



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

**AT NAKURU**

**CIVIL SUIT NO.296 OF 2011**

**LUCY WAIHIGA WANJOHI..... PLAINTIFF/APPLICANT**

**VERSUS**

**JOHNSTONE GIKANDI THEURI ..... DEFENDANT/RESPONDENT**

**RULING**

The application dated 13<sup>th</sup> October 2011 is by way of Notice of Motion under **section 3, 3A and 63(e)** of the **Civil Procedure Act, Order 35 rule 1 and 2** of the **Civil procedure Rules**, seeking that pending hearing and determination of the suit, this court do issue orders of injunction restraining the Defendant/Respondent by himself, his agents, servants and or through anyone claiming through him, from disposing, selling, wasting, alienating, changing, encumbering and/or dealing adversely and to the plaintiff's detriment with parcel known as **Nakuru Municipality Block 23/266** and such an injunction/encumbrance be registered as an encumbrance against the Title of the said property by the Land Registrar, Nakuru Land Office.

The reason why these orders are sought is that:

1. The suit property is matrimonial property and registered in the name of the Defendant who holds the same in trust for the plaintiff.
2. The plaintiff and the defendant are living separately and are not in good terms and there is imminent likelihood that if defendant learns that she has filed these proceedings, he will alienate the same in order to frustrate the plaintiff's claim and make her suffer.
3. If the suit property is alienated and/or adversely dealt with by the Defendant, the plaintiff's suit will be rendered nugatory and her proprietary interest in the property prejudiced and she will not be able to enjoy fruits of her judgment herein and will be occasioned denial of justice which is irreparable damage.

The matter proceeded exparte after the Respondent (although served), failed to attend court.

In the supporting affidavit sworn by the applicant she states that they got married in 1990 under Kikuyu custom, then solemnized their marriage as per the certificate produced as annexure LWW1. They established their matrimonial homes at different places, the last one being Nakuru and the union has been blessed with three children namely:

1. **Martin Theuri – 1991**
2. **Stella Muthoni – 1995**
3. **Vincent Wanjohi – 1999**

The applicant works as a high school teacher while the Respondent is a lecturer at Egerton University. They have been contributing jointly towards maintenance of their family and providing for their needs. The couple treated their joint incomes as a common pool from which they would share maintenance of their family – the mode established being that applicant would contribute towards household expenses and some bills whilst Respondent would take care of other needs including acquiring properties. It was out of this arrangement that Respondent purchased the suit land while they were living in Nairobi, and registered it in his name although it was purchased through joint efforts. They agreed to develop the property as their matrimonial home and Respondent channeled most of his income towards the said development while applicant shouldered other family obligations and whenever possible contributed towards building the house. She borrowed Kshs.16,000/= in June 2000 from a **“Merry Go-Round”** group, and used the money to finance fencing of the site and to construct a small site house.

In December 2000, she took a development loan in the sum of Kshs.134,000/= from the co-operative society which she utilized by putting the foundation for their house – this is demonstrated by the entries in her payslip LWW6. Around 2003, she again took another loan of Kshs.200,000/= from the co-operative society, which money she used to put up the roof of the building – as per the documents marked LWW7.

In the year 2004, she took a bank loan of Kshs.90,000/= which was utilized to finish the house – a copy of the bank slip is annexed as LWW8. They then moved to live in the house in February 2005 after plastering and roofing had been done.

In May 2005, the Respondent chased her and their off springs from the house after exhibiting cruelty towards her and the issues of the marriage, and this resulted In litigation she filed a Separation Cause No.24 of 2009 which is still pending in the CM’s court Nakuru.

I have not seen any documents filed in response to the application. Basically what is sought to be protected here is the applicant’s interest in what she describes as matrimonial property as envisaged under **section 17** of the **Married Women’s Property Act (1882)**. She has also demonstrated what she terms as her contribution and justified her stake in it by virtue of being married to the Respondent. This involves the principle of equal protection under the law as contemplated by **Article 27(3) and 4** of the **Constitution of Kenya 2011** – this is also consistent with the principles of non-discrimination and human dignity found in **Article 15** of the Convention on the Elimination of Disclaimer against women (CEDAW) and reflects **Article 7** of the Universal Declaration of Human Rights (UDHR) which provides:

**“1 State parties shall accord to women equality with men before the law.”**

**“2 State parties shall accord women in civil matter, a legal capacity identical to that of men and the same opportunities to exercise that capacity . . . .”**

The upshot of all this is that the applicant has adequately established a prima facie case with reasonable possibility of success.

Secondly this is a home she has lived in with the Respondent and their off-springs. She has not only financial contributions towards the home but the natural emotional and sentimental attachment - which cannot be adequately compensated by way of damages – even if the same was to be eventually disposed, I am persuaded that she ought to have an opportunity to determine or at least have a say towards that disposal and even the price at which it would be disposed off.

Thirdly – even if these two factors were not persuasive, the balance of convenience tilts heavily in her

favour – it is certainly more convenient to preserve the matrimonial property in its current status, rather than try to get it back after it has been disposed off were the applicant’s suit to succeed.

The applicant has satisfied the principles set out in the **Giella v Cassman Brown** case to warrant granting of orders of injunction as prayed.

I have noticed that applicant has not cited **Order 40** of the **Civil Procedure Rules** and instead relies on **Order 35(1)** which addresses situations where there are proceedings by agreement of parties. I think the failure to cite Order 40 would not be fatal as the substance of the application is well communicated and justice, as addressed by the provisions of **Section 1A** of the **Civil Procedure Act** requires that the objective of the Act and Rules is to facilitate just and expeditious resolution disputes. The application is allowed – the Respondent by himself and/or agents/servants be and is hereby restrained from disposing of the property mentioned herein in terms of the prayers set out in the Notice of Motion.

Delivered and dated this **25<sup>th</sup>** day of **November**, 2011 at **Nakuru**.

**H.A. OMONDI**  
**JUDGE**