



**Maina v Macharia (Environment & Land Case E64 of 2022)
[2023] KEELC 22066 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22066 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E64 OF 2022
LA OMOLLO, J
DECEMBER 7, 2023**

BETWEEN

BETH WAMBOI MAINA PLAINTIFF

AND

JAMES MAINA MACHARIA DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Plaintiff/Applicant’s Notice of Motion application dated 14th November, 2022.
2. The said application is expressed to be brought under Order 40 Rules 1, 2, 3 and 4, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Sections 2, 6(1), 7, 12, 14 & 17 of the *Matrimonial Property Act*, Section 93 of the *Land Registration Act*, Articles 40(1), 60(1), 27 & 45(3) of *the Constitution* of Kenya.
3. The Plaintiff/Applicant seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this suit, this honorable court be pleased to issue an order restraining the Defendant/Respondent by himself, his officers, servants, agents, family members and/or relatives or anyone acting on the Defendant’s/Respondent’s behalf and/or authority be restrained from collecting rent, evicting and/or interfering with the Plaintiff/Applicant’s exclusive and quiet possession of land title number Bahati/Kabatini Block 1/9238. The Defendant/Respondent further be restrained from subdividing, leasing,



selling, transferring, charging, developing or dealing with land title number Bahati/Kabatini Block 1/9238 in any manner whatsoever that may see its title change ownership.

- d. That pending the hearing and determination of this suit, the court be pleased to issue an order prohibiting the Defendant/Respondent from solely collecting rental income from the rental property erected on land title number Bahati/Kabatini Block 1/9238 and direct that all monthly rental proceeds from the rental property erected on land title number Bahati/Kabatini Block 1/9238 be equally shared between the Plaintiff/Applicant and the Defendant/Respondent.
- e. Spent
- f. That costs of this application be costs in the cause.

factual Background

4. This suit was commenced by way of a Plaint dated 14th November, 2022. The Plaintiff/Applicant seeks the following prayers;
 - a. A declaration that land title number Bahati/Kabatini Block 1/9238 registered in the name of the Defendant and held in trust by the Defendant for both the Plaintiff and the Defendant is matrimonial property and does not belong solely to the Defendant.
 - b. A declaration that the Plaintiff has matrimonial/spousal, overriding and/or beneficial interest in the matrimonial property as wife and co-owner.
 - c. A permanent injunction restraining the Defendant by himself, his officers, servants, agents, family members and/or relatives or anyone acting on the Defendant's behalf and/or authority be restrained from collecting rent, evicting and/or interfering with the Plaintiff's exclusive and quiet possession of land title number Bahati/Kabatini Block 1/9238. The Defendant further be restrained from sub dividing, leasing, selling, transferring, charging, developing or dealing with land title number Bahati/Kabatini Block 1/9238 in any manner whatsoever that may see its title change ownership.
 - d. An order that the monthly rental income generated from the rental property constructed on Bahati/Kabatini Block 1/9238 be shared equally between the Plaintiff and the Defendant.
 - e. An order that the Officer Commanding station of Kagoto Police Station do supervise compliance with the Honorable Court's order.
 - f. The costs of this suit be awarded to the Plaintiff.
 - g. Any other relief that this honorable court may deem fit to award.
5. The Plaintiff/Applicant's application first came up for hearing on 16th November, 2022.
6. The hearing of the application was adjourned to 17th January, 2023 when the court gave directions that it be canvassed by way of written submissions.
7. Subsequently, the matter was mentioned severally before it was finally reserved for ruling on 5th June, 2023.



