IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

HCC 2562 OF 1994

EUNICE KYALO MUTHEMBWA…..……APPLICANT

VS

COSMAS K. MUTHEMBWA……RESPONDENT

RULING

Temporary injunction

[1] The Plaintiff's application seeks for only two significant prayers:-

a. ***A temporary injunction to restrain the defendant/respondent, his agents or servants from wasting, demolishing, charging, parting with possession, alienating or dealing with the suit properties in any manner whatsoever until the settlement of the Plaintiff's interest in L.R. Nos; 12767/29 Lang'ata; 12767/30 Lang'ata; 127661/58 Hardy and Makueni/Kako/493 as per the judgment entered herein; and***
b. ***Costs of this application.***

[2] The Plaintiff has formally withdrawn the prayer for injunction in respect to L.R.No. 12767/30 which was transferred to a third party on 21st April 1998 and prayer (c) of the application on production of documents as the documents were provided as annextures to the replying affidavit. The application is supported by the affidavits of Peter Mwaniki Kiura Advocate erroneously referred to as a "replying affidavit" and "James Mururu" both sworn on 31st January 2014. It is also grounded on the grounds set out on the face of the application and the following grounds.

Affidavit by counsel

[3] This is a preliminary issue. Counsel for the Respondent accused Mr. Kiura of swearing an affidavit on behalf of his client on issues which were in controversy. They also submitted that some of the averments in the said affidavit of Mr. Kiura were erroneous and false and could not have been within his knowledge. Here, they gave example of withdrawal of prayer C as one such erroneous averment. On the basis of the judicial jurisprudence on the matter, the Respondent submitted that the affidavit by Mr. Kiura should be struck out, which in turn means, the application is not founded on any evidence and should be dismissed as well. They cited relevant cases such as **Kisya Investment Limited & Others –vs- Kenya Finance Corporation HCCC No.3504 of 1993,** where Justice Ringera (as he then was) stated:

> "…***The Applicant's counsel has deponed to contested matters of fact and said that the same are true and within his knowledge, information and belief. It is not competent for a party's advocate to depose to evidentiary facts at any stage of the suit…by deposing to such matters the advocate courts an adversarial invitation to step from his privileged position at the bar into the witness box. He is liable to be cross examined on his deposition. It is impossible and unseemly for an advocate to discharge his duty to the court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case".***

And, **In the matter of the Estate of M'Magiri M'Mugira (Deceased) [2005] eKLR** where the High Court stated:

> "***It is now trite law that an advocate acting on instructions of his client, should avoid swearing any affidavit in the matter in which he is acting unless the circumstances are such that it is necessary, nay, imperative, to require him to swear such an affidavit…. In my view an advocate does not become authorized to swear an affidavit merely because, by virtue of his representation, he becomes knowledgeable of the relevant facts. He still needs to decide whether or not swearing such an affidavit will not bring him in professional conflict with his position as such advocate. He needs to decide whether if he swears such an affidavit he will place himself in a position where he becomes a potential witness by the sheer nature of the contents of the affidavit. And in my view, even where he finally finds that he indeed has to swear such affidavit because he is the only one who should do so by the nature of things, <u>he nevertheless, must at the head of the affidavit clearly reveal that he has been authorized by his client to do so, preferably through a short affidavit by his client to that effect</u>".***

[4] I have considered all the arguments by the Respondent and the Applicant on this issue. I have also considered the entire affidavit and the facts of the case. And upon placing them on the threshold of the law, I take the following view of the matter. I agree that a party's advocate may not swear an affidavit on issues which are disputed as such course would tear apart his privileged garment as an advocate and plunge him into the witness box for cross-examination. This is quite undesirable situation for counsel to find himself in because he inadvertently denies his client right to counsel of choice. But on perusal of Mr Kiura's affidavit, he deposes to issues which are uncontroverted and which relate to orders of the court in this case. He also deposes on information given to him about demolition by the Valuer, Mr. James Mururu. The Valuer has also sworn an affidavit to that effect which is sufficient to support the application. The application is a Notice of Motion and the grounds on the face thereof alone provide sufficient foot on which the Motion will stand in law. Further, the demolition of the suit properties has been admitted by the Respondent. The averment on non-cooperation by the Respondent at paragraph 9 of the affidavit is clearly on information contained in the affidavit of James Mururu at paragraph 7 where he deposes that he asked for approved plan for the premises as at December 1992 from the Respondent but he declined to provide them. Even in the case of **Ismael vs. Kamukamu & others** admitted-and under the Advocates Act it is allowed-that an advocate can depose to formal or non-contentious matters or facts in any matter in which he acts or appears. When all these things are put together, the affidavit does not constitute factual issues which an advocate cannot depose to in a case. After all, the Respondent has not applied for his cross-examination on the averments therein. Therefore, I find nothing on which the affidavit should be struck out. I sustain it and I will proceed on the basis that the application is not devoid of evidence and determine it on merit.

