



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

**AT NAKURU**

**CIVIL CASE NO. 156 OF 2010**

**LUCY WAITHIRA.....PLAINTIFF/ RESPONDENT**

**VERSUS**

**DANIEL BARAGU.....DEFENDANT/ APPLICANT**

**JOHN KAMAU MWANGI. ....INTERESTED PARTY**

**RULING**

Baragu Daniel, ("the applicant") brought the notice of motion dated 21st February, 2013 seeking to join John Kamau Mwangi to the proceedings herein as an interested party and to temporarily restrain him (John Kamau Mwangi) from selling, transferring, and/ or in any other way dealing with all that parcel of land known as Title No. Bahati/ Kabatini Block 106-45 pending the hearing and determination of the suit herein. The applicant also wants the court to punish the plaintiff (Lucy Waithira Baragu) and the interested party for disobeying the orders of the court issued on 5th October, 2010 restraining both the, applicant and the respondent from disposing of, alienating, dealing, and/ or in any other way interfering with the matrimonial properties namely:-Plot No.303 Kiamunyeki and two (2) posho mills thereon, Home Assets, J.N Sawmill at Kiamunyeki, Ngomongo Sawmill at Engarusha in Nakuru, Motor vehicle registration number KAB 480T and Direct Engineering Workshop pending the hearing and determination of this suit.

The application is supported by the affidavit of the applicant and is premised on the grounds that the applicant jointly with the plaintiff/ respondent bought, among other assets, three plots at Ngomongo and installed a sawmill in 2007. The plaintiff filed an application on 12th July, 2010 seeking conservatory orders in respect of the matrimonial properties which included the three plots in Engarusha in Nakuru at Ngomongo and the sawmill installed therein. On 5.10.2010 the court issued conservative orders for all matrimonial properties pending the hearing and determination of this suit. The applicant contends that despite the existence of the said court orders, the plaintiff, without his consent, processed and obtained title deeds of the three (3) plots in Ngomongo in her name and purported to transfer Plot No.Bahati/Kabatini Block 1/106/-45 to the interested party. The applicant's contends that the respondents (contemnors) were aware of the existence of the orders of the court and were as such done in contempt of the dignity and authority of this court.

In reply to the application, the interested party filed the notice of preliminary objection dated 15th March, 2013. In that notice of preliminary objection, the interested party contends that this court lacks jurisdiction to adjudicate on his right to the property herein because he is neither a wife nor a husband to the principal parties in dispute; that the parcel of land herein is not the subject matter of the settlement prayed for in the originating summons in the original and / or the amended suit; and

that the applicant having not filed any counterclaim to the plaintiffs suit cannot lodge a motion for orders of injunction.

On 20/3/2014 the court directed that the preliminary objection be disposed of by way of written submissions. Subsequently, the parties filed their respective submissions, which I have read and considered.

In the submissions filed on behalf of the interested party, it is submitted that under section 17 of the Married Women's Properties Act 1882, existence of a husband and wife relationship is a prerequisite, for the court to have jurisdiction. It is reiterated that the court does not have jurisdiction to determine the interested party's property rights herein because no husband and wife relationship exists either between the plaintiff and the interested party or between the applicant and the interested party.

Further that the property which the plaintiff subdivided and transferred to him does not form part of the properties listed in the originating summons. For that reason, the interested party has submitted that there is no substratum for the defendant's claim.

Finally, the interested party contends that the notice of motion brought by the applicant is incompetent because he did not lodge a counterclaim to the plaintiffs suit.

Terming the interested party's preliminary objection misplaced and diversionary, the applicant has submitted that the issue between the applicant is disobedience of a valid court order. Contending that the plaintiff and the interested party were aware of the existence of the court order herein when they entered into the impugned transaction; and that the preliminary objection herein is aimed at short circuiting the due process of law and interfering with the duty of the court to inquire whether its orders were disobeyed. The applicant has reiterated his contention that the interested party's property formed part of the suit properties before the plaintiff transferred it to him.

Pointing out that under order 40 rule 3(1) of the Civil Procedure Rules, this court has power to punish for disobedience or breach of its injunctive orders the applicant submitted that court orders must be obeyed by all persons who are aware of their existence and not necessarily parties to the suit. In this regard the applicant cited the decision in **Christine Wangari Gachigi v. Elizabeth Wambua & 8 others; Nakuru High Court Succession cause No.96 of 2000**; where it was observed:-

**"The most important aspect of obedience of an order of the court is knowledge. If a person becomes aware of an order of the court which binds him, he has no option but to obey it. Such person need not be a party to the suit."**

From the preliminary objection herein and the submissions by the respective parties the issues for determination are:-

1. Whether this court has jurisdiction to hear and determine the dispute between the applicant and the interested parties?
2. Whether the applicant's claim against the interested party is unsustainable for lack of substratum?
3. Whether in absence of a counterclaim or a set off or a cross suit an injunction can issue in favour of the applicant?