The Plaintiff/Applicant's contention

8. The Plaintiff/Applicant contends that she is the wife of the Defendant/Respondent having been married in the year 1986 under Kikuyu Customary Law and that their marriage was blessed with five children.
9. The Plaintiff/Applicant further contends that the Defendant/Respondent is the registered owner of land parcel No. Bahati/Kabatini Block 1/9238.
10. It is her contention that they jointly acquired the suit property in the year 2007 and subsequently built their matrimonial home where they have been residing to date.
11. It is also her contention that the suit property is matrimonial property which they acquired during the subsistence of the marriage between them.
12. It is further her contention that she contributed to the purchase of both the suit property and the construction of their matrimonial home and other structures that have been erected thereon.
13. The Plaintiff/Applicant contends that her marriage with the Defendant/Respondent has had its fair share of challenges as the Defendant/Respondent has refused to provide for his family.
14. The Plaintiff/Applicant also contends that the Defendant/Respondent has from time to time deserted their matrimonial home and that he allegedly physically assaulted their son Moses Kamau Maina on 18th July, 2021 due to a land dispute over the harvesting of beans and potatoes and the incident was reported at Kiamaina Police Post.
15. The Plaintiff/Applicant further contends that in 2020 she took a loan together with the Defendant/Respondent of Kshs. 100,000/= from a loan “shylock” known as Ann Mwangi in order to construct rental houses on the suit property.
16. It is her contention that they used the loan to construct eight shops which have since been completed and are generating an income of Kshs. 40,000/=.
17. It is also her contention that the Defendant/Respondent has been solely collecting the rental income and paying off the loan which she believes was long paid of and settled.
18. It is further her contention that in December 2021, she was shocked to receive a vacation notice from an agent acting on the instructions of the “shylock” requiring her to vacate the property within three months due to an alleged default of the said loan.
19. The Plaintiff/Applicant contends that when she approached the said “shylock” with a view of establishing the origin and basis of the said notice, the “shylock” informed her that she had not issued the notice.
20. The Plaintiff/Applicant also contends that she later came to learn that the vacation notice had been an attempt orchestrated by the Defendant/Respondent and his accomplices to evict her and their children from the suit property and that she therefore did not vacate the suit property.
21. It is her contention that the Defendant/Respondent devised another scheme and on 15th January, 2022 she together with the tenants received a notice informing them of a change in management and giving details of an account number to deposit the rent effective 1st February, 2022.



22. It is also her contention that she is apprehensive that the Defendant/Respondent may sell the suit property and has on the advice of her Advocates on record registered a caution over the suit property so as to prevent any improper dealings.
23. It is further her contention that they have made several attempts to solve the matter with the family and local chief, Kiamaina Location but none of the efforts have borne fruits.
24. She ends her deposition by stating that unless this court intervenes, the Defendant/Respondent may sell the suit property causing her and their children to suffer substantial and irreparable financial loss and prejudice.

The Defendant's/Respondent's Contention

25. In response to the Plaintiff/Applicant's application, the Defendant/Respondent filed a Replying Affidavit sworn on 22nd December, 2022 and filed on the same date.
26. The Defendant/Respondent contends that he does not dispute that the Plaintiff/Applicant is his wife as they were married under Kikuyu customary law and as a result of the said marriage, they were blessed with five children.
27. The Defendant/Respondent also contends that he is the registered owner of land title No. Bahati/Kabatini Block 1/19238 measuring 0.034 Ha which is not their matrimonial home.
28. The Defendant/Respondent further contends that he established the matrimonial home on Plot No. 4679 Kabatini which property he registered in the name of the Plaintiff/Applicant.
29. It is his contention that it is true that he and the Plaintiff/Applicant have developed the suit property and have constructed commercial shops which generate income.
30. It is also his contention that on 25th January, 2021 he sold the suit property to Ann Wambui Mwangi at a consideration of Kshs. 1,000,000/= after obtaining the Plaintiff/Applicant's consent.
31. It is further his contention that pursuant to the sale, it was agreed that the Plaintiff/Applicant would move out of the suit property to pave way for the buyer to take possession.
32. The Defendant/Respondent contends that as from 1st February, 2022 the said buyer has been collecting rent without any objection.
33. The Defendant/Respondent also contends that it was ludicrous for the Plaintiff/Applicant to claim that he had been plotting to have her and the children vacate the suit property and yet she gave her consent for its sale.
34. The Defendant/Respondent further contends that the Plaintiff/Applicant approached the court with unclean hands and is not worthy of the orders sought.
35. It is his contention that the alleged caution placed on the suit property was unlawful and in any event the Plaintiff/Applicant is denying the innocent and lawful purchaser the right to her quiet and peaceful enjoyment of the suit property.
36. He ends his deposition by stating that the Plaintiff/Applicant's application should not be allowed as it is an abuse of the court process.



The Plaintiff/Applicant's Response to the Defendant/Respondent's Replying Affidavit.

