



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL SUIT NO. 31 OF 2013 (OS)**

**IN THE MATTER OF AN APPLICATION UNDER THE MARRIED WOMEN PROPERTY ACT  
1882**

**BETWEEN**

**J.M.W.....PLAINTIFF/DEFENDANT**

**AND**

**P.M.O.....DEFENDANT/RESPONDENT**

**RULING**

1. Before court is a Notice of Motion dated 7<sup>th</sup> June, 2013 and taken out under Order 40 Rules 1, 2, 2A and 31 of the Civil Procedure Rules and Sections 1A, 1B, 3A, and 63 ( c ) and ( e ) of the Civil Procedure Act and all enabling Provisions of the Law. The Applicant seeks orders that:-
  - a. ....(Spent)
  - b. ....(Spent)
  - c. That the Honourable Court be pleased to issue an interlocutory injunction restraining the Defendant from selling, charging or further charging, parting with possession – save to the Plaintiff/Applicant, disposing of, alienating or in any other way dealing with that parcel of land known as [*particulars withheld*] as to jeopardise interests of the Plaintiff/Applicant pending the hearing and determination of the main suit herein.
  - d. That the costs of this application be provided for.
  
2. The application is premised on the grounds that:-
  - a. That prior to their estrangement the Plaintiff/Applicant purchased the said plot using her own money without any contribution from the Defendant/Respondent.
  - b. That prior to their estrangement the Plaintiff and defendant jointly constructed their matrimonial home on the said property, with the Plaintiff contributing the larger share.
  - c. That the Plaintiff/Applicant expensively equipped and furnished the said matrimonial home without any contribution from the Defendant/Respondent.
  - d. That following their estrangement the Plaintiff has left the matrimonial home with the child of the marriage forcing her to incur further costs of renting, equipping and furnishing another house, leaving the Defendant in the matrimonial home.

3. The application is further supported by the annexed affidavit of J.M.W sworn on 7<sup>th</sup> June, 2013, where she has largely reiterated the grounds stated above. She further avers that though the said property is registered in both their names, the Defendant is likely to try and part with possession in whichever way and that to her detriment, and therefore important for the Honourable Court to restrain him from doing so.
4. The Respondent has opposed the application and has sworn a Replying Affidavit filed on 9<sup>th</sup> July, 2013, and where he has made several averments. Salient among them are that the applicant is cheating the Honourable Court that she bought the said property and yet she knows that she contributed not even a single cent into the venture. That he bought the said property out of the proceeds from the sale of a *matatu* he acquired before their marriage, that at the time of their marriage the said house was fully financed and the Applicant never did anything to furnish the house. That the Applicant was never chased from the said house, and that the Applicant brought a track where she packed all the family households which she took to her new home. Further, that he is furnishing the house with new households now. He avers that he developed the said property through a bank loan he took with National Bank of Kenya which loan facility he is servicing today. That he contributed towards the purchase of the property only that they agreed it be registered in the Applicant's name because they wanted to use her credit facility with Kenya Commercial Bank while he concentrated on other developments and taking care of them.
5. This application was prosecuted by way of written submissions. The Applicant filed in her written submission on 15<sup>th</sup> November, 2013, while the respondent's submission was filed on 5<sup>th</sup> December, 2013. It is the Applicant's case that they jointly put up a family home on plot number *[particulars withheld]* which she had purchased alone without any contribution from the Respondent. That she only requested the Respondent for his identity card so that the property could be registered in their joint names. She further submits that she contributed over 70% towards the building of the matrimonial home and the respondent only contributed Kshs. 300,000 which he had borrowed through NHIF where he was working then. It is the Applicant's position that she personally took two loans of one million each and used it to build the house.
6. She submits that the title deed for *[particulars withheld]* has been in the custody of the Respondent since 2008 and that the Respondent assured her that he had kept the original title deed in safe custody and has never raised with her the issue of it being lost. That, it is the Applicant's concern, that the Respondent is likely to dispose of the said property, unless he is permanently restrained by this court from doing so.
7. The Respondent on his part, submits that the Applicant is frivolous, vexatious and moved to court in bad faith and has not substantiated her claim by any standards, and has concealed material facts while presenting blatant falsehoods in seeking the aid of the Honourable Court to deprive the Respondent of his legally acquired property, which he bought alone. He submits that the Applicant alleges to have bought the said property yet she has not provided any single piece of evidence to back her wild allegations.
8. Further, it is the Respondent's submission that since the land in question *[particulars withheld]* is registered in the names of both the Applicant and the Respondent, it is impossible to dispose of the same without her involvement. The respondent contends that he does not harbor any intention of ever disposing/parting possession with the property, and that the Applicant has not demonstrated the basis of bringing this application to court, save to waste the court's time and punish the Respondent with frivolous litigation. He submits that any restraining order prayed for is unnecessary.
9. I have carefully considered the application, the affidavits on record and the rival submissions. The main issue for determination is whether the Applicant has made a case for the grant of an interlocutory injunction restraining the Defendant from selling, charging or further charging, parting with possession – save to the Plaintiff/Applicant, disposing of, alienating or in any other way dealing with that parcel of land known as *[particulars withheld]* as to jeopardise interests of

