



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL CASE NO. 40 OF 2011**

A K M.....PLAINTIFF

VERSUS

A M M.....1<sup>ST</sup> DEEFNDANT

SOLOMON KYALO MUTISO.....2<sup>ND</sup> DEFENDANT

KYALO ISIKA.....3<sup>RD</sup> DEFENDANT

**RULING**

1. On the 17<sup>th</sup> February, 2011, the Applicant filed an application by way of Notice of Motion pursuant to the provisions of **Order 40 Rule 1,2,3 and 4** of the **Civil Procedure Rules; Section 3A** of the **Civil Procedure Act** and all enabling provisions of the law, seeking injunctive orders restraining the respondents by themselves, their agents, servants and employees from selling, charging, transferring, trespassing, developing, and evicting the applicant or in any manner interfering with parcels of Land No. **[Particulars withheld], [particulars withheld]** and **[particulars withheld]** (subject property) pending hearing of the application on temporary basis.

2. Further she seeks a permanent injunction to issue against the respondents restraining them and those claiming under them from entering into, selling, transferring, cultivating, sub-diving, clearing natural vegetation, fencing, grazing, developing, evicting the applicant and taking possession of the subject property pending hearing and determination the suit.

3. The application is premised on grounds that; the applicant is the 2<sup>nd</sup> wife of the 1<sup>st</sup> respondent. The subject property was acquired by her and the 1<sup>st</sup> Respondent jointly from the year 1983. The 1<sup>st</sup> subject property was registered in the name of the 1<sup>st</sup> Respondent while the other two (2) are still in the names of the previous owners. The subject property was fenced off as one block such that the boundaries cannot be discerned. The applicant has built a matrimonial home on Land **[particulars withheld]** part of the subject property while the 2<sup>nd</sup> Respondent has disposed **[particulars withheld]** to the 3<sup>rd</sup> Respondent. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents with their agents have entered the property and begun clearing natural vegetation, blocking the applicant from accessing her homestead and issuing threats of eviction to her. The 1<sup>st</sup> respondent holds the titles in trust for both himself and the applicant therefore cannot dispose the premises without her consent.

4. In an affidavit in support of the application the applicant deponed that she gave the 1<sup>st</sup> Respondent

money to purchase *[particulars withheld]*, *[particulars withheld]* and *[particulars withheld]* from **Muoka** and **Ngata Munguti, Nzioka Kilai, Muia** and **Nzioka Kiali** respectively. In breach of the trust the 1<sup>st</sup> respondent transferred *[particulars withheld]* in his name and a title deed was issued accordingly. She sued him before the **Mwala Land Disputes Tribunal** in **Case No. 20** of **2005** when he attempted to sell it. Per the award of the Tribunal she had the right to utilize the land as a legal wife of the 1<sup>st</sup> respondent. She continued to reside with the 1<sup>st</sup> respondent until 2003 when he returned to his 1<sup>st</sup> wife in Kangundo.

5. After the award by the tribunal the 1<sup>st</sup> respondent took his children from the 1<sup>st</sup> wife to cultivate the subject property whereby they caused destruction by cutting down trees. She reported the matter to the District Officer who warned them. In December, 2010, the 1<sup>st</sup> respondent transferred the *[particulars withheld]* and *[particulars withheld]* to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents despite being registered in the names of the previous owners. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents now intend to evict her.

6. In a reply thereto the 1<sup>st</sup> respondent having been authorized by the 2<sup>nd</sup> respondent deposed in an affidavit that he married the applicant as a 3<sup>rd</sup> wife under the Kamba Customary Law in 1984. He bought *[particulars withheld]* and *[particulars withheld]* with his own money. The applicant was allowed to cultivate the land but could not bar him from selling the property. He stated that *[particulars withheld]* had been sold to the 3<sup>rd</sup> respondent, with the knowledge of the applicant and therefore suggested that the applicant relocates to his other land.

7. According to the principle in ***Giella versus Cassman Brown and Company [1973] E.A. 358*** an interlocutory injunction can only be granted if; the applicant establishes a *prima facie* case with a probability of success; that he will suffer irreparable damage should the order sought be denied and where the court is in doubt, it should decide the application on a balance of convenience.

8. A ***prima facie*** case was defined by the Court of appeal in the case of ***Mrao Ltd versus First American Bank of Kenya Ltd & 2 others [2003] eKLR*** as follows:-

***“A prima facie case in civil application includes but is not confined to a genuine and arguable case”. It 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 as to call for an explanation or rebuttal from the later.”***

9. In the instant case, it is admitted that the 1<sup>st</sup> respondent is the applicant’s husband having entered into a polygamous marriage. It is also admitted that the subject property was acquired as the marriage continued to exist. The 1<sup>st</sup> respondent has denied vehemently having purchased the property using the applicant’s money. He states that he has the right to dispose the property having just allowed the applicant to reside thereon. The applicant on the other hand argues that the property being owned by the family could not just be disposed at the 1<sup>st</sup> respondent’s whim. The argument by the applicant indeed holds water therefore a *prima facie* case with a probability of success is established. This would mean that failure to grant injunctive orders sought would be detrimental to the applicant.

10. It is not denied that the applicant established a matrimonial home on the suit property. This is where she calls home, where she resides with her family. The balance of convenience would tilt in her favour.

11. However, the interlocutory order sought was:-

***“Pending hearing and determination of this application”***

On the 13<sup>th</sup> October 2011, the court granted preservative orders pending hearing of the application. Once the application is determined – the orders and prayer 1 of the application shall stand spent.

12. The second prayer is for a permanent injunction pending hearing and determination of the application.

It is trite law that permanent injunctions cannot issue at an interlocutory stage. (See *Salim Lemuta Kanyoike and Another versus Erick Konchella & 2 Others [2006] eKLR*). However strong the case may seem, it is advisable for such an injunction to be granted at the conclusion of a case. Issues to be addressed are at the heart of the case. Granting such an order is tantamount to negating the effect of the judgment to be obtained. In the premises I decline to grant the order sought.

13. I wish to point out that this is a case that should be heard on priority basis.

14. No orders as to costs.

**DATED, SIGNED and DELIVERED at MACHAKOS this 15<sup>TH</sup> day of JANUARY, 2015.**

**L.N. MUTENDE**

**JUDGE**