37. In response to the Defendant/Respondent's Replying Affidavit, the Plaintiff/Applicant filed a supplementary affidavit sworn on 27th January, 2023 on 30th January, 2023.
38. The Plaintiff/Applicant deposes that as far as she was concerned, their matrimonial home was on the suit property and not on Plot No. 4679 Kabatini as the Defendant/Respondent alleged.
39. The Plaintiff/Applicant also deposes that she is not aware of Plot No. 4679 Kabatini that is allegedly registered in her name and that the Defendant/Respondent has not produced any evidence as to the existence of the said plot.
40. The Plaintiff/Applicant further deposes that the reason why she came to court was because of the hostile and adverse activities that are being done by the purported agents of the Defendant/Respondent and the purchaser who have started to demand for rent.
41. It is her contention that she has never collected rent from the commercial shops on the suit property and that she could neither confirm nor deny if the Defendant/Respondent was collecting rent as this was uniquely within the Defendant/Respondent's knowledge.
42. It is also her contention that she is not aware of any sale of the suit property for kshs. 1,000,000/= and that her consent was not obtained.
43. It is further her contention that the sale agreement annexed to the Defendant/Respondent's replying affidavit is a fabrication made for the purposes of the present suit or for the purposes of defrauding the family.
44. The Plaintiff/Applicant contends that there is no evidence of the payment of the kshs. 1,000,000/= and that other crucial transactional documents necessary to execute the transaction are missing.
45. The Plaintiff/Applicant also contends that it is puzzling that the Defendant/Respondent is claiming that he sold the suit property on 25th January, 2021 and yet she registered a caution over the property on 21st April, 2022.
46. The Plaintiff/Applicant further contends that she conducted a search on 21st April, 2022 which confirmed that the Defendant/Respondent was the registered owner of the suit property and that she had placed a caution on the property which means that the alleged sale is a non-starter, null and void since there was no transfer to that effect.
47. It is her contention that the alleged purchaser Ann Wambui Mwangi operates a "shylock" business where she and the Defendant/Respondent jointly took a loan of Kshs. 100,000/= from her to construct the commercial shops on the suit property.
48. It is also her contention that she did not agree to move out of the suit property so that the alleged purchaser could take possession.
49. It is further her contention that she did not consent to the alleged sale of the suit property as alleged by the Defendant/Respondent and that the signature in the spousal consent annexed to the Defendant/Respondent's replying affidavit is a forgery.
50. The Plaintiff/Applicant contends that the Defendant/Respondent has approached this court with unclean hands as he has concealed material facts that would have been of benefit to the court.



51. The Plaintiff/Applicant also contends that the alleged purchaser cannot be said to have any right to be joined to the suit as there is no transfer to prove the alleged sale.
52. The Plaintiff/Applicant denies all other allegations in the Defendant/Respondent's Replying Affidavit and ends her deposition by stating that she swears the supplementary affidavit in further support of the instant application which has merit and should be allowed with costs.

Issues for Determination.

53. The Plaintiff/Applicant filed her submissions dated 20th March, 2023 on 24th March 2023 while the Defendant/Respondent filed his undated submissions on 25th April, 2023.
54. The Plaintiff/Applicant in her submissions identifies one issue for determination.
 - a. Whether the applicant should be granted temporary injunctive orders as against the Defendant/Respondent as sought in the application dated 14th November, 2022.
55. The Plaintiff/Applicant relies on the judicial decision of *Giella vs Cassman Brown Co. Ltd* 1973 EA 358 which set out the conditions that must be met before an interlocutory injunction is granted.
56. The Plaintiff/Applicant submits that the said conditions are separate and have to be surmounted sequentially as was held in *Kenya Commercial Finance Co. Ltd v Afraha Education Society* (2001) Vol. EA 86.
57. The Plaintiff/Applicant relies on *Mrao Limited versus First American Bank of Kenya & 2 Others* [2003]KLR 125 and submits that she has established that she has a prima facie case as she contributed towards the purchase of the suit property and the construction of the matrimonial home.
58. The Plaintiff/Applicant further relies on Sections 2, 6 and 12(1) of the Matrimonial Act(sic), the judicial decision of *DKG v EG* [2021]eKLR and submits that the alleged sale that the Defendant/Respondent claims took place was a non-starter since there was no transfer to that effect.
59. The Plaintiff/Applicant reiterates the contents of her supplementary affidavit, relies on *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR and submits that she has furnished sufficient evidence before the court to warrant the granting of an injunction.
60. On whether she will suffer irreparable injury that cannot be adequately compensated by damages, the Plaintiff/Applicant relies on *Nguruman Ltd vs Jan Bonde Nielsen & 2 Others* [2014] eKLR and submits that since her matrimonial home is on the suit property, she will be rendered destitute if the Defendant/Respondent is not stopped by way of temporary injunctive relief.
61. The Plaintiff/Applicant relies on *Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 Others* [2016] eKLR and submits that the balance of convenience tilts in her favour as the Defendant/Respondent has not proved the existence of Plot No. 4679 Kabatini which he alleges hosts the matrimonial home and is registered in the Plaintiff/Applicant's name.
62. The Plaintiff/Applicant also relies on *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018], *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another* [1990] eKLR and submits that she has approached the court with clean hands and therefore seeks that her application be allowed as prayed.
63. The Defendant/Respondent in his submissions relies on Order 40 Rule 1(a) of the Civil Procedure Rules, the principles set out in *Giella vs Cassman Brown* [1973] EA 358 and submits on whether the Plaintiff/Applicant has made out a prima facie with probability of success, whether the Plaintiff/



Applicant will suffer irreparable loss that cannot be compensated by an award of damages and in whose favour the balance of convenience tilts.

