



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELC CASE NO. 73 OF 2021**

**REGINA CHEPKEMOI KIPRONO.....PLAINTIFF/ APPLICANT**

**VERSUS**

**LUKA KIPRONO CHEBOR.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**EVANS KIPKOSGEI KURGAT.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. This ruling is in respect of the Plaintiff's Notice of Motion application dated 16<sup>th</sup> September 2021. The said application is brought under certificate of urgency and seeks the following orders:

***i) Spent.***

***ii) Spent.***

***iii) THAT pending the hearing and determination of this suit, a permanent injunction be issued against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/ Respondents from disposing off, alienating, transferring, selling and/or interfering with the Applicant/Plaintiff's quiet use, possession and enjoyment of Land Parcel number KAKAMOR/KIPROTA/221.***

***iv) THAT the cost of this application be provided for.***

2. The application is expressed as being brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, CAP 21 Laws of Kenya and Order 40 Rule 1 of the Civil Procedure Rules, 2010

3. The application is based on the grounds set out on its face and supported by the affidavit sworn by one Regina Chepkemai Kiprono, the Plaintiff/Applicant herein.

4. The 1<sup>st</sup> Defendant/Respondent filed a replying affidavit in response to the application. The said affidavit is sworn by him. I note that there is no indication that it sworn on behalf of the 2<sup>nd</sup> Defendant and/or with his authority.

5. The 2<sup>nd</sup> Defendant/ Respondent did not file any response to the application.

**FACTUAL BACKGROUND**

6. The application came up for hearing ex-parte and the on the 21<sup>st</sup> September, 2021 and the duty Judge ordered that the application be served on the Respondents and the application was fixed for *inter partes* hearing on 4<sup>th</sup> October 2021.

7. On the 4<sup>th</sup> October, 2021 when the application came up for *inter partes* hearing, counsel for the Defendants stated that he was not ready to proceed and gave reasons that he had just received instructions from his client. He sought 14 days to enable him file his responses. Consequently, the application was rescheduled for hearing on the 13<sup>th</sup> October, 2021.

8. On the 13<sup>th</sup> October, 2021 the application was adjourned on account of indisposition of counsel for the Defendants/Respondents. An order for maintenance of status quo was issued pursuant to ELC Practice direction No. 28 (k). The application was adjourned to the 4<sup>th</sup> November, 2021.

9. On 4<sup>th</sup> November, 2021 parties appeared and agreed to dispose off the application by way of written submissions. The application was reserved for mention on 6<sup>th</sup> December, 2021 to confirm filing of submissions.

10. On the 6<sup>th</sup> December, 2021, the Plaintiff/ Applicant appeared and confirmed the fact of filing submissions. The application was then reserved for ruling.

### **ISSUES FOR DETERMINATION**

11. The Plaintiff/ Applicant in her submissions has identified and listed the issues for determination as follows:

***a) Whether the applicant should be granted a temporary injunction pending the hearing and determination of the suit.***

***b) Whether a prima facie case with a probability of success at the intended trial has been proved.***

***c) Whether the suit land is matrimonial property.***

***d) Whether damages would be adequate compensation and in whose favour the balance of convenience tilts***

12. The 1<sup>st</sup> Defendant/Respondent in his submissions has identified the following issues for determination:

***a) Whether the land KAKAMOR/KIPROTA/ 221 is part of matrimonial property.***

***b) Whether spousal consent is mandatory to sell and/or transfer land.***

***c) Whether the Plaintiff contributed to the acquisition of the suit land.***

13. In my view, the issues for determination at this stage are:

***a) Whether the Plaintiff/Applicant has met the criteria for the grant of order of temporary injunction pending the hearing and determination of this suit.***

***b) Who shall bear the costs of the application?***

### **THE PLAINTIFF/APPLICANT'S CONTENTION.**

14. The Plaintiff/ Applicant, on the grounds on the face of the application states that she is the wife of the 1<sup>st</sup> Respondent and has spousal rights over land parcel number KAMAKOR/ KIPROTA/ 221.

15. She states that the suit land is matrimonial property on which she was residing before the 2<sup>nd</sup> Respondent forcefully evicted her.

16. The Applicant contends that she became aware of the illegal sale in July 2021 when she was forcefully evicted from the suit parcel.

17. The Plaintiff/Applicant contends that the 2<sup>nd</sup> Respondent allegedly entered into a sale agreement with the 1<sup>st</sup> Respondent but the title to the suit land is still in the name of the 1<sup>st</sup> Respondent.

18. It is the Applicant's contention that the forceful eviction has violated her proprietary rights over the suit land and has threatened her with unjustified loss of user and ownership.

