



**ROSEBELLA NDUMI MBITHI .....APPLICANT**

**VERSUS**

**1. JONATHAN MBITHI NTHUKA**

**2. ROSEVELLA MALINDA MBITHI**

**3. ELIZABETH MUTHEU MUSYOKI**

**4. SAMSON MUSYOKI KIVANGO .....RESPONDENT**

**RULING**

1. The Application before the Court is the Amended Chamber Summons dated **28/06/2010** (“Application”). It is brought by **Rosebella Ndumi Mbithi** (“Applicant”) under **Order 39; rule 1(a)** of the **(Old) Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. It is supported by the Supporting and Supplementary Affidavits sworn by the Applicant on **28/06/2010**.

2. The Application seeks various orders restraining the Defendants/Respondents (hereinafter, jointly, “Respondents”) from alienating, disposing, charging, wasting or dealing in any other manner various properties registered, in various permutations, in the names of the Respondents.

3. The Application is predicated on the Further Amended Originating Summons (“Originating Summons”) dated **21/05/2010**. In the main, the Originating Summons seeks the distribution of matrimonial property (including all the properties respecting which the present Application is brought) between the Applicant and the 1<sup>st</sup> Respondent, **Jonathan Mbithi Nthuka** (“First Respondent”).

4. The Applicant’s case is that she and the First Respondent are married. It is more accurate to say from their pleadings that both of them expectantly await the outcome of **Machakos CMCC No. [particulars withheld]** – a divorce cause aimed at dissolving their union. The Applicant says that during the pendency of their marriage she and the First Respondent acquired membership in **Lukenya Ranching and Farming Cooperative Ltd.** (“Lukenya Ranching”). The same was registered in the name of the First Respondent but the Applicant says it constitutes matrimonial property acquired during the pendency of the marriage.

5. It is the Applicant’s case that out of the root membership **No. 172** in **Lukenya Ranching Cooperative Ltd**, several parcels of land were allocated and, in particular, **Plots No. 506, 183, 86** and **83** among others. However, in a bid to disentitle her, the Applicant alleges, the First Respondent caused some of these parcels to be registered in the names of the other Respondents.

6. In addition, the Applicant claims, there are four other parcels of land registered in the joint names of the First Respondent and his deceased brother, **William Nzioka Nthuka** to which she is entitled to a half share. These are parcels **No. Iveti/Mungala/155; 7; 150; and 1142**.

7. The Respondents vigorously resist the Application. The essential factual elements of the 1<sup>st</sup> Respondents' case is as follows:

- a. First, that the Applicant left the matrimonial home in **1974**.
  - b. Second, that the membership of the **Lukenya Ranching** Cooperative which the Applicant avers is the root of some of the properties she lays claim to was not obtained until **1977** – that is, at least three years after the Applicant left the matrimonial home.
  - c. Third, that, in any event, the Applicant did not contribute in any way to the membership of the Cooperative. He has attached a receipt from the Cooperative dated **01/12/1977** to prove this claim;
  - d. Fourth, that following the above three premises, the Applicant cannot lay any claims to any of the parcels of land which derive their root title to the 1<sup>st</sup> Respondent's membership of the **Lukenya Ranching Cooperative**;
  - e. Fifth, that he is lawfully married to the 2<sup>nd</sup> Respondent to whom he transferred, as a gift for taking care of him while he was sick, parcel **No. Mavoko Town/Block 3/3538** and the same was registered in the name of the 2<sup>nd</sup> Respondent on **19/09/2006**;
  - f. Sixth, that the 4<sup>th</sup> Respondent purchased for value parcels **No. Mavoko Town/Block 2/1941** and **Mavoko Town/Block 2/1940** from the 1<sup>st</sup> Respondent and duly paid the full purchase price therefor and had the former parcel registered in the 3<sup>rd</sup> Respondent's name and the latter parcel registered in his name;
  - g. Seventh, that parcels **No. Iveti/Mung'ala/7; 150; 155 and 1142** are co-owned by the 1<sup>st</sup> Respondent and his brother, **William Nzioka Nthuka** ("Mung'ala Plots") and that the same were gifts from their deceased father. The Applicant, then, argues the 1<sup>st</sup> Respondent, has no claim thereon.
8. The claims by the Respondents enumerated in paragraph 7 above cover most of the property respecting which injunctive relief is sought. The only ones remaining are parcels **No. Mavoko Town Block 3/1942; Mavoko Town Block 3/485** and **Plot No. 83** in **Lukenya Ranching and Farming Cooperative Society Ltd**. These are all registered in the name of the **1<sup>st</sup> Respondent**.
9. These, then, are the rival factual accounts which form the basis of the dispute here. The Applicant argues that what she has placed before the Court is enough to warrant the issuance of an injunction pending the hearing and final determination of the (Amended) Originating Summons. She makes the straightforward argument that all the property derived from the 1<sup>st</sup> Respondent's membership in **Lukenya Ranching** ("Lukenya Plots") is matrimonial property to which she is entitled to a share. This is because, she argues, the membership was acquired during the subsistence of her marriage to the 1<sup>st</sup> Respondent as a result of joint efforts and funds of the Applicant and the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent, she argues, was only registered as the sole member in trust for both of them. She argues that she made monetary contributions to the purchase of the same which came from the proceeds of her farming efforts.
10. Respecting the **Mung'ala Plots**, the Applicant says the same were gifts endowed jointly on both her and the 1<sup>st</sup> Respondent whereby they were to jointly enjoy half ownership of each (with the other half going to the 1<sup>st</sup> Respondent's brother, **William Nzioka Nthuka**). The Applicant claims that she has contributed to the improvement of the value of the **Mung'ala Plots**, and that, in fact, that is where she carried out her farming business in order to contribute to the acquisition of the 1<sup>st</sup> Respondent's membership of **Lukenya Ranching**. Finally, and importantly, the Applicant avers that she occupies **Plot No. 150** which is one of the **Mung'ala Plots**. The 1<sup>st</sup> Respondent does not deny this but insists that she only lives there as a guest (perhaps licensee) of the son of the 1<sup>st</sup> Defendant.