64. The Defendant/Respondent relies on *Mrao vs First American Bank of Kenya Limited & 2 Others* [2003] KLR 125 and submits that he is the registered owner of the suit property which fact is affirmed by the Plaintiff/Applicant.
65. The Defendant/Respondent also submits that the suit property does not host the matrimonial property as it is on Plot No. 4679 Kabatini which is registered in the name of the Plaintiff/Applicant.
66. The Defendant/Respondent reiterates the contents of his Replying Affidavit and submits that even though the Plaintiff/Applicants denies that she did not give her consent for the sale of the suit property, he has annexed a copy of the said consent to his replying affidavit.
67. The Defendant/Respondent relies on *Mbuthia vs Jimba Credit Corporation Ltd (1988)* KLR1 as was cited in *Linus Ngetich vs Cecilia Chelangat Ngetich & 2 others* [2018] eKLR and submits that the suit property was sold with the consent of the Plaintiff/Applicant.
68. The Defendant/Respondent also submits that the suit property was sold without any encumbrances and the caution placed by the Plaintiff/Applicant was an afterthought.
69. The Defendant/Respondent relies on *Joel Richard Wamai (Suing through Virginia Wambui Wamai Guardian) vs Mary Wanjiru Wamai* [2018]eKLR and submits that the Plaintiff/Applicant has not established a prima facie case with high chances of success.
70. The Defendant/Respondent relies on *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] eKLR and submits that the Plaintiff/Applicant has not demonstrated that she will suffer irreparable injury should the court fail to grant the orders sought.
71. The Defendant/Respondent further submits that there is an alternative property known as Plot No. 4679 Kabatini that is registered in the name of the Plaintiff/Applicant and that the Plaintiff/Applicant has not demonstrated any legal and/or beneficial interest in the suit property.
72. The Defendant/Respondent submits that the suit property has already changed ownership and so the balance of convenience does not tilt in the Plaintiff/Applicant's favour.

Analysis and Determination

73. I have considered the application, supporting affidavit, replying affidavit, supplementary affidavit and the rival submissions. The only issue that arises for determination is whether the Plaintiff/Applicant is entitled to the orders sought in the application.
74. The law governing the grant of temporary injunctions is Order 40 rule (1) (a) and (b) of the Civil Procedure Rules 2010. Further, there are principles set out for grant of a temporary injunction which were spelt out in *Giella v Cassman Brown* (1973) EA 358.
75. The principles were reiterated in *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No 77 of 2012 (2014) eKLR where the Court of Appeal held as follows:

“in an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour. These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all



the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

76. The judicial decision of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 defined a prima facie case as follows;
- “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.”
77. It is the Plaintiff/Applicant’s case that she is the wife of the Defendant/Respondent who is the registered owner of land parcel No. Bahati/Kabatini Block 1/9238.
78. It is also the Plaintiff/Applicant’s case that she purchased the suit property jointly with the Defendant/Respondent.
79. It is further the Plaintiff/Applicant’s case that they established their matrimonial home on the suit property and also built shops that were rented out but it was the Defendant/Respondent who was collecting rent.
80. The Plaintiff/Applicant alleges that sometime in the year 2022, together with the tenants, they received a notice of new management which indicated a change in the mode of payment of rent. She later found out that the Defendant/Respondent was intending to evict her from the suit property.
81. The Plaintiff/Applicant has attached to her supporting affidavit a copy of a notice dated 15th January, 2022 issued by Philacom Commercial Agency addressed to “all tenants” notifying them that the premises they were in occupation of was under new management and they were given new details for payment of rent.
82. A copy of certificate of official search is also attached which shows that the Defendant/Respondent James Maina Macharia is the registered owner of land parcel No. Bahati/Kabatini Block 1/9238. The Certificate of search also shows that the Plaintiff/Applicant had registered a caution on the property.
83. The Defendant/Respondent, on the hand, admits that he is the husband to the Plaintiff/Applicant and that they jointly acquired the suit property and developed it. However, he denies that their matrimonial home is established on the suit property and states that it is on Plot No. 4679 Kabatini.
84. The Defendant/Respondent states that he has already sold the suit property to Anne Wambui Mwangi with the consent of the Plaintiff/Applicant.
85. He has attached to his replying affidavit a copy of a sale agreement dated 25th January, 2021 entered between himself and Anne Wambui Mwangi for the sale of land parcel No. Bahati/Kabatini Block 1/9238 for a consideration of Kshs. 1,000,000/=.
86. The Defendant/Respondent has also attached to his replying affidavit a copy of a spousal consent allegedly signed by the Plaintiff/Applicant acknowledging the said sale.
87. The Plaintiff/Applicant denies signing the said consent and disputes the existence of plot No. 4679 Kabatini. The Plaintiff/Applicant further disputes the said sale of the suit property to Anne Wambui Mwangi.