Applicant's Submissions on substantive issues

[5] Should the Respondent be restrained from carrying out further demolition of the suit premises? The Applicant submitted that demolition is admitted by the Respondent at Paragraph 7 of the replying affidavit and is therefore not in controversy. The timing of the demolition is not a coincidence since it was done just when the Valuers were set to visit the site. The rights and share of the Applicant in the suit premises has been determined by the court and the only outstanding

issue is valuation of the suit property and the profits from the said properties. The assets should, therefore, be preserved, for, they are in the hands of the respondent and are being wasted away while recovery of the value of her share as ordered in Court of appeal Civil Appeal Number 74 of 2001 is pending. While it is true that the Court of appeal never ordered that the suit properties should not be developed, that issue did not arise before the said court and could not therefore be ruled on. No party would have anticipated 12 years later, the applicant would still not have been paid her share. Only the post 1992 improvements belong to the Respondent but the value as at that date and the profits thereafter are to be shared equally.

[6] The Respondent has admitted that he has taken out loans amounting to Kshs. 35 Million and has sold one of the prime properties where the applicant claims a share. It is therefore in the interest of justice that the respondent is restrained from further encumbering the suit properties or disposing of them pending recovery of the Applicants share of the value of the said properties. The Applicant took a swipe at the several judicial and legal authorities relied on by the Respondent. For instance, Article 40 of the Constitution does not apply as protection of rights to property is not in issue as the Applicant's claim on the suit property has already been determined. Until the applicant's claims are satisfied, the Respondent cannot claim exclusive rights to the suit properties. Order 40 rule 7 deals with setting aside an injunction which is not an issue in this matter. The Principles set out in the case of **Giella V. Cassman Brown and East Africa Industries V. Trufoods** are not disputed. The issue of Prima facie case does not arise as the applicant already has a judgment in her favour. The balance of convenience is in favour of the Applicant as she only seeks the preservation of the suit properties until she recovers the share awarded to her. The issue of adequacy of damages does not also arise as the trial of the suit has already been finalized at the highest Court (then) and the applicants share determined. The question of damages cannot arise now. The Respondent by his actions has diluted his share of the suit properties by selling one of the prime properties and encumbering the others with huge debts.

[7] The Applicant cited the following authorities in support of her application:-

i. ***Bananahill Investment Ltd V. Panafrica Bank Ltd & 2 others [1987] KLR 351.***

> The Court of appeal in that matter overturned a decision by the High Court which had denied an injunction on the basis that the applicant had not shown that it would suffer irreparable loss which cannot be compensated with damages. The court of appeal found that the value of the suit property as in this matter was disputed and could only be determined at trial, which the court should have considered the balance of convenience which favoured the applicant and proceeded to grant the injunction.

ii. ***Central Bank of Kenya & Another V. Uhuru Highway Development Ltd & Others***

> ***[2000] KLR 382***
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> The Court of Appeal stated that in considering whether to grant an injunction the court should look at the whole case and decide what is best to be done. It emphasized the importance of the remedy by interlocutory injunction such that it should be kept flexible and discretionary and not made subject of strict rules. The court held that if the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is to embark on a course of action which he has not previously found it necessary to undertake.

[8] The Applicant submitted that the Respondent has not previously from 2002 carried out development or change the status quo of the properties until the day complained of. And an injunction is now necessary and which would only delay him for the months necessary for the valuation of the suit properties to be determined and the applicant's share paid. On those reasons, the Applicant beseeched court to allow the application for injunction.

