



**Gichuru v Gichuru (Environment & Land Case 103 of 2023)
[2023] KEELC 21517 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21517 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND CASE 103 OF 2023
YM ANGIMA, J
NOVEMBER 9, 2023**

BETWEEN

LUCY WANGARI GICHURU PLAINTIFF

AND

SAMUEL GATHUO GICHURU DEFENDANT

RULING

A. Introduction and Background

1. By a plaint dated 11.04.2023 the Plaintiff sought the following reliefs against the Defendant:
 - a. The hounourable court be pleased to grant/issue a permanent injunction restraining the Defendant/respondent by himself, his agents, employees, assigns or whomsoever is acting by them or through them or under their authority of any nature or otherwise howsoever, from advertising, selling, transferring, encumbering, alienating, taking possession, accessing the property, evicting anyone in the property or in any other way interfering with the Plaintiff/Applicant's peaceful and quiet enjoyment of the property known as Sipili Market Plots No. 59, 60A and Plot 60B, previously No. 50 and 51 within Laikipia County.
 - b. Damages for unlawful trespass with interest from the date of filing suit.
 - c. The officer commanding station Rumuruti Police Station do ensure compliance with this honourable court's order at all times.
 - d. The Plaintiff be awarded the costs of the suit with interest.
 - e. Any further orders that the court may deem just and fit to award in the circumstances.
2. The Plaintiff pleaded that he was the wife of one, Bartholomew Gichuru with whom they jointly acquired the suit properties. It was pleaded that sometime in February and March, 2023 the Defendant,



who was the son of Bartholomew Gichuru, had through intimidation and violence threatened to evict her from the suit properties without any colour of right. It was further pleaded that on 30.03.2023 the Defendant had invaded the suit properties and destroyed door locks, windows and an electricity power box without lawful justification. It was contended that despite issuance of a demand and notice of intention to sue, the Defendant had failed to cease his interference with the suit properties hence the suit.

B. Plaintiff's Instant Application

3. Simultaneously with the filing of the suit, the Plaintiff filed a notice of motion dated 11.04.2023 expressed to be based upon Articles 40 & 159(2)(e) of the Constitution of Kenya, Sections 1A, 1B, 3A & 62(e) of the Civil Procedure Act (Cap.21), Order 40 rule 1 & Order 51 rule 1 of the Civil Procedure Rules, 2010, the Plaintiff sought the following orders:
 - a. ...spent;
 - b. ...spent;
 - c. That the honourable court be pleased to issue an injunction restraining the Defendant/respondent by himself, his agents, employees, assigns or whomsoever is acting by them or through them or under their authority of any nature or otherwise howsoever, from advertising, selling, transferring, encumbering, alienating, taking possession, accessing the property, evicting anyone in the property or in any other way interfering with the Plaintiff/Applicant's peaceful and quiet enjoyment of the property known as Sipili Market Plot Nos. 59, 60A and Plot 60B, previously No. 50 and 51, within Laikipia County pending the hearing and the determination of the suit.
 - d. That the Officer Commanding Station Rumuruti Police Station do ensure compliance with this honourable court's order at all times.
 - e. That the honourable court do award any other orders it may deem just, fit and expedient to award in the interest of justice.
 - f. That the costs of this application be awarded to the Plaintiff/Applicant.
4. The motion was based upon essentially the same facts pleaded in the plaint and supported by the 2 supporting affidavits of Lucy Wangari Gichuru and Eunice Nyakinini Irungu both sworn on 11.04.2023. The Plaintiff contended that she was still the lawful wife of Bartholomew Gichuru with whom she acquired the suit properties during the existence of their marriage. She stated that she was apprehensive that unless the orders sought were granted, the Defendant might evict her from the suit property thereby rendering her destitute.

