



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 306 OF 2014**

HELLEN MUTHONI MUTHIKE.....1<sup>ST</sup> PLAINTIFF/APPLICANT

NANCY MUTHONI MUTHIKE.....2<sup>ND</sup> PLAINTIFF/APPLICANT

VERSUS

FAUSTO MUTHIKE MBUKO.....DEFENDANT/RESPONDENT

**RULING**

On 28<sup>th</sup> November 2014, the plaintiffs herein filed this suit against the defendant seeking the following remedy:-

- a. ***Declaration that the defendant holds L.R No. MWEA/TEBERE/B/4034, 4035, 4041, 4042, 4043, 4044, 4045, 4046, & 4047 in trust for the plaintiffs and their children.***
- b. ***Costs of the suit.***

The suit was premised on the pleading that the plaintiffs are the wives of the defendant and between them have twelve (12) children and at all material time, the defendant was the registered owner of land parcel No. L.R MWEA/TEBERE/B/68 and he has now thrown the plaintiffs and the children from the matrimonial home. The defendant has then proceeded to sub-divide the parcel No. MWERUA/TEBERE/B/68 into various portions some of which he has registered into his names while others in strangers' names. Among those that the defendant has registered in his names are the parcel No. MWERUA/TEBERE/4034, 4035, 4041, 4042, 4043, 4044, 4045, 4046 and 4047 (hereinafter the suit properties) which he did without the knowledge of the plaintiffs who together with their twelve (12) children are now living in destitution in rented houses and villages thus giving rise to this suit.

Simultaneously with the filing of the suit, the plaintiffs moved the Court citing the provisions of **Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** and sought by their Notice of Motion the following orders:-

1. ***Spent***
2. ***That a prohibitory order be issued against L.R. No. MWERUA/TEBERE/B/4034, 4035, 4041, 4042, 4043, 4044, 4045, 4046 and 4047 by having the same not sold, charged or transferred pending hearing and determination of the main suit herein.***
3. ***That costs of this application be in the cause.***

The application was based on the grounds set out therein and also supported by the supporting affidavit sworn by the 1<sup>st</sup> plaintiff HELLEN MUTHONI MUTHIKE. The gist of the application is that although the defendant is the registered proprietor of the suit properties, that registration is in trust for the plaintiffs and

their children. That the said suit properties are what remain of the original parcel No. MWERUA/TEBERE/B/68 measuring 35 acres most of which the defendant has sold leaving the plaintiffs and their children to live as destitutes.

The defendant filed a defence in which he pleaded, inter alia, that his title is absolute and in any event, the plaintiffs did not protest when surveyors came to the land. He added that the plaintiffs live on the suit properties and that a Preliminary Objection on a point of law would be raised to have the suit struck out with costs.

On 15<sup>th</sup> April 2015, the defendant did indeed file a Notice of Preliminary Objection to the Notice of Motion and the entire suit seeking that the same be struck out on the following grounds:-

1. ***The plaintiffs lack locus standi in law to file this suit.***
2. ***Married women can only file suits against their husbands over property under the provisions of the Married Women's Property act 1882.***
3. ***The suit is an abuse of the Court process.***

And in response to the Notice of Motion seeking prohibitory orders, the defendant filed grounds of opposition arguing that the application is an abuse of the Court process since the applicants have already placed restrictions on the suit properties and also, that the plaintiffs have no cause of action against the defendant and this suit is only calculated at intimidating and harassing him.

When counsels appeared before me on 1<sup>st</sup> October 2015, it was agreed that both the plaintiffs Notice of Motion filed herein on 28<sup>th</sup> November 2015 and the defendant's Preliminary Objection be heard together by way of written submissions. Those submissions were subsequently filed as agreed.

I shall commence with the defendant's Preliminary Objection because it not only touches on the plaintiff's capacity to file this suit but also question the competency of the claim.

It is not clear on what basis the plaintiff's capacity is being questioned. They certainly have the locus to sue the defendant if he holds the suit properties in trust for them and their children. And that is what their claim is all about. That Preliminary Objection is clearly unfounded and must be dismissed.

On the issue that the plaintiffs should have filed this suit under the ***Married Women's Property Act 1882***, that Act ceased to apply in Kenya following the commencement of the ***Matrimonial Property Act 2013 on 16<sup>th</sup> January 2014***. This suit was filed on 28<sup>th</sup> November 2015. By that time, the law that governed disputes over matrimonial property was therefore the ***Matrimonial Property Act of 2013***. Having said so however, the plaintiffs have filed this suit claiming that the defendant holds the suit properties in trust for them and their children. They have not pursued a claim for distribution of matrimonial property. A party is entitled to pursue the claim that best suits his demands and as far I am aware, there is no prohibition against one spouse laying a claim in trust against the other. If there is, then it was not brought to this Court's attention. That objection therefore similarly fails.