19. In the affidavit in support of the application, the Applicant reiterates the grounds on the face of the application.

20. She deposes that she registered a caution against the suit property when she became aware of the illegal sale.

21. It is the Applicant's deposition that she was forcefully evicted from the suit parcel by police men and has attached certain blurred photographs as evidence of this fact.

22. According to the Appellant her children and herself have been peacefully utilising the suit land and prays that the court declares the suit land as matrimonial property and that the 1<sup>st</sup> Respondent holds 50% of the beneficial interest thereon in trust and for her benefit.

23. The Applicant ends her deposition by praying for an order restraining the Respondents from disposing off, alienating, transferring, selling and/or interfering with her rights to use the suit property.

**THE 1<sup>ST</sup> DEFENDANT/RESPONDENT'S RESPONSE.**

24. The 1<sup>st</sup> Defendant/Respondent filed a replying affidavit sworn by him. He deposes that he is the husband of the Plaintiff adding that they married under Tugen Customary Law in the year 1974.

25. It is his deposition that he is a retired police officer having worked in the police force for 35 years.

26. The 1<sup>st</sup> Respondent deposes that after his marriage to the Plaintiff, they settled in Kures Village, Barigo County on a parcel of land reference number KAKIMOR/ KIPROTA/ 56 as their matrimonial home.

27. The 1<sup>st</sup> Respondent deposes that he subsequently, in 1979, contracted a second marriage to one Alice Chepkoech Toroitich and settled in a separate matrimonial home in Moien, Uasin Gishu County.

28. According to the 1<sup>st</sup> Respondent that after settling his two families, he purchased the suit parcel of land i.e. KAKAMOR/KIPROTA/221 as investment for his children's school fees.

29. The 1<sup>st</sup> Respondent deposes that there was an understanding between him and his two wives that the suit land was to be sold later to cater for their children's school fees.

30. The 1<sup>st</sup> Respondent further deposes that the Plaintiff/ Applicant has been in occupation, since 1974, of a 40 acre parcel of land known as KAKIMOR/ KIROTA/ 56 which he describes as their matrimonial home.

31. It is the 1<sup>st</sup> Respondent's deposition that the Plaintiff/ Applicant was not forcefully evicted from the suit parcel by police but rather, the police went to restore peace after the Plaintiff/ Applicant and some of their sons destroyed the 2<sup>nd</sup> Respondent's property. This he states happened on 19<sup>th</sup> April 2019.

32. According to the 1<sup>st</sup> Respondent in the year 2013 he sold the suit parcel to a certain buyer and received Kshs 425,000 but subsequently children from him and the Plaintiff/Applicant opposed the sale and he was forced to refund the amount. The 1<sup>st</sup> Respondent deposes that he approached the 2<sup>nd</sup> Respondent to purchase the suit land for Kshs. 3,000,000 out of which Kshs. 425,000 was to pay the debt accrued from the botched sale.

33. It is deposed that the proceeds from the sale of the suit parcel to the 2<sup>d</sup> defendant have been used to pay school fees for the children of the Plaintiff/ Applicant and the 1<sup>st</sup> Respondent and those between him and his second wife and another two adopted after the death of his brother.

34. The 1<sup>st</sup> Respondent deposes that the Plaintiff/Applicant and their sons attacked and injured him and also destroyed the 2<sup>nd</sup> Respondent's property. He deposes that the Plaintiff and their sons were ordered to pay the 2<sup>nd</sup> Respondent kshs. 380,000 for damage to his property. A letter from the Director of Public Prosecution Eldama Ravine is attached as evidence of this fact.

35. It is the 1<sup>st</sup> Respondents deposition that his children on realising that they could not sustain a claim against him, have resorted to financing their mother to institute the present suit and application yet one of his sons sent an e-mail to the 2<sup>nd</sup> Respondent stating that they had withdrawn their claim as against the 2<sup>nd</sup> Respondent and would let the Plaintiff/Applicant pursue the matter with him, the 1<sup>st</sup> Defendant/Respondent

36. The 1<sup>st</sup> Respondent contends that there have been attempts by his family and clan to resolve the dispute and that the Plaintiff/Applicant and their sons have been prevailed upon to end the dispute.

**RESPONSE OF THE PLAINTIFF/APPLICANT TO THE REPLYING AFFIDAVIT BY THE 1<sup>ST</sup> RESPONDENT.**

37. The Plaintiff/Applicant filed a further affidavit dated 28<sup>th</sup> October 2021 in response to the 1<sup>st</sup> Defendant's/ Respondent's reply.

38. The Plaintiff/Applicant contends that land reference number KAKAMOR/KIPROTA/56 is ancestral land which the 1<sup>st</sup> Defendant/Respondent holds with his deceased brother on behalf of his family of four siblings. A copy of the title deed is annexed.

39. According to her the 1<sup>st</sup> Defendant/ Respondent has a second family which is settled on a 20 acres parcel which was bought during the subsistence of her marriage to the 1<sup>st</sup> Defendant/ respondent.

