



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

MATRIMONIAL CAUSE NO. 8 OF 2020

BMM.....APPLICANT/APPLICANT

VERSUS

EMM.....RESPONDENT

RULING

1. The Plaintiff/Applicant herein has filed an application dated 17/03/2020 brought pursuant to sections 2, 6(1), 7, 12(1) (3), 14 of the Matrimonial Property Act 2013 and Order 40 of the Civil Procedure Rules seeking the following reliefs namely: -

(1) (Spent)

(2) (spent)

(3) That a temporary injunction do issue restraining the Respondent from selling, leasing, letting, charging, alienating, transferring or completing any conveyance in the property the subject of this suit pending hearing and determination of the main suit.

(4) That costs of the application be provided for.

2. The application is supported by the annexed affidavit of the Plaintiff/Applicant sworn on even date as well as grounds on the face thereof. The Applicant's case is that she is the legal wife of the Respondent having solemnized their union in church sometimes on 9/08/1975. It was her case that she largely contributed towards the acquisition of the family property known as **Machakos/Mua Hills/xxx** which property the Respondent is now in the process of disposing it off to buyers to the detriment of the Applicant and her children. It was her case that she stands to suffer irreparable harm if an injunction is not granted pending the determination of the originating summons. It was finally her case that she had contributed a lion's share in the purchase of the suit property and thus entitled to 85% share of the property which is equal to her contribution.

3. The Respondent opted not to file any response to the application despite being duly served. It would therefore appear that the Applicant's application remains unopposed. However, due to the nature of the case and the prayers sought it is necessary to scrutinize the Applicant's averments and establish whether or not the prayer sought in the interim is merited pending the determination of the Originating Summons.

4. Learned counsel for the Applicant filed written submissions dated 23/06/2020. Counsel raised one issue for determination namely whether the Applicant is entitled to the orders sought. It was submitted that the Applicant has made out a prima facie case with a probability of success and has met the requisite conditions established in the case of **Giella –vs- Cassman Brown [1973] EA 358**. It was further submitted that the Applicant being the legally wedded wife of the Respondent and who substantially contributed towards the purchase of the suit property is entitled to conservatory order pending determination of the originating summons. It was also submitted that the Applicant stands to suffer irreparable harm not compensable by monetary award due to the fact that her matrimonial home is situate within the suit land. Finally on the issue of balance of convenience, it was submitted that the status quo requires that an order of injunction be granted so as to preserve the subject property from alienation pending determination of the main suit. Reliance was placed in Order 40 Rule 1 of the Civil Procedure Rules - **Mrao limited –vs- First American Bank of Kenya Ltd & 2 others [2003] KLR 125, Kenleb Cons Ltd –vs- New Gatitu Service Station Ltd & Another [1990] eKLR and Paul Gitonga Wanjau –vs- Gathuthis Tea Factory Co. Ltd & 2 Others [2016] eKLR**

5. I have considered the Application together with the submissions. The copy of the certificate of marriage leaves no doubt that the Applicant and Respondent lawfully conducted a church wedding on 9/08/1975 under the African Christian Marriage and Divorce Act (Cap

151 Laws of Kenya). It is also not in dispute from the correspondences availed that the Applicant did contribute towards the purchase of land parcel plot number 167 Mua Hills and that the Respondent has embarked on selling part of the said parcel of land. The issue for determination is whether or not the Applicant has presented sufficient reasons to warrant a grant of conservatory order of injunction pending the determination of the originating summons.

6. The law regarding grant of interlocutory injunction is found in Order 40 Rule 1 of the Civil Procedure Rules as follows:

“Where in any suit it is proved by affidavit or otherwise:-

(a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree;

(b) That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further order.”

The Applicant herein has already presented her Originating Summons under the Matrimonial Property Act 2013 seeking for the divisions of the suit property Machakos/Mua Hills/xxx. She has also availed some correspondences showing that she duly contributed towards the acquisition of the said property. She has also averred that the Respondent who is her estranged husband of many years has embarked on a selling spree whereby he has already sold about five acres out of the suit land and is intent on disposing of the entire parcel to her detriment and those of her children. She has also averred that her matrimonial home is situate within the suit property. She has finally averred that she is entitled to about 85% of the suit property since she contributed a substantial chunk of the purchase price and therein lies her case at this interlocutory stage of the proceedings.

