



Chepkemboi alias Salome Chepkemboi Kimaiyo v Chepkok (Originating Summons E007 of 2024) [2025] KEHC 1553 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1553 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
ORIGINATING SUMMONS E007 OF 2024
RN NYAKUNDI, J
FEBRUARY 21, 2025**

BETWEEN

**SALOME CHEPKEMBOI ALIAS SALOME CHEPKEMBOI
KIMAIYO APPLICANT**

AND

MICHAEL KIMAIYO CHEPKOK RESPONDENT

RULING

1. What is pending before me for determination is Notice of Motion Application dated 28th November 2024, where the Applicant is seeking the following orders;
 - a. Spent
 - b. Not granted
 - c. That pending hearing and determination of the main cause interpartes and/or further orders of this Court, an order of temporary injunction do issue against the Defendant/Respondent restraining him either in person, or through his agents, servants, proxies and/or assigns from selling, charging, transferring, leasing and/or in any other adverse manner dealing with the matrimonial properties being L.r. No. Uasin Gishu/charar/32 Lr No. Uasin Gishu/charar 33 And Eldoret Municipality Block 9/1006 acquired and developed jointly by the parties albeit registered in the sole name of the Defendant/Respondent.
 - d. That this Honourable Court do make any such further orders it may deem fit and expedient to serve the best interest of justice pending the hearing and determination of the substantive suit.
 - e. That costs of this application be in the cause.



2. The Application is premised upon Order 40 Rule 1 of the Civil Procedure Rules and sections 1A & 1B, 3 & 3A, 63(e) of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules 2010 and section 84(1) of the *Marriage Act*, 2014 among other provisions of the law.
3. The Application is based on the grounds on the face of it among others;
 - a. That the parties herein were husband and wife having married each other on 3rd December 1975 pursuant to Cap 150. now repealed.
 - b. That during the subsistence of their marriage, the parties acquired and developed matrimonial properties being L.R. No. Uasin Gishu/charar/32 Lr No. Gishu/charar 33 And Eldoret Municipality Block 9/1006 by their UASIN joint efforts.
 - c. That the parties were blessed with four (4) issues of marriage
 - d. That the said marriage has since been dissolved vide Eldoret Chief Magistrate's Court Divorce Cause Number 96 of 2022.
 - e. That the Defendant/Respondent who has been of violent tendencies has threatened to dispose of the aforesaid matrimonial properties albeit the monetary and non-monetary contribution by the Plaintiff/Applicant.
 - f. That the Defendant/Applicant has severally threatened to evict the Plaintiff from their matrimonial home, a threat he made evident since their marriage was dissolved.
 - g. That in the above circumstances, it is necessary that appropriate orders issue pending the hearing and determination of these proceedings in order to safeguard the substratum of the cause.
 - h. That unless interim orders are issued, the Plaintiff/Applicant stands to suffer irreparable loss and damage as the suit parcels of land risk being dealt with adversely by the Defendant albeit here beneficial interest therein.
 - i. That in the foregoing, it is necessary that appropriate orders issue in the best interest of justice in order to preserve the substratum of the main cause.
4. The Application is supported by the Annexed Affidavit dated 28th November 2024 sworn by the said SALOME CHEPKEMBOI KIMAIYO, the Applicant herein, the contents of which I have read.
5. I take note that at the time of this ruling the Respondent has not filed any document opposing the application hence it is unopposed.

Analysis and Determination

6. I have read and considered the application herein, the affidavit in support and annexures thereto. There is one issue for determination i.e.
Whether the Applicant has established grounds for grant of Injunctive Orders
7. It is evident that that Order 40 Rule 1 and 2 of the Civil Procedure Rules, 2010 provides that the court has powers to grant an order of temporary injunction to restrain such acts and prevent the selling, charging, transferring, leasing and/or in any other adverse manner dealing with the matrimonial properties.



8. Moreover, Rule 20(2) of the Matrimonial Properties Rules provides that:

A party to the proceedings may, before or after commencement of the proceedings under these Rules, but before the final determination of the respective claims, apply for temporary injunctions or other interlocutory orders in accordance with Order 40 of the Civil Procedure Rules, 2010, and the court may grant the orders sought on such terms or conditions as may be just in the circumstances.