11. Based on these two related set of arguments, the Applicant claims that all of **Lukenya Plots** consist of

matrimonial property between herself and the 1<sup>st</sup> Respondent while half of the **Mung'ala Plots** similarly comprises their matrimonial property. As such, awaiting the final determination of her Amended Originating Summons filed under **Married Women's Property Act of 1917**, the Applicant asks the Court to grant injunctive relief to preserve the property for ultimate distribution between herself and the 1<sup>st</sup> Respondent.

12. The Respondents raised both the factual arguments enumerated above as well as legal arguments why the present Application does not satisfy the very high threshold for granting interlocutory injunctions. To fully assess the Respondent's arguments, let us first set out the legal principles applicable. The legal principles for granting interlocutory injunctions are now well settled in Kenya. They are set out in the celebrated case of *Giella vs Cassman Brown* in [1973] E.A.358 the words of Spry V.P.:

First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

13. In his authoritative book on injunctions, *Justice Kuloba* (now retired) restated these legal principles thus:

[T]he right formulation of [the principles] would be this, *that among other considerations a court takes into account* in determining whether a temporary injunction should be issued, first, whether there is a significant likelihood that the applicant will prevail on the merits of the case at a full trial. Second, the court will ordinarily consider whether there is a threat of irreparable harm. Finally, there is the traditional consideration of whether harm to the respondent would outweigh the need for temporary relief. But there may be other matters, for example public interest, involved. [Emphasis his]

14. Given the nature of the matter here, it is important to make some preliminary remarks that are germane to the resolution I have come to. The main purpose of a preliminary injunction is to protect the plaintiff from irreparable injury and to preserve the power of the Court to ultimately render a meaningful decision on the merits. The Court must be careful, in considering applications for preliminary injunctions, not to determine any controverted right. The aim is to prevent a threatened wrong or the doing, by one of the parties to a litigation, an act which might threaten or endanger the rights of the plaintiff.

15. Given the true objective of preliminary injunctions, namely, guarding against a change in conditions which could prevent the Court from later on granting relief it might find proper, it may be said that the most important factor in deciding whether to grant a preliminary injunction or not is the likelihood that the plaintiff will suffer irreparable injury of a nature beyond the power of the court to remedy before a trial on the merits may occur.

16. Applying the three-part legal test which has emerged in our jurisprudence to the instant Application, I have found it necessary to bifurcate the properties: I have issued injunctive relief respecting all the properties that are still in the names of the 1<sup>st</sup> Respondent but declined to do so respecting the properties that are registered in the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent. My reasoning for the bifurcation is that I am not persuaded that the Applicant will succeed in her claim against these Respondents. At the very best, it seems to me, she will succeed in her claim against the 1<sup>st</sup> Respondent and the sales and/or gifts that the 1<sup>st</sup> Defendant has effected which have wrongfully depleted the matrimonial property will be deducted from his share at the point of distribution. In other words, owing to the fact that the property has already changed hands and titles registered, in circumstances which seem, on their face, to be legitimate at least as far as the 2<sup>nd</sup>-4<sup>th</sup> Respondents are concerned, it seems that the Applicant cannot prove irreparable injury. On the contrary, because the parcels are specifically known, their value can be easily ascertained and considered in the distribution of matrimonial property if the Applicant is, in fact, successful in her (Amended) Originating Summons.

17. I need to explain why, in the face of the strenuous, well researched and well argued points raised by

the 1<sup>st</sup> Respondent; I have found it fitting to grant injunctive relief respecting all the property registered in his name. In doing so, I recall that the Court has broad discretion in granting or denying a preliminary injunction. I am also guided by the important consideration that a preliminary injunction is an extraordinary remedy which should be used sparingly by the Court.

18. There are many factual and legal issues that are intensely contested. I am aware that the Court is not required, in order to grant a preliminary injunction, to virtually satisfy itself that the Plaintiff will succeed on the merits. As aforesaid, an application for an injunction does not involve a final determination on the merits. Indeed, depending on the other relevant factors (such as likelihood of irreparable harm and balance of convenience or hardships), a preliminary injunction might be denied even though the Plaintiff's suit raises arguable points and even though there exists a likelihood she might prevail on merit.