Respondent's submissions on substantive issues

[9] The Respondent opposed the application for injunction. He filed an affidavit sworn on 19th February, 2014.The Respondent confirmed that he is aware that he is bound by the orders issued by the judgment of the **Court of Appeal in CA No.74 of 2001, Muthembwa –vs- Muthembwa.** But in compliance with the said orders on 15.1.2014 and for purposes of the determination of the value thereof as at 31/12/1992 the Respondent gave the Plaintiffs and his own valuers access to the subject properties namely:-

a. L.R. 12767/29
b. L.R. No. 12767/30
c. L.R. No. 127661/58
d. L.R. No. Makueni/Kako/493

[10] The Respondent argued that neither the Court of Appeal nor the High Court ordered that he should not develop his properties. The orders were that the properties were to be valued as at their status on 31.12.1992 not as at to-date. The truth and fact of the matter is that the value of the said properties was captured in :-

i. Valuation reports prepared by Lloyd Masika Ltd in September, 2010. Copies of the said reports are annexed to the Respondent's Replying Affidavit as the bundle or Exhibits marked "**A"**.
ii. A valuation by the same Plaintiff now applying to court in 13.6.05 carried out by a valuer known as Mr. Gitonga Aritho of Gitonga Aritho & Associates. Copy of the relevant letter on point is annexed to the Respondent's Replying Affidavit as Exhibit marked "**B"**

[11] Therefore, according to the Respondent, the Plaintiff valued the property in 2005, which is a material fact they have withheld from the court, and she actually knows or has a basis for estimating the true value of the suit property as at 31.12.92. The application is just one of her pretenses. The court should just determine: Whether an injunction order should be issued against the Defendant from continuing with the improvement and/or development of the suit properties pending determination of the main suit. In this application, the applicant seeks to restrain the Respondent from continuing with the demolition and re-development of the matrimonial properties herein. The Applicant has not met the test for granting injunction set out in **Giella – vs- Cassman Brown & Co. Ltd (1973)A EA 358** and **East Africa Industries – vs- Trufoods (1972) EA 420** by proving:-

i. Existence of ***prima facie*** case with a high probability of success.
ii. That damages are not an adequate remedy;
iii. Balance of convenience in the event that court cannot decide on the basis of the above 2 considerations.

[12] First, the Respondent submits that the orders of the Court of Appeal in CA No.74 of 2001 cannot be construed to bar the Respondent from carrying on developments on the suit properties. Further, it has not been proven by affidavit evidence or otherwise that the properties being demolished were in existence as at 31st December 1992, which is the effective date for purposes of valuation as per the Court of Appeal order aforesaid. Thirdly, the Respondent has in our respectful submission already proved that the matrimonial properties were valued earlier on in 1995 by M/S Lloyd Masika Ltd and Gitonga Aritho & Associates which reports should be in the possession of the Plaintiff. It would be contrary to the Respondent's constitutionally right to property for a court of law to deny a property owner right to develop his very own property. Had the Court of Appeal and the High Court intended that the Respondent was not to develop and re-develop these properties nothing would have been easier than to say so in very express terms. The application herein is solely calculated to harass the Respondent to stop the on-going development works on his property which is the duty and pride of any property owner. It is needless to state that contrary to the averments of Mr. James Mururu, the Defendant has through its replying affidavit proved that he has never obstructed valuation of the suit properties. If anything, there had

been other valuations effected on the same properties by the same or other valuers, which have been availed to the Plaintiff/Applicant.

[13] According to the Respondent, the multi-million shillings developments at the matrimonial properties have been financed by borrowings from financial institutions as follows:-

i. L.R No.127661/58 was charged to Co-operative Bank (k) Ltd in 2011 for a loan of Kshs.22 million;
ii. L.R. No.12767/29 was charged to Eco Bank Ltd in June, 2013 for Kshs.15 million;
iii. L.R. No.12767/30 was sold to Gen. James Mulinge in 1996.

Therefore, the Honourable Court cannot and should not make injunction orders on properties which have innocent 3rd party interests without those parties being heard. To do so would be tantamount to the condemnation of a party without a hearing contrary to the rules of natural justice. The Applicant herein has withheld pertinent material facts from the court for reasons best known to her and she is determined to drag this matter indefinitely. The Plaintiff's application is based on a mischievous misapprehension of the orders of court aforesaid. The application should be dismissed.