9. This is an application for temporary injunctive relief pending suit, and is governed by the principles in *Giella Vs Cassman Brown* and reiterated in the case of *Nguruman Limited Versus Jan Bonde Nielsen & 2 Others* Ca No. 77 of 2012 (2014) eKLR where the Court held thus:

“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 damages; and if the court is in doubt then it can decide the application on a balance of convenience.

10. Therefore, according to the principles set out in *Giella Vs Cassman Brown*, an applicant is required to establish:

- a. The existence of a prima facie case based on the Notice of Motion Application and Affidavit Evidence.
- b. The likelihood of irreparable injury to the applicant if the injunction is not granted;
- c. On where the balance of convenience tilts in case the court cannot decide based on the first two requirements.

11. The Court is also, by virtue of section 1A (1) & (2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided for thereunder, while exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing, while expeditiously disposing of this suit.

12. I will analyze the foregoing principles emanating from the locus classicus of *Giella Vs Cassman Brown* (Supra) above as below;

Whether the applicant has established a prima facie case

13. On what constitutes prima facie case, the Court of Appeal in *Nguruman Limited Vs Jan Bonde Nielsen & 2 Others* [2014] eKLR stated that:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which



has been or is threatened with violation. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

14. I note that the Applicant stated in her supporting grounds to the application that during the subsistence of their marriage, the parties acquired and developed matrimonial properties being L.r. No. Uasin Gishu/charar/32 Lr No. Uasin Gishu/charar 33 And Eldoret Municipality Block 9/1006 by their joint efforts. She also stated that the said marriage has since been dissolved vide Eldoret Chief Magistrate's Court Divorce Cause Number 96 of 2022 and that the Defendant/Respondent who has been of violent tendencies has threatened to dispose of the aforesaid matrimonial properties albeit the monetary and non-monetary contribution by the Plaintiff/Applicant.
15. The Applicant also stated that the Respondent has severally threatened to evict her from their matrimonial home, a threat he made evident since their marriage was dissolved.
16. From the above, I make reference to Section 6(1) of the *Matrimonial Property Act* which provides that matrimonial property means;
 - a. The matrimonial home or homes;
 - b. Household goods and effects in the matrimonial homes; or
 - c. Any other immovable or movable property jointly owned and acquired during subsistence of the marriage.
17. Moreover, Section 7 of the Matrimonial Properties Act also provide that; Subject to section 6(3) ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards the acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.
18. From the foregoing, it is clear that matrimonial properties being L.r. No. Uasin Gishu/charar/32 Lr No. Uasin Gishu/charar 33 And Eldoret Municipality Block 9/1006 need to be protected from disposal by the Respondent herein pending the hearing and determination of this suit.

Whether the Applicant stands to suffer an irreparable injury that cannot be adequately compensated by an award of damages:

19. It is a rationale that the Applicant has to establish that she would suffer an irreparable injury that cannot be adequately compensated or remedied by any monetary award or damages that may be awarded later. From the grounds in support of the application, I note that the Applicant stated that the Defendant/Respondent who has been of violent tendencies has threatened to dispose of the aforesaid matrimonial properties albeit the monetary and non-monetary contribution by the Plaintiff/Applicant. Moreover, she had stated that during the subsistence of their marriage, the parties acquired and developed matrimonial properties being L.R. No. Uasin Gishu/charar/32 Lr No. Uasin Gishu/charar 33 And Eldoret Municipality Block 9/1006 by their joint efforts.
20. I am guided by the decision in the case of Family Bank Limited vs. Tassels Enterprises Limited & 2 Others [2021] eKLR which cited the ruling Nguruman Limited Vs Jan Bonde Nielsen & 2 Others (Supra) where the Court stated that;

The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there



is a possibility of quantifying damages. Only in cases of doubt court will proceed based on the balance of convenience while being aware that formal evidence will be adduced at the hearing...

21. The applicant stated that unless interim orders are issued, she stands to suffer irreparable loss and damage as the suit parcels of land risk being dealt with adversely by the Defendant albeit her beneficial interest therein. It is my view that the intervention of this Honourable Court is crucial in the circumstances.