The Preliminary Objection raised by the defendant with respect to this suit is therefore dismissed.

I now turn to the plaintiffs' Notice of Motion filed on 28<sup>th</sup> November 2014 seeking the prohibitory orders indicated above. Counsel for the defendant, and rightly so, has taken issue with the orders sought therein being prohibitory orders. That complaint is justified. The application itself is founded under the provisions of ***Order 40 of the Civil Procedure Rules*** which reads:-

***“TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS”***

That order does not provide for prohibitory orders which are the orders sought in the plaintiffs' application. However, a closer look at the application leaves no doubt that the plaintiffs were seeking injunctive reliefs. The prayer sought is worded as follows:-

***“That a prohibitory order be issued against L.R No. MWEA/TEBERE/B/4034, 4041, 4042, 4043, 4044, 4045, 4046 & 4047 by having the same NOT sold, charged or transferred pending hearing and determination of the main suit herein”***

Clearly, what the plaintiffs are seeking are orders that the suit properties should not be “*alienated*” or “*sold*” as provided for under ***Order 40 of the Civil Procedure Rules***. While the drafting by counsel is far from perfect, I think that defect can be cured by invoking the provisions of ***Article 159 of the Constitution***. However, this Court must caution counsels that it expects pleadings to be drawn properly.

Having said so, are the plaintiffs deserving of the injunctive relief sought by their Notice of Motion filed herein on 28<sup>th</sup> November, 2014?

An application for temporary injunction must be considered in light of the principles set out in the case of ***GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358*** which are:-

1. ***That the applicant must establish a prima facie case with a probability of success at the trial.***
2. ***That the applicant must demonstrate that unless the injunction is granted, he might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages and,***
3. ***If in doubt, the Court will determine the application on the balance of convenience.***

It must also be remembered that being an equitable remedy, a temporary injunction will not be granted where the applicant has not approached the Court with clean hands. Finally, in considering an application for temporary injunction, the Court, while not making any final determination with regard to the parties respective interests in the property subject of the suit, will ordinarily take the route that appears to have the lower risk of injustice. This Court will be guided by those broad principles in determining this application.

Have the applicants established that they have a prima facie case to warrant the orders sought herein? A prima facie case was defined by the Court of Appeal in the case of ***MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL NO. 39 of 2002*** as follows:-

***“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 from the latter”***

The applicants’ case is that they are the two wives of the respondent and the properties in dispute is part of their matrimonial home from which the respondent has now removed them and is in the process of disposing leaving the applicants and their twelve (12) children to live as destitutes renting houses in the village. Those averments as contained in the supporting affidavit of the 1<sup>st</sup> plaintiff/applicant **HELLEN MUTHONI MUTHIKE** have not really been rebutted because the respondent only chose to file grounds of

opposition to the application without any replying affidavit to rebut the averments. While that option was available to the respondent, the fact remains that those averments are not rebutted. Whether or not the properties subject of this suit are matrimonial property or were held by the respondent in trust for the applicants and their children are matters to be determined at the trial once the evidence is placed before the Court. What is clear however from the supporting affidavit is that the applicants and their children were living on the properties subject of this suit before they were thrown out of their home. It has not been pleaded anywhere that the parties are divorced in which case it would be contrary to the provisions of ***Section 12 (3) of the Matrimonial Property Act*** for the respondent to throw the applicants and their children out of their home. The same provision prohibits the alienation of such matrimonial property without the consent of the other spouse. On the basis of the above, this Court is entitled to make a finding, which I hereby do, that the applicants have established a prima facie case as set out in the case of ***GIELLA*** (supra) to warrant the orders sought.

With regard to the second limb set out in the *GIELLA* case (supra), it is now well settled that a party should not be denied the remedy of an injunctive relief merely because the respondent is able to compensate him with an award of damages. In any event, if there is a contravention of **Section 12 (3) of the Matrimonial Property Act** as alleged, such transgression of the law would be sufficient ground upon which to grant interlocutory relief.

Finally, if the application is to be determined on the balance of convenience, the scales would tilt in favour of the plaintiffs/applicants because the course that best meets the cause of justice is to ensure that the plaintiffs/applicants and their children are not rendered destitute.

In the circumstances therefore and having considered all the material before me, I find this application is well merited and I grant the orders sought therein. I further direct, pursuant to the provisions of **Order 40 Rule 6 of the Civil Procedure Rules**, that the parties do expedite compliance with the provisions of **Order II Civil Procedure Rules** and have the suit heard and determined within twelve (12) months from today otherwise the injunction order shall lapse unless the Court directs otherwise.

Costs in the cause.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY, 2016**

Ruling delivered this 26<sup>th</sup> day of February, 2016 in open Court

Ms Thungu for Mr. Chomba for Plaintiff present

Ms Kiragu for Mr. Kiama for Defendant present.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY, 2016**