquired several properties through joint effort and contribution

3. That the 1st Respondent subsequently and without the consent of the Applicant disposed off the aforesaid properties and acquired and developed Donholm Plot No. xxx (Nairobi Block xx/xxxx).

4. That the 1st Respondent caused the said plot to be registered in the names of the 2nd Respondent who he has been cohabiting with jointly with the 3rd and 4th Respondents.

5. That the applicant is entitled to a share of the said plot.

6. That the Respondents are in the process of disposing off the said Plot to 3rd parties.

7. That the Applicant is in occupation of parcel of land number; **NGARIAMA/ RUNG'ETO/537** and greatly fears that the Respondents might start interfering with her peaceful occupation of the same.

8. That the actions of the Respondents unless restrained will cause the applicant irreparable harm.

The application is supported by the affidavit of Dorothy W. Nyaga sworn on 16th September, 2019 in which she avers that she got married to the 1st respondent on 19th September, 1955 in the office of the District Commissioner at Embu.

There are six issues of the marriage who are now all adults.

She has listed the various properties she acquired during the subsistence of the marriage.

She was chased away from the matrimonial home in 1985 which was on land parcel number NGARIAMA/ RUNG'ETO/xxx. Later she went back to the matrimonial home and she lives there to date.

The 1st Respondent disposed off properties they had acquired jointly and purchased Donholm Plot number. 745 (Nairobi Block xx/xxxx) with the proceeds.

She came to learn that the plot was registered in the joint names of the 2nd, 3rd and 4th respondents. She has also learnt that the respondents are in the process of disposing the property to third parties and if this happens she will stand to suffer irreparably as most of her lifetime work will have gone down the drain.

She further depones that the 1st respondent has further sub-divided the original number. NGARIAMA/ RUNG'ETO/xxx into two portions and her matrimonial home is now in plot number NGARIAMA/ RUNG'ETO/xxx and she urges the court to inhibit dealings with Donholm plot number xxx (Nairobi Block xx/xxxx) pending the hearing and determination of the originating summons.

The 1st respondent has filed a replying affidavit sworn on 29th October, 2019. He depones that the applicant is his wife but they separated in 1983 and he now lives with the 2nd respondent on parcel of land NGARIAMA/ NGIRIAMBU/ xxxx measuring 2 acres and has 2 adult sons.

The applicant came back to the matrimonial home land parcel number NGARIAMA/ RUNG'ETO/xxx measuring 2 acres where she lives to date.

He is willing to give her that parcel of land together with all the developments thereon.

It is his contention that the applicant did not contribute a single coin towards the acquisition and development of Donholm plot number xxx (Nairobi Block xx/xxx) the plot is registered in the 2nd, 3rd and 4th respondents. It was bought in year 2004 through joint efforts with the 2nd respondent.

It is his contention that the applicant has not contributed in the acquisition of the other properties she has listed. They were acquired through his personal efforts as he was working as a town clerk, with the [Particulars Withheld] Municipal Council until 1981 when he resigned.

I have considered the application and the submissions. The issue which arises for determination is Injunction.

- The leading authority is the **Giella -vs- Cassman Brown & company limited (1973) EA.**

It was stated:

“The conditions for the grant of an interlocutory injunction re now, I think, well settled in East African. First, an applicant must show a prima facie case with a probability of success.

Secondly, an interlocutory injunction will not be normally 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 party must establish that he has a prima facie case with probability of success.

He must demonstrate that he will suffer irreparable damages and if the court is in doubt it will determine the case on a balance of probabilities.

The applicant is seeking to restrain the respondent over land parcel number; NGARIAMA/ RUNG'ETO/xxx and Donholm Plot number xxx (Nairobi Block xx/xxxx) with regard to Plot number Ngariama/ Rung'eto /xxx the respondent has said that he has no objection and he is willing to give her the plot together with all the developments.

With regard to plot number; Donholm Plot number xxx (Nairobi Block xx /xxx) the applicant has deposed that the plot is registered in the names of 2nd, 3rd and 4th respondents.

The respondent has deposed that the plot is registered in the names of 2nd, 3rd, and 4th respondents and was acquired in 2004.

It was not acquired during the subsistence of the marriage, and is also registered in the names of other parties apart from the respondent.

It is not registered in the name of the respondent. **Section 26 (1) OF The Land Registration Act Cap 26 Laws of Kenya Provides as follows;**

“ Certificate of title issued by the registrar upon registration or to a purchaser of land upon a transfer or transmission by a proprietor shall be taken by all courts as prima facie evidence that the person named as a proprietor of land is the absolute and divisible owner, subject to encumbrances, easements, restrictions and conditions contained and endorsed in the certificate and the title shall not be subject to challenge except;

(a) On the ground of fraud or misrepresentation to which the person is proofed to be a party or where the certificate of title has been acquired illegally, unprocedurally or through corrupt schemes”

The 2nd, 3rd and 4th respondents are not parties to the dispute between the applicant and the respondent.

This property was acquired long after the applicant and the respondent separated.

The applicant has not established a prima facie case with chances of success over this plot as the same is not registered in the names of the 1st respondent. It has been demonstrated how the respondent acquired the plot through purchase.

No injunction will issue to restrain the registered owner of immovable property. See **Moses Warui Gatimu -vs- Douglas Mwai Machuru & Another Kerugoya ELC Case No. 786 of 2013.**

In the circumstances I find that the application is without merit and is dismissed.

Dated signed at Kerugoya this 29th day of May 2020.

L.W. GITARI

JUDGE