



**Mutisya v Musyoki & another (Environment & Land Case
E026 of 2024) [2025] KEELC 1149 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1149 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E026 OF 2024**

**EO OBAGA, J
MARCH 6, 2025**

BETWEEN

DAMARIS MUTHEU MUTISYA APPLICANT

AND

DANIEL NGAO MUSYOKI 1ST RESPONDENT

JANE KINGOO 2ND RESPONDENT

RULING

1. Before this Court for determination is the application dated 5th September, 2024 brought under the provisions of Sections 3A and 63 (c) (e) of the *Civil Procedure Act* in addition to Order 40 Rules 1 and 2 and Order 51 Rules 1 of the Civil Procedure Rules, 2010. The Plaintiff/Applicant seeks issuance of the following orders: -
 1. [Spent]
 2. [Spent]
 3. [Spent]
 4. That the 1st Respondent be restrained by an order of injunction whether by himself, his agents, servants, employees or persons claiming on his behalf from advertising, selling, charging, disposing of, subdividing, gifting, alienating or in any other way interfering with the Plaintiff/Applicant's and her children use and occupation of land parcel number Nzau/Kikumini/779 pending the hearing and determination of this suit.
 5. That the 2nd Respondent be restrained by an order of injunction whether by herself, her agents, servants, employees, husband, sons, daughters or person acting on her behalf trespassing, entering upon, fencing, constructing, bringing any building material, cultivating or in any



other way interfering with the Plaintiff and her children use and occupation of land parcel number Nzai/Kikumini/779 pending the hearing and determination of this suit.

6. That costs of this application be provided for.
2. The application is premised on the grounds appearing on its face in addition to the supporting affidavit of Damaris Mutheu Mutisya sworn on even date.
3. The Applicant averred that she is married to the 1st Defendant and that they have established their matrimonial home within land Parcel No. Nzai/Kikumini/779 (the suit property). She added that the suit property was given to the 1st Defendant by his parents and the same later registered in his name in the year 2015.
4. The Applicant asserted that upon their marriage, she started to develop the suit property by planting crops such as bananas, mangoes and oranges. She further asserted that she has drilled a borehole which provides water for home and farm use. She also averred that she constructed a modern house on the suit property out of her salary. Again, she stated that she was the one paying school fees for their children.
5. The Applicant averred that the 1st Defendant threatened to sell the suit property to the 2nd Defendant in August 2024. That the 2nd Defendant entered into the suit property and curved a sizeable portion which she has fenced, in addition to bringing in building materials. The Applicant further averred that she has acquired beneficial interest in the suit property and that she stands to lose her investment if the land is sold, alienated and or charged. In addition, she stated that she will suffer irreparably with her children who will have nowhere to call home.
6. Opposing the application, the 1st Defendant filed a replying affidavit on 2nd October, 2024. He averred that the suit property is inherited land which is held in trust by himself on behalf of his siblings and not matrimonial property. He further averred that the Plaintiff did not participate in the development of the suit property in any way. The 1st Defendant asserted that it was he that had developed part of the suit property by securing a loan after the Plaintiff refused to take part in any development.
7. The 1st Defendant averred that the Plaintiff had not adduced any evidence to support her claim of beneficial interest. He added that the Plaintiff is attempting to frustrate the Defendants in their rightful inheritance including the Plaintiff's children who reside in the suit property. The 1st Defendant averred that the Plaintiff had deserted their home without any provocation whatsoever.
8. The Plaintiff filed a supplementary affidavit on 13th October, 2024 wherein she reiterated that the suit property was given to the 1st Defendant and herself by their late father in the year 2015. She denied having deserted the matrimonial home stating that her duties as a school headteacher allow her to return home during holidays and weekends. She added that the 1st Defendant is never at home when she arrives stating that he stays in Mwingi where he is also a teacher.
9. The 2nd Defendant did not file any reply to the application.
10. The application was canvassed by way of written submissions.
11. In the Plaintiff's submissions dated 13th November, 2024, Counsel argued that the Plaintiff had acquired a beneficial interest which is adverse to that of the registered owner by improving the suit property. Counsel detailed that the Plaintiff had constructed a house, sunk a borehole in addition to doing farming.
12. Counsel contended that no other rights have been registered to the 1st Defendant's title demonstrating that he is the absolute owner. Counsel further argued that the Plaintiff's contributions in the improvement of the suit property meant that she had acquired a beneficial interest which is protected