THE DETERMINATION

[14] These are the undisputed facts in the case. 1) The Applicant is a holder of a judgment and decree of the court; 2) By virtue of the said decree, the Applicant has an equal share in the suit properties as well as profits generated therefrom; 3) The Applicant has not realized her said share out of the suit properties; 4) The suit properties are; *L.R. Nos; 12767/29 Lang'ata; 12767/30 Lang'ata; 127661/58 Hardy and Makueni/Kako/493;* except *L.R.No. 12767/30* was transferred to a third party on 21st April 1998; 5) some of the suit properties have been demolished or altered or improved or mortgaged by the Respondent; and 6) the actual valuation of the Plaintiff's share in the suit properties is still outstanding.

[15] As long as the Applicant has a share in the suit properties, the Respondent does not have exclusive rights on the suit properties. The Applicant's share will cease when the Respondent pays of the value of the share as shall be determined in this suit. The process of valuation of the share and its realization is still outstanding. Therefore, in the circumstances, it is not entirely defensible to state with confidence that an injunction will not and should not issue to stop development of the suit properties because neither the Court of Appeal nor the High Court stopped the Respondent from developing the suit properties. The fact that the Applicant has an undivided share in the suit property constitutes prima facie case in the sense of the case of **Giella vs Cassman Brown.** Similarly the interest conferred upon the Applicant by the decree herein is in the nature of proprietary interest in the suit properties to the extent and terms in the decree of the court. The question of adequacy of damages will not therefore, arise here. Thus, in all fours, convenience will tilt in favour of granting an injunction. The Applicant has made out a case for issuance of injunction but I reckon that the law governing the grant of injunctive relief *has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before.* See **Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J (as he then was).** I admit that, today, in granting an injunction the court should look at the whole case and be guide by the fundamental principle of law that ***'' the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong."*** See the words of Justice Hoffman in the English case of **Films Rover International (1986) 3 All ER 772.**

[16] Applying that test, I note that the problem here is valuation of the Applicant's share entitlement in the suit property. The Respondent referred the court to two valuation reports and accused the Applicant to already know the value of her share only that she wants to drag the case for as long as possible in order to harass him. I do not wish to make a pronouncement of that

allegation, except to state that the valuation and full realization of the Applicant's share is outstanding and should be resolved expeditiously and in a resoundingly finality so that each party will reign over their respective entitlements. The cord joining them is the outstanding issue on valuation and realization of the Applicant's share-which is now becoming a source of unnecessary and bitter struggle once again. The orders I will, therefore, grant orders which are in the line with the law, the circumstances of the case and in the spirit of overriding objective of the court to resolve this dispute once and for all expeditiously, justly and fairly. Accordingly, I hereby issue an injunction restraining the Respondent from further altering or encumbering the suit properties herein save *L.R. No 12767/30* which was transferred to a third party on 21st April 1998. I am aware there are mortgages on the suit properties but those interests will not be affected as the injunction will subsist for only 90 days from today within which time the following actions will be performed: 1) the Respondent will provide the approved plans for the suit properties and allow the Valuer appointed herein by the Applicant and or the Applicant unhindered access to the suit properties for purposes of valuation of the Applicant's share in accordance with the decree herein; 2) the Valuer appointed by the Applicant Mr. James Mururu will visit the sites, compile and file a report on the share of the Applicant in accordance with the decree herein; and 3) the court will have determined the entitlement of the Applicant in the suit property for settlement by the Respondent. For good order and clarity, action (1) will be performed by the Respondent within 7 days of today since he stated in his affidavit that annexure **''C''** is the approved building plans of the suit properties. The Valuer will only confirm those are copies of the approved plans and will be provided with copies for his use in these proceedings. Action and (2) will be performed within 21 days from receipt of the approved building plans provided in action (1). The obligation to ensure performance of action (2) is the Applicant's as long as the Respondent has fully performed action (1). The court will, then, determine the Applicant's share within 14 days from the date the report is filed in (2) above. Given the nature of this case, I will make a comfort order; that any party may apply for appropriate orders herein, say, early discharge or extension of the injunction. Parties should abide by these orders as strictly set out herein to avoid any delay in this case. It is so ordered.

Dated, signed and delivered in court at Nairobi this 26th day of November 2014

F. GIKONYO

JUDGE