40. It is her contention that the suit parcel, just like the one in Moiben, was registered in the name of the 1<sup>st</sup> defendant/Respondent to hold for himself, their children and the plaintiff/Applicant.

41. The Plaintiff/Applicant reiterates that she has been using the suit parcel since it was purchased until the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/ Respondents forcefully evicted her.

42. The Plaintiff/Applicant deposes that there does not exist a verbal or oral agreement that the suit land was to be sold and proceeds used as

school fees for the children. She deposes further that the responsibility of educating her younger children was left to the older children.

43. It is the Plaintiff/Applicant's contention that the 1<sup>st</sup> Defendant/Respondents had previously attempted to sell the suit land but the sale did not materialise as her children registered a caution against the suit land.

44. The Plaintiff/Applicant deposes that her children have previously offered to pay school fees for their step siblings but the 1<sup>st</sup> Defendant/Respondent turned down the offer.

45. The Plaintiff/Applicant further deposes that she refused to give consent for the suit land to be sold and the 1<sup>st</sup> Defendant resorted to threats and intimidation and that she reported the matter to the area chief.

46. According to the Plaintiff/Applicant she did not maliciously damage the 2<sup>nd</sup> Defendant/ Respondent's property. She states that the matter was reported to the police and when the file was forwarded to the Director of Public Prosecution; it was recommended that the same be resolved by the Environment and Land Court as the dispute was civil in nature.

47. It is her deposition that she is of advanced age and would be rendered destitute if the 1<sup>st</sup> Defendant/ Respondent would be allowed to sell the suit land.

48. She reiterates that the parcel on which she resides (KAMAKOR/KIPROTA/56) does not belong to the 1<sup>st</sup> Defendant/Respondent wholly and that his share has not been determined. The Plaintiff/ Applicant contends that only 10 acres of the parcel is habitable and that the rest is prone to flooding.

49. The Plaintiff/Applicant ends her deposition by stating that the 1<sup>st</sup> Defendant/Applicant has admitted that his second family is settled on a parcel that he bought for them while attempting to sell what belongs to her children and herself. She terms the actions of the 1<sup>st</sup> Defendant/ Respondent as discriminatory and in violation of the constitution.

#### **ANALYSIS AND DETERMINATION**

50. I have read the application, affidavit in support of the application, replying affidavit, further affidavit and their accompanying annexures, submissions filed by both the Plaintiff/Applicant and the 1<sup>st</sup> Defendant/Respondent and the judicial decisions referred to and/or attached to both submissions.

51. Regrettably, the 1<sup>st</sup> Defendant/Respondent lost sight of the prayers sought in the application. The application is seeking injunctive orders but the 1<sup>st</sup> Defendant/ Respondent chose to submit on whether the suit land is matrimonial property, whether spousal consent is mandatory and whether the Plaintiff/Applicant contributed towards the acquisition of the suit land.

52. It is even more puzzling that the Plaintiff/Applicant in her application is seeking orders of **permanent injunction** against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant restraining them from disposing, alienating, transferring, selling and/ or interfering with the Applicant/Plaintiffs quiet use, possession and enjoyment of land parcel number KAKAMOR/ KIPROTA/221 **pending the hearing and determination of the application and suit** but in her issues for determination lists one of the issues for determination as:

#### ***Whether the Applicant should be granted the temporary injunction pending the hearing and determination of the suit.***

53. The Plaintiff/Applicant, interestingly, has extensively submitted on the criteria for the grant of an order of temporary injunction.

54. It is obvious that counsel for the Plaintiff/Applicant did not have the legal provisions in active contemplation while drafting this application or quite simply and disappointingly a classic case of terrible drafting and/or copy pasting. This would otherwise necessitate an order dismissing the application. I am, however, mindful of the social circumstances presenting in this case; family members pitted against each other, physical fights, police complaints lodged with the police, arrests by police and attempts at prosecution.

55. I have taken into consideration the provision of law pursuant to which this application is brought in order to be clear of the intention of the Plaintiff/Applicant. The application is brought under Order 40 Rule 1. The said order provides for cases in which **temporary injunction** may be granted.

56. Order 40 Rule 1 further provides that 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.

57. Article 159 (2) (d) of the Constitution of Kenya 2010 calls upon me to administer justice without undue regard to procedural technicalities.

58. I am further reminded that the overriding objectives of the Civil Procedure Act and Rules are to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

59. Section 1B of the Act spells out the duty of the court in furthering the overriding objectives of the Act. One of the aims of the court shall be the just determination of proceedings.

60. Section 63 (e) of the Civil Procedure Act also gives the court discretion to make such other interlocutory orders as may appear to the court to be just and convenient in order to prevent the ends of justice from being defeated.