The conditions for the grant of an interlocutory injunction were settled in the case of **Giella Vs Cassman Brown [1973] EA 358** where the court held as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, 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 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 of the balance of convenience.”

The Applicant has no option but to satisfy all the above three conditions in order to secure a conservatory order at this stage of the proceedings.

7. As regards the first condition, it is noted that the Originating Summons are yet to be heard in earnest. It is also noted that the suit property is registered in the names of the Respondent. At this stage, the Applicant has pleaded that the Respondent holds the property in trust for her and her children and that she had substantially contributed towards the purchase price of the suit land. I have seen two letters dated 11/10/1976 and 3/1/1984 addressed to the Applicant's former employer (TSC) and which confirms her contribution towards the purchase of the suit land then described as Plot No. xxx Mua Hills now described as Machakos/Mua Hills/xxx. The copy of the certificate of marriage added further proof of the relationship between the Applicant and the Respondent as wife and husband respectively. There is therefore no doubt that the Applicant has made a full and frank disclosure of all the relevant facts for the court's attention. It seems these documents form part of the exhibits she intends to rely on in her case during the hearing of the main suit. I am satisfied that she has shown that she has some right whether legal or equitable meriting protection by this court by way of an order of injunction. This is the prima facie test that I find the Applicant at this stage has managed to surmount. A prima facie case was held by the court in **Mrao limited –vs- First American Bank of Kenya Ltd & 2 others [2003] KLR 125:**

“A prima facie case in a Civil Application includes but is not confined to a genuine and arguable case; it is a case 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 as to call for an explanation or rebuttal from the latter.”

The letter from the District Settlement officer Machakos dated 3/01/1984 addressed to the Applicant's former employer (TSC) clearly indicated as follows:-

“Please refer to the above irrevocable order and note that Mrs Blanche E. Musembi used to be deducted Kshs. 200/=w.e.f, 1.11.76.

According to our records she has fully paid all the debts outstanding against plot xxx Mua Hills.

Would you please now revoke the order and stop deducting her the amount.

(P.K NJOROGE)

for: DISTRICT SETTLEMENT OFFICER.”

The above therefore, leaves no doubt that the Applicant did contribute towards the purchase of the suit land and hence she has a stake

thereon. I find that she has shown a prima facie case with a probability of success in that during the hearing of the Originating Summons there is a chance that she is not likely to come out empty handed.

8. As regards the second condition, the Applicant has averred that her matrimonial home is situate within the suit land and that if the Respondent is not stopped then there is a possibility that the entire land is likely to be alienated thereby causing her to suffer irreparable harm. Indeed, land has an intrinsic value and the fact that the Applicant's matrimonial home is located within the suit land leaves no doubt that she has great sentimental attachment to the said land and that if the same is alienated then she and her children stand to suffer great loss which cannot be compensated by way of monetary award. The land is where she nurtured her children and therefore she has shown that she has a stake thereon. I am satisfied that the Applicant has satisfied the second condition.

9. As regards the third condition, I find that even though both parties herein requires the court to balance their rival interests, the balance of convenience tilts in favour of granting an interlocutory injunction so as to preserve the suit property pending the determination of the competing rights of the parties in the Originating Summons. The suit land is the subject of the dispute and therefore it is appropriate to preserve the same pending the final determination. There is evidence that the Respondent is currently engaged in selling portions of the land and hence in order to prevent further alienation a conservatory order of temporary injunction is merited in the circumstances. I find the Applicant has satisfied the requisite conditions for an order of temporary injunction.

10. In the result, it is my finding that the Applicant's application dated 17/03/2020 has merit. The same is allowed in terms of prayer No. 3 thereof. As the application was not opposed by the respondent I order that the costs hereof are awarded to the Applicant. Parties are now directed to proceed to set down the main suit for hearing on priority basis.

It is so ordered.

Dated and Delivered in open court at Machakos this 22nd day of September, 2020.

D. K. Kemei

Judge