88. It is not disputed that the Defendant/Respondent is the registered owner of the suit property. It is also not disputed that the suit property was jointly acquired by the Plaintiff/Applicant and the Defendant/Respondent.
89. It is further not disputed that the developments made on the suit property were done by both the Plaintiff/Applicant and the Defendant/Respondent.
90. What is disputed is whether the suit property has been sold, whether the Plaintiff/Applicant gave her consent for the property to be sold and who is collecting the rent from the tenants.
91. My view that the issues which are contested can only be determined at the hearing of the main suit.
92. Given the circumstances of this case, it is my view that the Plaintiff/Applicant has established a prima facie case.
93. The Plaintiff/Applicant has to demonstrate that she will suffer irreparable injury if an order of temporary injunction is not granted. The Court in the judicial decision of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai [2018] eKLR held as follows on what constitutes irreparable injury;
- “Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”
94. It is not disputed that the Plaintiff/Applicant is in possession and/or occupation of the suit property and that she jointly purchased and developed it with the Defendant/Respondent. It is also evident that the Defendant/Respondent is in the process of selling the suit property. The Plaintiff/Applicant describes the suit property as her matrimonial home. In my view, the sentimental values attaching to a matrimonial home are not capable of being compensated by way of damages. This is sufficient demonstration that she will suffer irreparable injury should it be sold.
95. The Plaintiff/Applicant has to demonstrate that the balance of convenience tilts in her favour. In Pius Kipchirchir Kogo Vs Frank Kimeli Tenai [2018] the court stated as follows on what constitutes a balance of convenience;
- “The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
- In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.
96. Given the facts and circumstances of this suit, the balance of convenience tilts in favour of granting an order of injunction.



97. The Plaintiff/Applicant is also seeking that the court issues an order prohibiting the Defendant/Respondent from collecting rental income from the suit property and instead order that the rental income be shared equally between the Plaintiff/Applicant and the Defendant/Respondent.
98. The Defendant/Respondent opposes the granting of the said order and argues that it is the purchaser who has been collecting rent effective 1st February, 2022.
99. One of the prayers the Plaintiff/Applicant is seeking in her plaint is for an order that the rental income from the suit property be shared equally between the her and the Defendant/Respondent.
100. It is my view the question of whether or not the court should issue an order that the rental income be shared equally between the Plaintiff/Applicant and the Defendant/Respondent goes to the substance of the main suit and allowing it is akin to determining the suit at the interlocutory stage. I decline to grant e said order cannot therefore be granted.

Disposition

101. The upshot of the foregoing is that the Plaintiff/Applicant's application dated 14th November, 2022 is hereby allowed in the following terms;
 - a. Pending the hearing and determination of this suit, the Defendant/Respondent by himself, his officers, servants, agents, family members and/or relatives or anyone acting on the Defendant's/Respondent's behalf and/or authority are hereby restrained from evicting the Plaintiff/Applicant from land title number Bahati/Kabatini Block 1/9238, from interfering with the Plaintiff/Applicant's exclusive and quiet possession, from subdividing, leasing, selling, transferring, charging, developing or dealing with land title number Bahati/Kabatini Block 1/9238 in any manner whatsoever that may see its title change ownership.
 - b. The costs of this application shall abide the outcome of the suit.
102. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 7TH DAY OF DECEMEBER, 2023.

L. A. OMOLLO

JUDGE

In the presence of:

Miss Aoko for the Plaintiff/Applicant.

Ms Njeri Njgwa for the Defendant/ Respondent.

Court Assistant: Monica Wanjohi.