C. Defendant's Response

5. The Defendant filed a replying affidavit sworn on 13.06.2023 in opposition to the application. He stated that on 07.02.2010 his father, Bartholomew Gichuru, gifted him and his step brother Stephen Njogu Gichuru the suit properties located in Sipili in Laikipia County. He stated that his father had already constructed some structures for rental purposes on the suit properties and that when he took possession he constructed an additional structure for a bar and restaurant business. It was his case that he operated his business thereon until 2015 when he leased out the premises to tenants.
6. The Defendant asserted that it was only in 2020 that the Plaintiff invaded the suit properties and demanded that all the rental income be channeled to her. He stated that Eunice Nyakanini Irungu



was his father's long time tenant on the suit properties and that she only shifted her allegiance to the Plaintiff. The Defendant also denied that the Plaintiff was residing on the suit properties. He further denied the allegations of trespass, threats of violence or eviction.

7. The Defendant asserted that the Plaintiff was once married to his father but they separated in 1981 and a judicial separation was granted in 2001. It was stated that when the Plaintiff filed a cause before the High Court for division of matrimonial property she did not include the suit properties among the properties jointly acquired hence her instant claim was suspect. The Defendant further stated that the Plaintiff was residing on a 6-acre parcel of land owned by his father which was far away from the suit properties.

D. Plaintiff's Rejoinder

8. The Plaintiff filed a further affidavit sworn on 19.06.2023 and reiterated that she held a beneficial interest in the suit properties and that the persons who were allegedly gifted the properties by Bartholomew Gichuru were merely strangers to her. She denied that there was any separation or divorce with her husband. It was her case that she was the one who had solely developed the suit properties for about 40 years and that she had been leasing it out to tenants.

E. Directions on Submissions

9. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their written submissions. The record shows that the Plaintiff's submissions were filed on 18.07.2023 whereas the Defendant's submissions were filed on 31.07.2023.

F. Issues for Determination

10. The court has perused the Plaintiffs' notice of motion dated 11.04.2023, the Defendant's replying affidavit in opposition thereto as well as the Plaintiff's supplementary affidavit. The court is of the opinion that the following are the key issues which arise for determination herein:
 - a. Whether the Plaintiff has made out a case for the grant of the interim injunction sought.
 - b. Whether the Plaintiff is entitled to the consequential orders sought.
 - c. Who shall bear costs of the application.

G. Analysis and Determination

a. Whether the Plaintiff has made out a case for the grant of the interim injunction sought

11. The court has considered the material and submissions on record on this issue. It is evident from the material on record that the Plaintiff's claim to the suit properties was hinged on the allegation that they were acquired during the existence of her marriage to Bartholomew. It was her contention that she was entitled to an equitable interest in the suit properties by reason of joint acquisition. The material on record shows that the Plaintiff has a pending Matrimonial Property Cause No. 6 of 2015 at Nakuru seeking division of the matrimonial property they jointly acquired with her husband. The said cause is still pending determination in court.
12. The Defendant alleged that the Plaintiff had nothing to do with the suit properties since they were acquired by his father in 1988 long after the Plaintiff has separated with him. It was contended that if



