



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MATRIMONIAL CAUSE NO. 5 OF 2019 (OS)

UNDER

ORDER 37 RULES 1& 2 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF SECTION 7 OF THE MATRIMONIAL PROPERTY ACT 2013

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

ARTICLE 45 (3) & 48 OF THE CONSTITUTION, 2010

AND

THE INHERENT JURISDICTION OF THE HONOURABLE COURT

BETWEEN

JNT.....PLAINTIFF/APPLICANT

AND

DTK.....DEFENDANT/RESPONDENT

RULING

1. The parties herein were married under Kikuyu customary law for 23 years since 1986. They apparently separated and were formally divorced in Nairobi Divorce Cause No. 26 of 2010, decree nisi issuing in January 2013. They have two adult children. On 26th March 2019 the Applicant filed an Originating Summons seeking determination of stated questions in relation to the following landed properties: _ **LR NO.Muguga/Gitaru/T.[xxxx], LR NO. Muguga/Gitaru/[xxxx] and LR NO.Muguga/Jet Scheme /[xxxx]**. The Applicant also contemporaneously filed a motion expressed to be brought under *inter alia* under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules , Sections 3A and 63(c) and (e) of the Civil Procedure Act and Sections 12, 17 and 18 of the Matrimonial Property Act, and seeking in the

main, an interlocutory injunction directed against the Respondent or the Respondent's servants, agents, to restrain them from selling, charging, alienating, parting with possession, save to the Applicant or in any way dealing with the matrimonial properties acquired, maintained or improved during coverture, namely, land parcels **NO.Muguga/Gitaru/T.[xxxx], Muguga/Gitaru/[xxxx] and LR NO. Muguga/Jet Scheme /[xxxx]** (the suit properties) pending the hearing of this suit.

2. The application is premised on the grounds that the suit properties were acquired during coverture or inherited during the subsistence of the marriage between the parties and should be shared equally.

3. **JNT** swore the supporting affidavit. She deposed that she was married to the Respondent and that her father-in-law bequeathed to them the land parcels **LR NO. Muguga/Gitaru/T.[xxxx], Muguga/Gitaru/[xxxx]** on which they jointly developed permanent and semi-permanent rental houses; that the couple jointly purchased land parcel **LR NO. Muguga/Jet Scheme /133[xxxx]**. She contended that in 2009, the Respondent evicted her from the matrimonial home which they had built together and on realizing that the Respondent was intent on selling these properties, she placed cautions in the relevant Lands Registry but that the cautions were unlawfully removed without her knowledge. Thus, exposing the suit properties to the risk of alienation, to the detriment of her children and herself. She is apprehensive that she will suffer irreparable loss as a result.

4. **DTK** filed his replying affidavit on 25th July, 2019, in opposition to the application. He deposed that he had acquired the suit properties prior to his marriage to the Applicant and that she had not made any financial contributions towards the acquisition. He explained that he had acquired the suit properties through transmission as an inheritance before marrying the Applicant and therefore, they did not constitute matrimonial property, further that the houses erected on the suit properties were constructed by his deceased father.

5. He further confirmed that indeed the Applicant had lodged cautions against the properties, and that they were lifted after the Applicant ignored notices by the Land Registrar to show cause why the cautions should not be removed.

6. Parties agreed to canvass the application by way of written submissions. The Applicant submitted that the suit properties were acquired and/or developed jointly during the pendency of the marriage and her suit, if successful, would be rendered nugatory if the suit properties are alienated. It was submitted that the Applicant has a prima facie case and in the event, the suit properties should be preserved. The case of **Giella vs. Cassman Brown** was relied upon in support of the motion. It was contended that the Applicant will suffer irreparable damage if the suit properties are not preserved. Thus, the court was urged to grant the orders sought.

7. Counsel for the Respondent submitted that the suit properties were inherited by the Respondent from his late father before he entered into marriage with Applicant, and that there had been no urgency to transfer the said parcels of land as it was accepted by his family that he would inherit the same. He reiterated that these properties do not form part of the matrimonial property, the Applicant not having made any contribution towards their improvement. It was submitted that the permanent and semi-permanent rental houses on the suit properties were constructed by the Respondent's father. The case of **JWG v GGW (2019) eKLR** was called to aid.