by the law. Counsel contended that the Plaintiff had demonstrated a prima facie case that warrants issuance of the injunctive orders and that a sale of the suit property would cause irreparable loss.

13. In the 1st Defendant's submissions dated 13th November, 2024, Counsel argued that the Plaintiff had failed to demonstrate any direct or indirect financial contribution towards acquisition or improvement of the suit property. Counsel urged the court to dismiss the application with costs.
14. The sole issue for determination is whether the Plaintiff/Applicant has met the legal threshold for issuance of the injunctive orders sought.
15. The prerequisite conditions for a grant of injunctive orders under Order 40 Rule 1(a) of the Civil Procedure Rules, 2010 were determined in the celebrated case of *Giella v 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.)”

16. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the Court of Appeal defined a prima facie case in the following terms:-

“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.”

17. It is not in dispute that the suit property is registered in the name of the 1st Defendant as the sole proprietor thereof. Nonetheless, the Plaintiff's claim is hinged on the fact that she has acquired an overriding equitable interest in the land by virtue of her contribution to the improvement thereof being the 1st Defendant's spouse. In his replying affidavit, the 1st Defendant did not deny that they are married only stating that the suit property is not matrimonial property and that he is registered as proprietor in trust for himself and his siblings.
18. The Plaintiff annexed evidence to support her claim that the land is matrimonial property. She annexed photographs of the residential house, the borehole in the land and the crops and fruit trees therein. In addition, she annexed a copy of her August 2024 payslip indicating deductions to her salary which she asserted were loans she had taken for the improvement of the suit property.
19. Section 9 of the *Matrimonial Property Act* outlines that one spouse acquires a beneficial interest to a property which they have made contribution towards improvement if the property is acquired by the other spouse before or during the subsistence of the marriage. The law provides as follows: -

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.



20. Section 93 of the Land Registration Act recognizes that an interest in land may be acquired by one spouse during the subsistence of a marriage. The law provides as follows: -

Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.

21. Arguing that she had demonstrated a prima facie case, the Plaintiff stated that she had been married to the 1st Defendant and that they had been residing together in the suit property since 1997. It is clear that she has a genuine and arguable case that the suit property is indeed matrimonial property.

22. In the case of Julius Kuria Nganga v Wambui Kigamba [2017] eKLR, the Court held as follows: -

“Further, the court will also take into account that at this stage the court is not called upon to determine the very issues with finality but only to find out if the Applicant has established that he deserved the orders sought basing it on the laid down criteria. See the case of Edwin Kamau Muniu vs Barclays Bank of Kenya Ltd Nairobi (Milimani) High Court, Civil Case No.1118 of 2002, where the court held that:

“in an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled to at that stage is whether the Applicant is entitled to an injunction sought on the usual criteria.”

23. The Plaintiff annexed photographs showing a fence that had been erected in the suit property which she alleged had been done by the 2nd Defendant as the buyer of a portion of land thereof. She averred that she had heavily invested in the land and that her occupation and use would be compromised if the 2nd Defendant is not restrained from any further acts of occupation.

24. It is therefore not in doubt that the Plaintiff stands to suffer irreparable loss if a portion of the suit property is disposed of to the 2nd Defendant.

25. The upshot of the foregoing is that the application dated 5th September, 2024 is merited and is allowed in terms of prayers 4,5 and 6 .

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF MARCH, 2025.

In the Presence of:

Mr. Mwangiangi for 1st Respondent

Mr. Muli for Mr. Kamolo for Applicant.

Court assistant Steve Musyoki