- it were not so then the Plaintiff would have included the suit properties in the matrimonial property cause which has been pending since 2015. The court has noted that in her supplementary affidavit the Plaintiff did not respond to the issue of exclusion of the suit properties from the pending cause even though it was expressly raised by the Defendant in his replying affidavit.
13. The Plaintiff further contended that she was at risk of being evicted from the suit properties with the consequence that she might be rendered homeless and destitute. It was stated that the Defendant had severally threatened her with eviction from the suit properties. On his part, the Defendant asserted that the Plaintiff showed up at the suit properties for the first time in 2020 when she demanded that all rental income should be paid to her. He further stated that the Plaintiff was actually residing on a 6-acre farm provided by his father which was very far away from the suit properties. In her supplementary affidavit, the Plaintiff did not directly respond to the issue of her actual place of abode but simply stated that she had developed the suit properties for over 40 years and let out the same to tenants.
 14. The court is aware that at this interlocutory stage it is not required to determine the contested matters of fact conclusively since that is the function of the trial court. Thus, the question of whether or not the suit properties form part of matrimonial property shall be conclusively determined at the trial. The court is aware of the principles for the grant of an interlocutory injunction as enunciated in the case of *Giella v Cassman Brown & Co. Ltd* [973] EA 358.
 15. The first principle is that the Applicant must demonstrate a prima facie case with a probability of success at the trial. The second is that an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss or injury which cannot be adequately compensated by an award of damages. Thirdly, if the court is in doubt as to the second principle then it shall decide the application on a balance of convenience.
 16. The court has noted that the Plaintiff has a pending matrimonial property cause for the division of matrimonial property. There is no indication on record whether the suit properties were included in that cause. Whereas the Defendant contended that they were not, the Plaintiff did not respond directly to this issue and no explanation was offered for their non-inclusion. The court is of the opinion that if the Plaintiff truly believed that they formed part of matrimonial property and she had developed the same for over 40 years as she claimed then she ought to have taken the earliest opportunity to include them in the cause and may be seek interim orders for their preservation pending the hearing and determination of the cause.
 17. The court has also noted that the Plaintiff's evidence on her true place of abode was quite evasive. Whereas in her plaint and application she indicated that she feared the risk of being evicted from her home and being rendered destitute, she did not exhibit any evidence in her two affidavits to demonstrate that she was residing there. When the Defendant asserted in his replying affidavit that the Plaintiff was residing on a 6-acres farm elsewhere and far away from the suit properties, the Plaintiff did not directly respond to the issue in her supplementary affidavit. She, instead, contended that she had 'developed' the suit properties over the past 40 years and let them out of tenants. As a result, the court is far from satisfied that the Plaintiff is resident on the suit properties and that she faces a threat of eviction therefrom.
 18. In the circumstances, the court is not satisfied that the Plaintiff has demonstrated a prima facie case with a probability of success at the trial. The court is not satisfied that the Plaintiff has demonstrated on a prima facie basis that the suit properties constitute matrimonial property. The fact that the Plaintiff has some receipts showing payment of rates does not change the court's view on the matter because even the Defendant's father appears to have receipts showing payment of rates to the county government of Laikipia. The court is also not satisfied on a prima facie basis that the Plaintiff is resident on the



suit properties and that she is under threat of eviction by the Defendant. Being of the opinion that the Plaintiff has not made out a prima facie case with a probability of success the court does not find it necessary to consider the second principle.

19. Even if the court were to consider the second principle on irreparable loss, the court finds no evidence on record to demonstrate that the Plaintiff stands to suffer any harm or injury which cannot be adequately compensated by an award of damages. The material on record points to the structures on the suit properties being let out to tenants. So, the only possible loss the Plaintiff may suffer would be loss of rental income. It was not contended or demonstrated that such rental income was incapable of quantification or that the Defendant was so impecunious that he would not be able to refund the same should the Plaintiff's claim ultimately succeed at the trial. The court is thus of the opinion that the Plaintiff has failed to satisfy the principles for the grant of an interim injunction to the required standard.

b. Whether the Plaintiff is entitled to the consequential orders sought

20. The court has already found that the Plaintiff has failed to demonstrate the principles for the grant of an interim injunction. The consequential orders were essentially meant to facilitate the due execution or compliance with the order of interim injunction. Since the court is not inclined to grant the injunction sought, then the Plaintiff is not entitled to the consequential orders as well. There would be nothing for the OCS Rumuruti Police Station to enforce compliance with in the absence of the interim injunction.

c. Who shall bear costs of the application

21. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. Although the Plaintiff has lost the application for interim orders the court is not inclined to condemn her to pay costs of the application at this stage. It is clear to the court that the parties are close relatives even though the Plaintiff disowned the Defendant as a stranger to her and her family. In the premises, the court is of the view that costs of the application should be in the cause.

H. Conclusion and Disposal Order

22. The upshot of the foregoing is that the court finds no merit in the Plaintiff's application for interim orders. Consequently, the court makes the following orders for disposal thereof:
- a. The Plaintiff's notice of motion dated 11.04.2023 be and is hereby dismissed in its entirety.
 - b. Costs of the application shall be in the cause.
 - c. Since the suit property is located in Rumuruti within Laikipia County, the suit is hereby transferred to the ELC at Nyahururu for trial and disposal.
 - d. The suit shall be mentioned on 04.12.2023 before the Deputy Registrar Nyahururu for pre-trial directions.

Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA THIS 9TH DAY OF NOVEMBER, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:



Mr. Okumu holding brief for Mr. Gaituri for the Plaintiff

Ms. Wanjiku Wamae for the Defendant

C/A - Carol

Y. M. ANGIMA

JUDGE