8. It was further argued that the Applicant has not established her claim or demonstrated her contributions towards the acquisition or development of the suit properties. Counsel submitted that numerous show-cause notices were issued to the Applicant prior to the lifting of the cautions on the parcels by the Land Registrar and that she failed to respond. Lastly, counsel submitted that the Applicant has not tendered any evidence to prove her claims that the Respondent intends to dispose of the suit properties or to demonstrate her right over the said properties. Counsel relied on the case of **Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 others (2016) eKLR** where it was stated that an injunction is granted on the basis of evidence and sound legal principles. He urged the court to dismiss the application.

9. The court has considered the material canvassed in respect of the motion. Certain facts are not in

dispute, including the marriage and coverture of the parties for over 20 years, divorce in 2013, the existence of the suit properties, the filing of cautions against dealings therewith by the Applicant, and removal of the caveats at the behest of the Respondent, prior to the filing of this suit. Two key questions keep arising, namely, whether the suit properties are matrimonial properties and what if any contribution, the Applicant made to their acquisition or development. These issues can only be fully determined after the full hearing.

10. For the purposes of the motion, the court must determine whether the Applicant has brought her application to the required threshold for the grant of an interlocutory injunction under Order 40 Rule 1 of the Civil Procedure Rules which provides that:

“ Cases in which temporary injunction may be granted [Order 40, rule 1.]

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; or

(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 orders.**”

11. What are the applicable principles? The decision of the Court of Appeal in **Nguruman limited v Janbonde Nielsen and others[2014] eKLR** is particularly illuminating as to 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.”

12. 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.

13. 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.” (emphasis added)

14. A *prima facie* case is built upon evidence and the applicable law. In this matter, the Applicant’s substantive case as found in the Originating Summons is founded *inter alia* on the provisions of Section 6 and 7 Matrimonial Property Act and the supporting affidavit evidence presently before the court.

13. The Applicant’s depositions that the couple lived on and used the suit properties during the subsistence of the marriage are not controverted by the Respondent. Further, the Respondent admits that during the said period, the Applicant was in gainful employment and earned a “decent” salary and is a person of means. The Respondent asserts however that the suit properties and developments thereon were gifted to him before marriage. That would have been in the early eighties. Yet, the developments in the Applicant’s annexure “TN6” appear relatively recent.

14. Moreover, the attached searches in respect of the suit properties indicate that these were transferred to the Respondent in the 1990s. The Respondent’s explanation being that though gifted earlier, he saw no urgency to effect transfer as he was the assured sole heir to his father! The parties herein cohabited over 20 years prior to separation in 2009 and subsequent divorce. They had children who obviously had needs such as education, food, shelter and medical attention. That is not a short period and the court will have to interrogate what contribution if any the Applicant may have made in respect of any of these properties. Prima facie, the Respondent’s suggestion that the Applicant spent her entire “decent” salary on her own projects does not seem plausible.

15. The fact that the Respondent has pursued the removal of cautions on the land could well be preparation for adverse dealings and therefore, the Applicant’s apprehension does not seem far-fetched. Prima facie, she has a fair and *bona fide* question to be answered in these proceedings. In addition, as the erstwhile wife to the Respondent, she has demonstrated a clear right that is under threat from the admitted conduct of the Respondent.

16. On the question of irreparable loss, and given the nature of the cause and its peculiar circumstances, the Applicant would suffer irreparably if the suit property were to be dissipated before her claim thereto is determined on evidence. Indeed, her suit may well be rendered nugatory.

17. Reviewing all the foregoing, the court is inclined to grant the application filed on 26th March,2019. Costs will abide the outcome of the Originating Summons. In order to expedite the matter, the court directs that within 45 days of today's date, the Applicant does file and serve her witness affidavits and documentary evidence upon the Respondent. The Respondent, upon being so served, will file his witness affidavits and documentary evidence within a similar period. Thereafter, the Applicant will have the cause listed for further pre-trial directions.

DELIVERED AND SIGNED AT KIAMBU THIS 20TH DAY OF DECEMBER 2019.

C. MEOLI

JUDGE

In the presence of:

Applicant no appearance

Respondent no appearance