



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KITALE**

**Civil Suit 48 of 2011**

**N. W.N.....PLAINTIFF.**

**VERSUS**

**J.N.K.....DEFENDANT.**

**R U L I N G.**

This suit has been brought by way of originating summons under section 17 of the Married Women's Property Act 1882.

The plaintiff seeks to have the court find and declare that specified movable and immovable premises were acquired during the subsistence of the marriage between herself and the defendant which marriage was culminated by an order of divorce issued on 4<sup>th</sup> March, 2011 in divorce cause No. [...] of 2009 at the High Court in Kitale.

A Notice of motion dated 21<sup>st</sup> April, 2011 was filed together with the material originating summons seeking a temporary injunction order restraining the defendant from selling, transferring and/or in any other way interfering with the subject properties pending the hearing and determination of the suit. The Notice of Motion made under section 40 Rules (1), (2), (3) and (4) of the civil Procedure rules (2010) is the subject of this ruling.

Basically, for a court to grant a temporary injunction, the applicant is required to fulfill the conditions for such grant set out in the famous case of **GIELLA VS. CASSMAN BROWN & CO. LTD (1973) E.A. 358**. These are that:-

- (a) The applicant must show a prima facie case with a probability of success.
- (b) The applicant is likely to suffer injury which cannot be adequately compensated in damages.
- (c) If the court is in doubt, it will decide the application on a balance of probabilities.

With regard to the first condition, the court is only required to gauge the strength of the plaintiff's case and not to determine the main suit at this stage since proof is only required at the hearing stage.

On that point, the plaintiff has submitted through the learned counsel, M/s. Arunga, that the subject

property constitutes matrimonial property since it was acquired during the substance of the marriage between the plaintiff and the defendant which marriage was contracted in the year 1978 and was subsequently dissolved on the 4<sup>th</sup> March, 2011.

The plaintiff contends that evidence of her contribution to the acquisition of the property would not be necessary at this stage and since no property is registered in the name of the defendant it would be necessary for the court to issue conservatory orders.

In opposing the application, the defendant through the learned counsel Mr. Kiarie, argued that the plaintiff has failed to show a prima facie case with probability of success since no evidence has been shown to establish her contribution to the acquisition of the subject property. In reference to the case of **Cecilia Wacuka Ng'ang'a vs. Bernadus Ng'ang'a (2009) eKLR**, the defendant contends that a marriage status does not wholly entitle a spouse to a beneficial interest in property acquired during a marriage. Therefore, having failed to provide evidence of her contribution to the purchase of the subject property, the plaintiff has failed to establish a prima facie case with probability of success.

The defendant further contends that the first property listed in the notice of motion (i.e. land parcel No. Kitale Municipality Block (Lessos/438) was acquired prior to the marriage as indicated in paragraph 4 of the supporting affidavit to the originating summons filed herein on the 3<sup>rd</sup> May, 2011. However, the said paragraph refers to the second property listed in the Notice of Motion dated 21<sup>st</sup> April, 2011.

Be that as it may. It is apparent from the arguments by both sides that there is no dispute that the plaintiff and the defendant were in a marriage relationship from 1978 upto the time the relationship was lawfully terminated on the 4<sup>th</sup> March, 2011. There is also no dispute that during the subsistence of the marriage property was acquired and treated as matrimonial property. Whether or not the plaintiff has a beneficial interest in part or the whole of the property is a matter which may only be determined after a full hearing of the suit rather than at this interlocutory stage.

At this stage, the plaintiff is required to demonstrate that she has an arguable case against the defendant. She really is not required to provide concrete evidence of her supposed financial contributing to the acquisition of the subject property. This would have to await the hearing of the main suit.

There been no dispute that there was a marriage and that property was acquired during its subsistence, it would not be far fetched to opine and hold that the first condition for the grant of a temporary injunction has been fulfilled by the plaintiff. On that ground alone, she would be entitled to the order sought. Accordingly, the application is granted in terms of prayer (2). The plaintiff should have the costs of the application.

Read and signed this 2<sup>nd</sup> day of February, 2012.

**J. R. KARANJA.**  
**JUDGE.**