REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. E001 OF 2020

TABITHA MWIKALI MWANGANGI.....PLAINTIFF/APPLICANT

VERSUS

DAVID MUTHUKA NTHIWA.....DEFENDANT/RESPONDENT

RULING

1. The application for determination is dated 23rd September, 2020 and filed by the Plaintiff/Applicant under certificate of urgency dated 24th September, 2020. It is brought under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and all enabling provisions of the Law.

2. The Applicant seeks the following Orders:

i) Spent.

ii) Spent.

iii) That a temporary order of injunction do issue restraining the Defendant/Respondent, his agents, servants or anyone acting or claiming through him from entering, trespassing, building houses, subdividing, registering and or in any other manner interfering with the Plaintiff's parcel of land being parcel Nos. Mbooni/Kalawani/1855, 1856, 1857, 1858, 1859, 1860 and 1861 being subdivisions of Mbooni/Kalawani/28 pending the hearing and determination of the suit herein.

iv) That costs of this application be borne by the Respondent.

3. The application is supported by the affidavit of Tabitha Mwikali Mwangangi sworn on 23rd September, 2020. The basis of the application is that the Applicant and the Respondent were the registered joint proprietors and occupiers of the suit property known as Title No. Mbooni/Kalawani/28 situate within Makueni County. That the Respondent who is the Applicant's brother in-law has caused to be subdivided the suit property into seven unequal portions to wit Mbooni/Kalawani/1855, 1856, 1857, 1858, 1859, 1860 and 1861. That the said subdivisions were done without the Applicant's knowledge with an aim of depriving her of her rightful property. That the Applicant has been allocated parcel No. Mbooni/Kalawani/1856 measuring 0.8266 Ha by the Respondent which is a small share in the suit property that measures 3.4 Ha. That the Respondent is intent on selling the suit property to the loss and detriment of the Applicant. That the Respondent is in the process of building houses on the suit property. That it is in the interest of justice that the orders sought be granted. She relies on Annexures marked "TMM1 – TMM5".

4. The application is opposed by David Muthuka Nthiw'a vide the Replying affidavit sworn on 2nd November, 2020. He has deposed that Title No. Mbooni/Kalawani/28 belonged to his father, Ngumbi Nthiwa, and that the suit property was jointly registered in their names after the demise of their father. That while he was still alive, his father sold several plots from the suit property to various people. That before he died, his father had expressed in a document marked as Annexure "DMN1" how he wanted the suit property to be shared. That the Applicant and Respondent sought the services of a surveyor who subdivided the suit property into the seven parcels hereinabove. That he has not sold any land since all the previous transactions were done by his late father. That he was only registered as the owner of the said land parcels to hold in trust pending formal transfer to the purchasers. That the Applicant was given her share of the suit property and thus she will not suffer irreparable loss and damage to warrant issuance of the injunctive orders. He relies on Annexures marked "DMN1 – DMN5".

5. The parties duly filed their respective submissions as per the directions issued on 24th September, 2020. I have read each parties' pleadings, evidence and submissions. It is common ground from the parties' submissions that the prerequisite conditions for a grant of the orders sought under Order 40 Rule 1(a) were determined in the celebrated case of **Giella –Vs- Cassman Brown & Co Ltd [1973] 1 EA 358 at 360 (CAK)** as follows:

> ***"The conditions for the grant of an interlocutory injunction are now. I think, well settled in East Africa. 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 adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)"***

6. On the aspect of whether the Plaintiff/Applicant has established a *prima facie* case, I am guided by the Court of Appeal findings in **Mrao Ltd -Vs- First American Bank of Kenya Ltd& 2 others [2003] eKLR** wherein it held;

> ***"4. A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."***

7. From the annexures placed before me, the suit property measuring approximately 3.4 hectares was registered in the joint names of the Applicant and Respondent on 26th January, 2011 and a title deed was issued. Nonetheless, the suit property has subsequently been subdivided into several portions and the Applicant has alleged that there was illegality in the subdivision process, because it was done without her knowledge. The Respondent has further deposed that the subdivided parcels contain plots that were sold and which await transfer to the purchasers.

8. Since it is not in contest that both litigants were joint proprietors of the suit property, then under Section 2 of the Land Act, 2012 both held undivided shares and interests therein. To this end, none of the parties herein can transfer and or dispose of their interest in the suit property to the exclusion of the other without the other party's consent. The Applicant has questioned the manner in which subdivision of the suit property was done and further, the sale agreements have been contested. I am convinced that the Applicant held an undivided property rights jointly with the Respondent and hence the questions to the nature in which these property rights were divided require substantive answers. No proof of the Applicant's consent to subdivide was presented. I therefore find that the Applicant has a *prima facie* case with a high probability of success in comparison to the Respondent's opposition.

9. On irreparable injury/loss, the Respondent has submitted that since the Applicant already has Title No. Mbooni/Kalawani/1856 issued in her name, then she stands to suffer no damage. In line with my finding above, there can be no subdivision of a joint proprietorship to the exclusion of one party. Monetary loss cannot be quantified at this stage. On this limb, I find in favour of the Applicant.

10. Lastly, the balance of convenience must at all times tilt towards safeguarding the property rights of the registered owner/s. Until final determination of how the subdivisions were done and registered without one party's knowledge, then this Court is enjoined to safeguard the rights of the joint proprietors of the suit property.

11. That said and given the above findings, it is my view that the Applicant has established the conditions for the grant of injunctive orders. The application is accordingly allowed in terms of Prayer 3 as follows;

> · ***That a temporary order of injunction do issue restraining the Defendant/Respondent, his agents, servants or anyone acting or claiming through him from entering, trespassing, building houses, subdividing, registering and or in any other manner interfering with the Plaintiff's parcel of land being parcel Nos. Mbooni/Kalawani/1855, 1856, 1857, 1858, 1859, 1860 and 1861 being subdivisions of Mbooni/Kalawani/28 pending the hearing and determination of the suit herein.***

12. Costs shall abide the outcome of the main suit.

Signed, dated and delivered at Makueni via email this 19th day of February, 2021.

.....

HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi