



REPUBLIC OF KENYA



Ambe v Mvungu (Civil Case E003 of 2024) [2025] KEHC 3352 (KLR) (18 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET**

CIVIL CASE E003 OF 2024

JR KARANJA, J

MARCH 18, 2025

BETWEEN

EVERLYNE RINA KAFUNA AMBE PLAINTIFF

AND

LINUS KITHINJI MVUNGU DEFENDANT

RULING

1. The Notice of Motion dated 26th September 2024 was taken out by Everlyne Rina Kafuna Ambe [Plaintiff] seeking a temporary injunction order to restrain Linus Kithinji Mvungu [Defendant], his agents/ Servants from offering for sell, disposing, transferring, mortgaging, leasing out or in any other manner dealing with Land Parcel No. Nandi/Kiminda/1350 [suit property] pending the hearing and determination of this suit which was commenced vide the originating summons dated 26th September 2024.
2. It is pleaded in the summons that the Plaintiff/ Applicant is entitled to the aforementioned parcel of land by virtue of being married to the Defendant/Respondent and therefore prays for a declaratory order that the suit property is matrimonial property on account of the existing marriage between her and the Defendant. She also prays for a permanent injunction order and prohibition orders against the Defendant/ Respondent together with costs of the suit which was filed together with the Notice of Motion.
3. The Defendant is yet to respond to the suit, but opposed the application on the basis of the facts and averments contained in his replying affidavit dated 27th October 2024.

Both parties filed their written submissions on the application through Kiplagat J. Misoi and Company Advocate and Kariuki Levis and Company Advocates, respectively.
4. The application together with the supporting grounds and those in opposition thereto were considered by this court in the light of the rival submissions and what clearly came out as the main point for



determination was whether the Plaintiff had provided sufficient and credible grounds for exercise of this court's discretion in her favour in issuing an interim injunction against the Defendant.

5. The conditions for issuance of an interim or temporary injunction were clearly set out in the famous case of *Giella Vs. Cassam Brown and Company Limited* [1973] EA 358, to wit: -
 1. An Applicant must show a 'prima-facie' case with a probability of success.
 2. 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.
 3. If the court is in doubt, it will decide an application on the balance of convenience.
6. With regard to the first condition, it was held by the Court of Appeal in *Mrao Limited Vs. First American Bank of Kenya Limited and 2 Others* [2003] KLR 126 that 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. It was in the same case stated that a "prima-facie" is more than an arguable case and that it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial and that is clearly a standard which is higher than an arguable case.

In the *Francois Vieljeux Case* [19384]KLR 1, the Court of Appeal cited the English Case of the *Torenia* [1983] 2 Lloyd's Reports 210, where it was stated that the words "prima-facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof.
8. In this matter, the Applicant's case is hinged on her alleged proprietary interest in the suit property which on account of her existing marriage with the Respondent is deemed to be matrimonial property by dint of Section 14 of the *Matrimonial Property Act* 2013 and Article 45 of *the Constitution* of Kenya. The Applicant alleges that the property is on the verge of being disposed off by the Respondent in total disregard of her matrimonial and proprietary interest.
9. In his rejoinder to the Applicant's allegations, the Respondent acknowledges the existence of a marital relationship between himself and the Applicant but contends that the suit property solely belongs to him. That, the property is registered in his name thereby granting him an indefeasible title thereto.

The Respondent indicates that he purchased and developed the suit property using his own resources without any contribution from the applicant and implies that the property is not part of their matrimonial property.
10. In essence, the Respondent accuses the Applicant of deceit and of acting in bad faith in bringing this suit against him.

Be that as it may, it would appear from the allegations of the parties made against each other that the present dispute is an offshoot of a wider matrimonial dispute and/or disagreement between themselves for which this court may not be the right forum.
11. However, for the purposes of this application it was incumbent upon the Applicant to establish by necessary evidence her alleged proprietary interest in the suit property and the Respondent's alleged intention to dispose of the property by sale.



12. While not denying that there exists a legal marriage between himself and the Applicant, the Respondent, however contends that the suit property is his sole property for which he possesses a valid title deed and which was acquired with his own resources prior to their marriage.