19. I have concluded that the Applicant's suit has a *probability* of succeeding on the merits. This is simply to say that she has raised arguable points which demonstrate that at the merit stage she will be able to persuade the Court that all the **Lukenya Plots** and the (half portion of the) **Mung'ala Plots** are, indeed, matrimonial property and should be shared between the Applicant and the 1<sup>st</sup> Respondent. In my view, the Applicant has made credible claims that she contributed to the acquisition of **Membership No. 172 at Lukenya Ranching**. It seems true that the membership certificate appears to have been issued sometime after 1974 when the 1<sup>st</sup> Respondent claims she left the matrimonial home to settle on one of the **Mung'ala Plots**. Yet, this does not disprove that the Applicant did not contribute to the membership. The date of issuance of certificate of membership is not dispositive as to the dates of acquisition of the membership. Indeed, the issuance of a certificate is often the end point of a process of payment of amounts associated with the shares respecting which the share certificate is issued rather than a one-time event.

20. Similarly, the Applicant makes believable claims that she has been in possession of, and has improved the **Mung'ala Plots**. It is a fact that she is in actual occupation and her homestead is located on one of them. This, coupled with the fact that it is not disputed that she was married to the 1<sup>st</sup> Respondent, for me, creates a *prima facie* case that the half-portion of the Mung'ala Plots is matrimonial property.

21. I must emphasize that this is not to say that there is *certainty* that the Applicant's case will succeed. Indeed, I have been very careful not to form anything other than very tentative conclusions of law and fact at this point. This is so as not to prejudge the issues or embarrass the Court which will hear the suit on merits. Thus, while I have read and considered the various authorities submitted by the parties, I have reserved making any conclusions on matter of law at this stage in the proceedings. For example, the Respondents raise the legal question whether the **Married Women's Property Act of 1882** ("MWPA") can apply with respect to property which is registered in the name of someone other than the spouse of the Applicant. Similarly, how does the **MWPA** operate where there are multiple wives? How about in situations where disputed property has already effectively been gifted to a third party? All these are examples of legal questions which the Court will have to answer before pronouncing on the question of distribution of marital property between the Applicant and the 1<sup>st</sup> Respondent. At this juncture, the Court can only form a provisional view that these are, indeed, arguable points of law.

22. As the United States Supreme Court has stated, the primary purpose for granting a preliminary injunction is "to preserve the relative positions of the parties until a trial on the merits can be held." (See *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). In that case, the Court there noted, this is a limited purpose and it is therefore generally inappropriate for the Court to render a decision on the merits at the preliminary injunction stage. While merely persuasive, this reasoning is consonant with the weight of our judicial decisions in Kenya. See, e.g., *Lifico Trust Registered v Patel* [1985] KLR 538 where the Court of Appeal held that the appropriate forum for deciding weighty issues of law raised is at the trial and not in the course of interlocutory proceedings.

23. I have also concluded that the Applicant has demonstrated that she will suffer irreparable injury if injunctive relief is not granted at this stage. Judge Friendly of the United States Court of Appeals for the second circuit once complained that the phrase "irreparable injury" "generally produces more dust than

light.” See *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 698 (2d Cir. 1966). At its most basic, however, the consideration under this second prong of the legal test for injunctive relief is whether there are adequate remedies at law for the threatened injury. This understanding of when to grant injunctive relief has a long and distinguished historical pedigree: it is derived directly from the practice of the English Court of Chancery around **1789**.

24. Why do I conclude that the Applicant would suffer irreparable harm absent injunctive relief at this stage? The main reason is that the 1<sup>st</sup> Respondent has already demonstrated an appetite for disposing off the property which might eventually be adjudged matrimonial property. While the property already sold might be accounted for in the distribution if the Applicant is successful, any further depletion of the matrimonial property might run the risk of rendering the Applicant’s (Amended) Originating Summons nugatory. I believe the balance of convenience tilts in favour of the Applicant for the same reasons. Additionally, we know that the Applicant has her homestead in one of the parcels of land which forms the subject matter of the (Amended) Originating Summons. I am persuaded that it is necessary to preserve the lands which have not yet been alienated for the fair and just determination of the suit.

25. The orders of the Court, then, shall be that **prayers 6 and 9** only in the Amended Chamber Summons dated **28/06/2010** are granted. Regarding **prayer 9**, I should be careful to clarify that the Applicant shall only be allowed the use of the portions of the parcels **No. Iveti/Mung’ala/7; 150; 155 and 1142** only to the extent that she was actually using the parcels immediately preceding the filing of this suit and no more. These orders shall not be construed to permit her to extend or substantially alter the usage of the properties the Applicant enjoyed or exercised immediately preceding the filing of this suit. The costs of this Application shall be in the cause.

**DATED, SIGNED and DELIVERED at MACHAKOS this day 27TH day of FEBRUARY 2012.**

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**J.M. NGUGI**  
**JUDGE**