

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI Civil Case 12 of 2010

BEATRICE WANJUGU MWANIKI.....APPLICANT

VERSUS

FRANCIS MWANIKI NJOGU.....RESPONDENT

RULING

Pursuant to Order XXXIX rules 1, 2, and 2A of the Civil Procedure Rules, BEATRICE WANJUGU MWANIKI the applicant herein, took out the summons dated 19th February 2010 in which she sought for two main orders namely:

1. *That the Respondent be restrained by temporary injunction by himself, his servant and/or agent or otherwise howsoever from wasting, damaging, alienating, removing, interfering or disposing land parcels NAROMORU/BLOCK 1/RAGATI/142 and NAORMORU/BLOCK 1/RAGATI/T383 pending the hearing and determination of this application and the entire suit.*
2. *That prohibitory orders be issues for immediate registration by the Land Registrar Nyeri against land parcels NAROMORU/BLOCK 1/RAGATI/142 and NAORMORU/BLOCK 1/RAGATI/T383 until further orders of this court.*

She has listed the grounds in support of the summons on the face of the application. She also sworn an affidavit in support of the same. FRANCIS MWANIKI NJOGU opposed the application by filing a replying affidavit he swore on 3rd March 2010.

Miss Mwai, learned advocate for the Applicant, urged this court to allow the application. She pointed out that the Applicant and the Respondent were married in 1962. Since then they have had serious disagreements which have adversely affected their marriage. In the substantive Originating Summons, Miss Mwai argued that the Applicant will show at the hearing of the Originating Summons that she contributed to the acquisition of NAROMORU/BLOCK 1/RAGATI/142 and NAORMORU/BLOCK 1/RAGATI/383. It is alleged that the Applicant gave money to the Respondent to purchase shares in Ragati Farmers Co-operative Society. The Applicant was settled in Plot No. L.R NAROMORU/BLOCK 1/RAGATI/142 where she reared cows and goats. In 1988 the Applicant claimed the Respondent chased her away whereupon she went to reside on the Respondent's father's land at Karatina. She alleged that the Respondent sold her cows and goats when she was away. The Respondent attempted to remove a caution placed against L.R NAROMORU/RAGATI/383 to enable him sell the land. The Applicant further averred that the Respondent did not contribute to the purchase of the aforesaid property though he is registered as the proprietor. She alleged that the Respondent holds the property in trust for her. In the end she will be asking this court to ascertain her share and declare her rights. In the meantime she is asking this court to issue an order to preserve the property pending the hearing and determination of this suit.

On his part, Mr. Bwonwonga, learned advocate for the Respondent, is of the view that the application does not meet the requirements for granting orders of injunction. The Respondent is of the view that since the marriage is still subsisting the Originating Summons is premature. He denied that the Applicant contributed to the acquisition of the aforesaid property. He said he bought the property through money he received from his masonry activities hence he was a shareholder of Ragati Co-operative Society. He denied having chased away the Applicant. He claimed that she fled home to live in a rented house at Karatina when she conceived a child out of wedlock. The Respondent further alleged that the Applicant is hell bent to frustrate him because he is a polygamous man. He claimed the Applicant and her sons poisoned the Respondent's second wife Josephine Wanjiku Mwaniki. As a consequence, he sold part of the land to meet her medical fees.

I have considered the grounds set out on the face of the summons and the facts deponed in the affidavit filed for and against the

application. I have further considered the submissions of the learned counsels from both sides. Mr. Bwonwonga raised a preliminary objection which needs to be disposed of first before considering the merits of the summons. If I understood Mr. Bwonwonga well, it seems he is of the opinion that *Section 17* of the Married Womens Property Act 1882, is only applicable when the marriage has been dissolved. With respect I do not agree with the learned advocate. The section applies whether or not the marriage had been dissolved. The Court of Appeal succinctly expressed itself in the case of PETER MBURU ECHARIA C.A. NO. 75 OF 2001 (unreported) at pg. 22 as follows:

“We have already referred to some speeches of the law Lords in both Pettit vs Pettit and Gissing Vs Gissing. It is clear from those cases that when dealing with disputes between husband and wife over property the court applies the general principles of law applicable in property disputes in all courts irrespective of whether or not they are married.”

Having disposed of the Preliminary Objection, let me now consider the merits of the summons. The principles of injunctions are well settled. First an applicant must show a *prima facie* case with probability of success. The dispute before hand is over some property alleged to be matrimonial property. The Applicant claims she contributed in the acquisition of L.R NO. NAROMORU/RAGATI BLOCK 1/142 and L.R NO. NAROMORU/RAGATI BLOCK 1/383. She now alleges the Respondent is busy selling the same. The Respondent has submitted that she has sold part of the land to pay for the medical expenses of his second wife. I am convinced that the Applicant has shown she has a *prima facie* case with probability of success. The second principle to be considered is whether the Applicant will suffer irreparable loss if the order of injunction is not given. It goes without saying that the property is now in the process of being sold. This will obviously defeat the substratum of the Originating Summons. I agree the Applicant may not be compensated in monetary terms. Even if the amount of damage is ascertainable in monetary terms, I fear the Respondent may not raise the money to buy out the Applicant. The last principle to be considered is convenience where the court is in doubt. I am of the view that if the land is sold the process of recovering the same is expensive and near impossible. It will also be extremely difficult to recover the monetary value of the land from the Respondent. In the end I find the summons to be well founded. It is allowed with costs to the Applicant.

Dated and delivered at Nyeri this 16th day of April 2010.

J. K. SERGON

JUDGE