the Plaintiff/Applicant pending the hearing and determination of the main suit herein.

10. The application as has been stated above is premised upon Order 40 Rule 1 of the Civil Procedure Rules which provides;

*‘Where in any suit it is proved by affidavit or otherwise-*

- a. *that any property in dispute in a suit is in danger of being wasted , damaged or alienated by any party to the suit or wrongfully sold in execution of a decree; or*
- b. *that the defendant threatens or intends to remove or dispose of his property in the circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,*

*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, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.’*

11. In deciding whether to grant the order as sought above in the instant application, this court will rely on the case of ***Giella vs. Cassman Brown (1973) EA 358*** in which the conditions for the grant of an interlocutory injunction were settled thus:

*“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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 the balance of convenience.”*

12. So has the Applicant met the first condition, a prima facie case with a probability of success? In the case of ***Mrao vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125***, this Court held, among other things, that a prima facie case means more than an arguable case, that the evidence must show an infringement of a right and the probability of success of the applicant’s case at the trial. It thus states:-

*“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 or rebuttal from the latter.”*

13. This court’s considered view is that the Applicant has not shown a *prima facie* case with a probability of success. Although the said property is registered in the joint names of both the Applicant and the Respondent, she has not established the wrong which has been committed by the Respondent herein. If that were established, then this court being a court of justice would take the necessary action to ensure that justice is meted out without the need to wait for full trial of the main suit.

14. The Respondent has in the opinion of this court ably submitted that since the said property is registered in their joint names, it would be impossible to dispose of the same without the involvement of the Applicant. Indeed, the grounds as framed in the application do not disclose any wrong the Respondent has committed, but is largely based on the Applicant’s contribution towards the acquisition of the said property.

15. In the same breath, there is no action by the Respondent that would lead to any loss. Further, the Applicant has not demonstrated that the said property is in danger of being wasted, damaged or alienated by the Respondent herein. Better still, there is nothing brought before this court to show that the Respondent has threatened or intends to remove or dispose of the said property.

16.I agree with the Respondent's submission that the applicant has not demonstrated the basis for bringing this application to court. It would therefore, be imperative to note that the power of the Court to issue injunctive orders is discretionary, and that the Court will not exercise this power capriciously and whimsically. This Court will exercise its discretion only in matters that are of merit.

17.It has been held by this court severally that the exercise of the Court's discretion is to prevent abuse of the process of the Court, to ensure that the ends of justice are met and in achieving the overriding objective of the Court in the dispensation of justice fairly and justly.

18.In the circumstances, I find that the Applicant has not met the conditions set out in the *Giella* case as well as Order 40 of the Civil Procedure Rules. Accordingly, this application is not merited and is for dismissal, and is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 20th DAY OF June 2014.

**W. MUSYOKA**

**JUDGE**

**In the presence of Mr. Mwaura advocate for the applicant.**