61. Having laid a basis for exercising my discretion in an effort towards a just resolution of the dispute rather than pre-occupation with form and procedural infractions, I will proceed to determine the substance of the application and on its merits.

62. The first issue for determination is whether the Plaintiff has met the criteria for the grant of an order of temporary injunction.

63. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of **Giella Versus Cassman Brown** (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of **Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014)eKLR** where the Court of Appeal held that;

***“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”***

64. Consequently, the plaintiff ought to, first, establish a prima facie case. The Plaintiff submitted that they have established a prima facie case and relied on the judicial decision of **Mrao Ltd Versus First American Bank Of Kenya Ltd (2003) EKLR** in which the Court of Appeal gave a determination on a prima facie case. The court stated that:

***“...in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

65. In support of her application, the Plaintiff/ Applicant has stated that she is the first wife of the 1<sup>st</sup> Respondent and that she is asserting her rights to the suit property as a spouse of the 1<sup>st</sup> Respondent and further that the suit property is matrimonial property. The fact of marriage and existence of the suit land purchased by the 1<sup>st</sup> Defendant/Respondent during the subsistence of his marriage to the Plaintiff/Applicant and purportedly sold to the 2<sup>nd</sup> Defendant/Respondent by the 1<sup>st</sup> Respondent necessitates an explanation and/ or rebuttal from the Defendants/Respondents. The 1<sup>st</sup> Defendant/Respondent has indeed offered an explanation in his replying affidavit. In my opinion, therefore, the Plaintiff has met the first criteria for grant of orders of temporary injunction.

66. Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to her if the order of temporary injunction is not granted. The judicial decision of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR** provides an explanation for what is meant by irreparable injury and it states;

***“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.***

67. The Plaintiff/Applicant has stated on the grounds on the face of the application that she was forcefully evicted from the suit parcel, her proprietary rights violated and has lost use and ownership of the suit parcel. She further states that unless the court intervenes the Applicant stands to suffer substantial loss. She has annexed a photo of the alleged forceful eviction. In her submissions, she states that the suit parcel is likely to be lost by her and that it is the only one that belongs to her and her children. She submits that the parcel on which the matrimonial home stands is ancestral land and that she has sentimental attachment to the land.

68. From the Plaintiff/Applicant’s depositions it is clear that if orders of injunction are not granted, there is every likelihood that the suit property will be transferred to the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Defendant/Applicant in his submissions states that he has every intention of setting off the money loaned to him by the 2<sup>nd</sup> Defendant/ Respondent by transferring the suit land to the 2<sup>nd</sup> Defendant/Respondent. In my view, this is sufficient demonstration of irreparable loss being occasioned to the Plaintiff if orders of temporary injunction pending the hearing and determination of the suit are not granted.

69. Thirdly, the plaintiff has to demonstrate that the balance of convenience tilts in her favour. In the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) EKLR** which defined the concept of balance of convenience as:

***‘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”*

70. In the case of **Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR**, the court dealing with the issue of balance of convenience expressed itself thus:-

*“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies”*

71. In the decision of **Amir Suleiman Vs Amboseli Resort Limited [2004] eKLR** where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated

*“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”*

72. Bearing in mind submissions by the Plaintiff/Applicant on the third criteria relating to balance of convenience, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. I have also not had opportunity to hear from the 2<sup>nd</sup> Defendant/Respondent.

73. The case of **Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Another [2019] eKLR** offers useful insights. The court in deciding on an injunction application stated;

*‘circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts.....’*

74. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute is in danger of being alienated as has been shown in the annexures to the affidavit in support of the application.

75. I have considered and weighed the Plaintiff/Applicant’s submissions as regards establishment of a prima facie case, the balance of convenience and in which position the same tilts to. I have also considered all facts in this application as regards which party stands to suffer greater harm following a grant of orders of injunction. In view of the foregoing, I find that the Plaintiff/Applicant has met the criteria for grant of orders of temporary injunction.

76. On the issue on costs; section 27 of the Civil Procedure Act provides that costs shall follow the event. The successful party shall ordinarily have costs.

77. Consequently, I make the following order:

*i) That pending the hearing and determination of this suit, an order of temporary injunction do issue, restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents from disposing off, alienating, transferring, selling and/or interfering with the Plaintiff/Applicants quiet use, possession and enjoyment of land parcel number KAKAMOR/ KIPROTA 221.*

*ii) The Plaintiff/Applicant shall have the cost of the application*

78. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 17<sup>TH</sup> DAY OF JANUARY 2022.**

**L. A. OMOLLO**

**JUDGE**

**In the presence of: -**

**Mr. Akango for the Plaintiff/Applicant.**

**Mr. Haggai for Rono for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondent**

**Court Assistant; Monica**