



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE NO. 49 OF 2011

TERESIA MABUTI NJAGI..... APPLICANT

VERSUS

NJAGARA NGURE.....RESPONDENT

R U L I N G

In **CMCC [.....] at Embu**, the present Applicant is seeking to divorce the Respondent on grounds of cruelty and neglect of responsibility. The couple got married in 1965 under Kikuyu customary law and were blessed with 8 children who are adults. The Applicant alleged that the couple was living peacefully until 2008 when the Respondent took a second wife and started mistreating her. The Respondent filed a defence in which he equally sought that the marriage be resolved. He pleaded that it was the Applicant who deserted the matrimonial home on 19th December 2002 subsequent to which he married in 2003. The cause is pending.

In the present suit brought by way of originating summons the Applicant claims that during the marriage they jointly contributed to the purchase of land parcels GATURI/GITHIMU/1235 and NTHAWA/RIANDU/834 which were however registered in the names of the Respondent. She seeks that the property be sold and/or be distributed in equal shares between them. In the meantime, she has filed the present application under Order 40 rules 1, 2 and 3 of the Civil Procedure Rules seeking a temporary injunction to restrain the Respondent from alienating or disposing the property until the summons is heard and determined. She is represented by Mr. Ombachi and alleged that the Respondent has subdivided the property with the intention of disposing it.

The Respondent filed a replying affidavit to the application in which he now says he does not wish to divorce the Applicant, but that he will be seeking to amend his defence in the divorce cause to challenge the divorce. It is evident that the Respondent is blowing both cold and hot. He denies that the property in question was jointly acquired. He admits that he has subdivided the parcels but says his intention was to give the respective portions to the Applicant's children. He denies that he wishes to sell or dispose the property.

The Applicant and Respondent are estranged and there is dispute about the property. The Applicant has shown that the Respondent has subdivided it. It does not appear to be in dispute that the property was acquired during the subsistence of the marriage. I am aware that Sections 27 and 28 of the Registered Land Act (Cap 300) protect the Respondent's proprietorship. He can ideally deal with the property as he wishes. However, there is a rebuttable presumption of fact that where property is bought during the

subsistence of a marriage and is registered in the name of one spouse it is deemed to have been bought with joint funds. (***COSMAS K. MUTHEMBWA VS EUNICE KYALO MUTHEMBWA [2002] IEA 186*** . The Applicant says that this is such property.

I consider the principles in ***GIELLA VS CASSMAN BROWN & CO. LIMITED [1973] EA 358*** and find that on the material placed on record the Applicant has demonstrated a *prima facie* case. If the injunction sought is not granted the property in question may be placed beyond the reach of the Applicant and that may occasion her irreparable loss. I allow the application but ask that costs be in the cause.

DATED, DELIVERED AND SIGNED AT EMBU 28TH DAY OF JULY 2011.

**A. O. MUCHELULE
JUDGE**