REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 39 OF 2014

IRENE MUKUHI MBUI ……..…… APPLICANT

VERSUS

LEONARD MBUI WAGACHA…RESPONDENT

R U L I N G

1. The application before court is the one dated 25th June, 2014. In it, the Applicant seeks orders from the court for an injunction restraining the Respondent whether by himself, his agents or servants from trespassing on, wasting, constructing on, alienating, disposing, transferring or otherwise interfering or dealing with the suit property being Title Number 411/Kabete/Karura and or its sub-divisions pending the hearing and determination of this application. It is brought under **Order 1 Rule 10, Order 51 rule 1 Civil Procedure Rules 2010, Section 1B, 3A and 63(e)** of the **Civil procedure Act (Chapter 21 of the Laws of Kenya).**

2. The application is premised on the grounds that the Applicant is co-owner of parcel known as Title Number 411/Kabete/Karura and its sub-divisions by virtue of being the wife of the Respondent; that the Respondent has interfered with the Applicant's said property by trespassing thereupon and has forcefully evicted her from the suit property which is her matrimonial home; that the Respondent has illegally transferred and disposed of parts of the suit property and sub-divided it without the consent of the Applicant; that the Respondent has married a second wife and intends to have her live in the Applicant's matrimonial property subject to the forceful eviction of the Applicant; that the Applicant has established her home on the suit property and has lived there all her married life, and that unless restrained, the Respondent will continue to interfere, by disposing of and transferring the suit property and will ultimately cause the Applicant irreparable damage with the likelihood of a breach of the peace.

3. Parties filed written submissions made by Mr. Munyasya for the Applicant and by Mr. Wamiti for the Respondent. Mr. Munyasya submitted that the Applicant had a prima facie case and that the Applicant will suffer irreparable damage if orders sought are not granted. He submitted that the land parcel in dispute is Title No. 411/Kabete/Karura and its subdivisions. That it is a family land which was acquired by both the Applicant and the Respondent together through inheritance from the Respondent's father, and they have lived on it since 1975 when they were married under Agikuyu Customary Marriage.

4. Mr. Munyasya argued that the piece of land was a gift to both the Applicant and the Respondent, and it is only prudent that the Respondent before transfer of the said land seeks consent from the Applicant. Despite the title not being in the Applicant's name her contribution to the ownership of

the land is deemed to be by virtue of the input of labour. He referred the court to **Section 93(3) Land Registration Act (2012)**.

5. Mr. Munyasya contended that despite orders from the court, the Respondent has continued to demarcate the land with the intentions of disposing the suit property and if allowed to continue with the transfer of the parcel of land, this will cause irreparable harm to the Applicant and contribute to furthering of an illegality as the ownership of the land is joint and consent must be sought before transferring it.

6. Mr. Munyasya urged the court to protect the Applicant's rights of ownership of property as enshrined in the Constitution of Kenya since the Respondent has already issued a notice to the Applicant to vacate the suit property. He prays that the court do issue a permanent injunction to the Respondent from transferring or otherwise interfering or dealing with the suit property being title Number 411/Kabete/Karura or sub-divisions in any way that may be detrimental or prejudicial to the Applicant.

7. Mr. Munyasya stated that a party cannot be allowed by a court of Law to trample on other people's rights with impunity at the pain of ability to pay damages. In such circumstances an injunctive relief is inevitable. Further that, where the mode of acquisition of the said property is suspicious and cannot be defended allowing payment of damages, will be tantamount to condoning an illegality. He cited the holding of **HCCC 227 OF 2009 Nambuye J** in **Agnes Wanjiku Kamweti vs Thamia Investment & 2 Others**.

8. Mr. Wamiti for the Respondent opposed the application. He submitted that the Respondent has never been married to the Applicant under any form of law recognized in Kenya and that they only cohabited with each other until the year 2013 when the Applicant moved to her son's house. Further, that the suit property has never been a matrimonial property, and neither the Respondent nor the Applicant, either individually or jointly have ever been the proprietor. That the parcel of land to date is registered in the name of the Respondent's father Wagacha Mbue Thairu as evidenced by the Applicant's own official search annexed to the affidavit in support of her application.

9. Mr. Wamiti contended that the Respondent cannot dispose of, or be restrained logically, practically and properly in law from disposing of a property that he does not own. That the Applicant has not furnished this court with proof of such sale. He argued that granting the substantive order of the Originating Summons by this court would serve no purpose as neither of the parties herein is the registered owner of the suit property and the suit property is not the parties' matrimonial property.

10. Mr. Wamiti further submitted that the Applicant has not furnished the court with any proof of marriage between her and the Respondent, and even if that marriage were to be said to exist, no proof of dissolution of the said marriage has been furnished. The conditions for the grant of an interlocutory injunction as were settled in **GIELLA VERSUS CASSMAN BROWN AND COMPANY LIMITED (1973) EA 358 in which SP AND, V.P**, first an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be 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 a balance of convenience.

11. The issue for determination in the application before me is whether he Applicant has established first that she has *prima facie* case with a probability of success. To do so, she must establish first that there exists or that there existed a marriage between her and the Respondent at some point in time. Secondly, she must establish that the property the subject matter of the application is a matrimonial property.

12. On whether or not there exists or there existed a marriage between the Applicant and Respondent,

the Applicant alleged that she and the Respondent contracted a marriage under Kikuyu Customary law in 1975. That thereafter they cohabited as husband and wife till the year 2013 when the marriage broke down irretrievably. The Respondent on his part denied the existence of any such contract of marriage. Whoever alleges a custom has a burden to proof. Whether or not the marriage exists therefore is a fact that needs to be proved. I find that the material placed before the court is not sufficient to enable the court to make a determination on this issue with any degree of certainty, one way or the other.

13. I had recourse to the decision of Duffus JA in **Kimani v Gikanga at pg 739** which did lend credence to my view on this issue. I find as did Duffus JA in the foregoing case that the Applicant having embarked on proving that she was married under Kikuyu Customary Law by the by the Respondent, she was duty bound to prove her allegation on a balance of probability. The judge pronounced himself as follows on customary law:

> **"To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case."**

14. On the second issue as to whether the property in issue is a matrimonial property, Mr. Munyasya referred the to court to **Section 93(3) Land Registration Act (2012)** which provides as follows:

> **" if land is held in the name of one spouse only but the other spouse contribute their labour or other means to the productivity, upkeep and improvement of the land, that spouse or other spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common."**

The said section refers to property that is "**held in the name of one spouse only."** The property which is the subject of the application before the court is not in the name of any of the two parties and the court has not been supplied with any evidence that the said property is matrimonial property. The evidence supplied by the Applicant indicates that the property belongs to one Wagacha Mbue Thairu.

15. For the foregoing reasons the court finds that the orders sought cannot be granted on the application as brought. The application is dismissed accordingly.

SIGNED DATED and **DELIVERED** in open court this **25th day** of **February 2016**.

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L. A. ACHODE

JUDGE