As concerns the first issue, the interested party has submitted that, under Section 17 of the MWPA 1882, under which the suit herein is premised, the court can only entertain a dispute if and if only the parties to the dispute are a husband and wife. Contending that he is neither a husband nor a wife to the principal parties to the suit, the interested party has submitted that this court lacks jurisdiction to hear and determine his right to the property cited therein.

Whereas I agree with the interested party that under section 17 of the Married Women's Property Act 1882, the jurisdiction of this court is to hear and determine questions between spouses, I cannot agree with the interested party's argument that the court cannot hear and determine his right to the property mentioned in the applicant's notice of motion herein simply because he is not a spouse to any of the parties in dispute. I say so because the interested party having, allegedly, obtained part of the properties in dispute between the spouses during the pendency of the current suit, he became an interested party with regard to any court proceedings in respect of that property. In this regard see **Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** which defines an interest party as:

**"a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation."**

As concerns the second issue, whereas it is true that the originating summon instituted by the plaintiff does not mention the property subsequently transferred to the interested party, taking note of the applicant's averment in his replying affidavit to the plaintiffs application dated 12th July, 2010, I find and hold that there is a dispute between the plaintiff and the applicant regarding ownership of all the home assets jointly owned between the plaintiff and the applicant. As the applicant claims that the property which was sub-divided and subsequently transferred to the interested party formed part of assets jointly owned between himself and the plaintiff, I find this question not to fit in the ambit of a preliminary objection properly so called. In this regard see the decision of the Court of Appeal, Sir Charles Newbold, President in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** where he held:-

**"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."**

To effectually determine the question as to whether the property the plaintiff subdivided and transferred to the interested party formed part of the suit property as contended by the applicant and denied by the interested party, I hold the view that evidence is required to prove or disprove that fact. That fact renders it difficult to determine the issue preliminarily as no evidence has been tendered capable of assisting the court ascertain that fact. In this regard see the affidavit that the applicant swore in reply to the plaintiffs application dated 12th July, 2010. In that affidavit the applicant, inter alia, deposed:-

**"5. That the properties listed by the applicant (read the plaintiff) at paragraph 5 of her affidavit were acquired as follows:-**

**(iv) Ngomongo sawmill occupies three plots and it was jointly acquired.**

**(vii) All the home assets are jointly owned between myself and the applicant."**

As concerns the third issue, my view is that a court has discretion to grant a temporary injunction to restrain any act likely to waste, damage, or alienate the property in dispute or to stay and prevent the wasting, damaging, alienation, sale, removal, or disposition of the property until the disposal of the suit or until further orders. Under Order 40 rule 1 of the Civil Procedure Rules that discretion is exercisable notwithstanding existence of a prayer for injunction by the parties as the aim is to preserve the subject matter of the suit. The rules provides as follows:-

**"40 (1). 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;**

**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."**

It is clear from the foregoing provision of the law that the law does not contemplate the situation urged by the interested party as the only situation in which a temporary injunction can issue.

In any event the parties herein (the plaintiff and the applicant) had recorded a consent, which was adopted as an order of the court, to the effect that both the plaintiff and the defendant be restraining from disposing of, alienating, dealing, and or in any other way interfering with the matrimonial properties namely:-Plot No.303 Kiamunyeki and two (2) posho mills thereon, Home Assets, J.N Sawmill at Kiamunyeki,Ngomongo Saw mill at Engarusha in Nakuru, Motor vehicle registration number KAB 480T and Direct Engineering Workshop pending the hearing and determination of this suit.

Since the applicant contends that the property transferred to the interested party forms part of the suit properties listed therein, I find and hold that the court has jurisdiction to issue the orders sought in the impugned application for purposes of preserving the subject matter of the dispute pending the hearing and determination of the application. It is only after it is ascertained that the property transferred to the interested party does not form part of the suit property when a determination can be made as to whether the applicant has a viable case against the plaintiff and the third party.

The upshot of the foregoing is that the preliminary objection has no merit and is dismissed with costs to the defendant/ applicant.

**Dated, signed and delivered this 27<sup>th</sup> day of August 2014 at Nakuru**

**H.A OMONDI**

**JUDGE**