The *Matrimonial Property Act* [Cap 152 Laws of Kenya] provides for the rights and responsibilities of spouses in relation to matrimonial property.

Section 6 of the Act defines matrimonial property to include the matrimonial home or homes. This implies that a married couple may have more than one matrimonial home.

13. Ownership of matrimonial property vests in the spouses according to their respective contribution to its acquisition [See, Section 7 of the *Matrimonial Property Act*].

Acquisition of interests in matrimonial property may be by contribution of either spouse towards the acquisition of the property.

“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.”

14. In this application great emphasize has been placed by the applicant on Section 14 of the Act which provides that: -

“Where matrimonial property is acquired during marriage:-

- a. In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
- b. In the names of the spouses jointly, there shall be rebuttable presumption that there beneficial interest in the matrimonial property are equal.”

In this suit the Applicant prays for a declaratory order to the effect that the suit property is matrimonial property by virtue of the existing marriage between her and the Respondent. In that regard, the Respondent through his replying affidavit contends that the suit property is not matrimonial property and has never been so.

15. A part from Section 14 of the *Matrimonial Property Act*, the Applicant has also placed reliance on Article 45 [3] of *the Constitution* to lay a claim on the suit property on account of her marriage with the Respondent.

The provision states that: -

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

While commenting on the provision, the Supreme Court in the Case of TOO Vs. MBO Petitioner No. 11 of 2020 [2023] KESC 4[KLR], stated that the provision [Article 45(3)] dealt with equality of the fundamental rights of spouses during and after dissolution of marriage, but that equality did not mean the re-distribution of proprietary rights at the dissolution of the marriage.



16. The Supreme Court then went on to hold “inter-alia” that:-

“(6) The equality provision in Article 45[3] of *the Constitution* did not entitle any court to vary existing proprietary right of parties and take away what belonged to one spouse and award half of it to another spouse that had contributed nothing to its acquisition merely because they were married to each other. To do so would mean that Article 40[1] and [2] of which protected the right to property would have no meaning which would not have been the intention of the drafters.

(7) Article 45[3] acted as a means of providing for equality as at the time of dissolution of marriage but such equality could only mean that each party was entitled to their fair share of matrimonial property and no more. Nowhere was there any suggestion that a marriage between parties automatically resulted in a common ownership or co-ownership [hence vesting of property rights and Article 45[3] was not designed for the purpose of enabling the court to pass proprietary rights from one spouse to another by fact of marriage only.”

17. The foregoing exposition of the Law and facts of the case as presented by both sides does clearly create an uncertainty as to whether the Applicant has established a “prima facie” case with probability of success. It would therefore follow that the Applicant has failed to satisfy the first condition necessary for temporary injunction order to issue.

As regards the second condition, it is apparent that both parties are looking towards deriving a commercial benefit from their alleged single or joint proprietary interest in the suit property. This is why the Applicant, without proof, alleges that the property is on the verge of being sold by the Respondent. There is nothing here to establish the fact which therefore remains a mere allegation and/or hear say.

On the other hand, the Respondent, also without proof, alludes to shady deals by the Applicant with third parties intended to have the suit property disposed of by sale.

18. Anything covered with commercial undertones such as the suit property is always capable of being compensated by an award of damages so that none of the parties and more so, the Applicant would suffer irreparable injury should the suit property in an unlikely event be disposed of by the Respondent in any manner. It would therefore follow that the Applicant has also failed to satisfy the second condition for issuance of temporary injunction order.

19. As regards the third condition, given that the Respondent has an indefeasible title to the suit property and that a marriage between parties does not automatically result in common ownership or co-ownership of property acquired before or during the subsistence of the marriage, the balance of convenience would tilt in favour of the Respondent rather than the Applicant.

20. For all the foregoing reasons it is the finding of this court that the Applicant has failed to provide credible and sufficient grounds for exercise of discretion in her favour. In the circumstances, the present application is devoid of merit and is hereby dismissed with costs to the Respondent.

DELIVERED AND DATED THIS 18TH DAY OF MARCH 2025

HON. J. R. KARANJAH,

JUDGE