On the balance of probabilities

22. In the case of *Chebii Kipkoech Vs Barnabas Tuitoek Bargarioria & Another* [2019] eKLR, it was held that:

“the meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed.”

23. The Applicant averred that during the subsistence of their marriage, the parties acquired and developed matrimonial properties being L.r. No. Uasin Gishu/charar/32 Lr No. Uasin Gishu/charar 33 and Eldoret Municipality Block 9/1006 by their joint efforts. She also averred that the Defendant/Respondent will not be prejudiced in any way should the orders herein issue as he is aware of her contribution to the acquisition and development of the parcels forming the subject of those proceedings. I do therefore find that; the Defendant is likely to suffer less prejudice even if the injunction sought is granted since an order restraining him from disposing of a property which they jointly own and cannot dispose of cannot be prejudicial to either party to the marital union.
24. The principle that there must be a substantive cause of action underpins the grant of an injunction. This remains to be good law. Therefore, the court has the jurisdiction to grant an injunction against the Defendant/Respondent on the basis that there is a cause of action or a substantive claim against him which if no injunction is granted, it might dissipate or render the suit nugatory.
25. From the record of the material evidence, both the Applicant and the Respondent have been married since 3rd December 1975. The properties in question are registered in the name of the Respondent as indicative on the face of the title deeds with effect from 01/01/1989 for Eldoret Municipality Block 9/1006 and 21/11/2003 for L.R. No. Uasin Gishu/charar/32 Lr No. Uasin Gishu/charar 33. It is apparent that the marital union has hit a dead end and bought of them are strangers of the covenants which governed their marriage. The effect of the originating summons is for the Applicant’s ability to challenge the Respondents interests and rights in the aforesaid estate stated to have been acquired during the subsistence of the marriage. To my mind there are justiciable issues under the *Matrimonial Property Act* and from the averments of the affidavits, the Originating Summons cannot be said to be vexatious or frivolous. The purpose of which this Court exercises discretion by granting interlocutory injunction is to improve the chances of this Court to do justice on the merits of the case.
26. After reviewing the issues raised by the plaintiff, I believe she has made a prima facie case for granting an injunction until the suit is heard and determined. However, this does not guarantee her success. What it means is that there is a basis for which this Court can prevent the defendant from disposing of the aforementioned properties.



27. The theme of this interlocutory application can be answered precisely by the persuasive principles enunciated in the case of *In Re Yendi Skin Affairs; Yakubu II v. Abdulai* (1984-86) 2 GLR, 231 the court in its holding stated that:

“the courts had consistently operated on the principle that where two parties were litigating, every care must be taken to ensure that the party who eventually won did not find his judgment useless in his hands. Hence, at first instance, there were rules for interim preservation of the subject of litigation, and for injunction to prevent waste. At the same time, the courts have tried to hold the balance evenly between the parties so that one did not take undue advantage of the other during the course of the litigation. Those principles have been applied, subject to the balance of the convenience in a particular situation and to the hardship which the making or the refusal of an order might have on one or other the other of the parties.”

28. In light of the above, I am satisfied that the Plaintiff/Applicant has satisfied the conditions necessary for the grant of the injunctory orders sought. Consequently, I find merit in the Notice of Motion Application dated 28th November 2024 and grant the following orders:

- a. That an order of temporary injunction do and is hereby issued against the Defendant/Respondent restraining him either in person, or through his agents, servants, proxies and/or assigns from selling, charging, transferring, leasing and/or in any other adverse manner dealing with the matrimonial properties being L.r. No. Uasin Gishu/charar/32 Lr No. Uasin Gishu/charar 33 And Eldoret Municipality Block 9/1006 acquired and developed jointly by the parties albeit registered in the sole name of the Defendant/Respondent.
- b. It follows therefore a prohibition order be entered against the Register affecting the above parcels of land pending the hearing and determination of the Originating Summons by the Land Registrar Uasin Gishu County.
- c. That the costs of this application shall be costs in the cause.
- d. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF FEBRUARY, 2025

R. NYAKUNDI

JUDGE

