



**MKS v MOW & another (Family Cause E020 of 2024)  
[2025] KEHC 6081 (KLR) (Family) (9 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6081 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
FAMILY CAUSE E020 OF 2024  
CJ KENDAGOR, J  
MAY 9, 2025**

**BETWEEN**

**MKS ..... PLAINTIFF**

**AND**

**MOW ..... 1<sup>ST</sup> DEFENDANT**

**CNO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The suit relates to a property known as IR No. 105905/1 in Syokimau (the suit property). The 1<sup>st</sup> Respondent is married to the 2<sup>nd</sup> Respondent through a civil marriage contracted in 1998. The facts around the ownership of the suit property are disputed and remain to be determined at the hearing of the main suit. However, a few facts are undisputed. They are as follows; the suit property was transferred from one K.W to the 1<sup>st</sup> Respondent on 17<sup>th</sup> October 2014 and he was issued a certificate of title in his name. He later obtained a provisional certificate of title to the suit property on 30<sup>th</sup> July, 2021. He subsequently transferred the suit property to the 2<sup>nd</sup> Respondent on 30<sup>th</sup> November, 2021.
2. The Applicant sued the Respondents through a Complaint dated 4<sup>th</sup> November, 2024 in which she claims that she has beneficial interest in the suit property and that she is entitled to an equal share of the same. She makes several claims to support the suit. She claims that she cohabited with the 1<sup>st</sup> Respondent as a husband and wife at the time when the 1<sup>st</sup> Respondent acquired the suit property. She claims that there was a common intention between her and the 1<sup>st</sup> Respondent towards its acquisition and development. In addition, she claims that they jointly developed it by use of their separate funds and that that common intention led to the creation of a constructive trust on the suit property.



3. In the Plaint/(the main suit), she seeks several orders, some against the 1<sup>st</sup> Respondent, others against the 2<sup>nd</sup> Respondent, and others against the two Respondents jointly. These are the orders sought;

As against the 1<sup>st</sup> Respondent, she seeks the following orders;

a. A declaration that in view of the existence of securely kept title deed in respect of the suit premises, the acquisition of the provisional title deed obtained by the 1<sup>st</sup> Respondent and the subsequently dealings therein obtained by use of the said provisional title are illegal, fraudulent, and of no consequence and the same be and hereby cancelled and is ordered to revert to its original state.

In addition and/or in the alternative to (a) above

- b. A declaration that there was a common intention of the Applicant and 1<sup>st</sup> Respondent at the time of joint development of the suit property that both
- c. A declaration that the common intention of the Applicant and the 1<sup>st</sup> Respondent at the time of joint development of the suit property gave rise to a constructive trust between the Applicant and the 1<sup>st</sup> Respondent.
- d. A declaration that the 1<sup>st</sup> Respondent acted to the detriment of the Applicant by transferring the suit property to the 2<sup>nd</sup> Respondent, in full knowledge of the common intention that both the 1<sup>st</sup> Respondent and Applicant should have a beneficial interest on the suit property.
- e. A declaration that the suit property situated in Syokimau with all the buildings and developments thereon was developed by the joint funds and efforts of both the Applicant and the 1<sup>st</sup> Respondent during the season of their marriage.
- f. An order that the suit property with all the buildings and developments thereon be jointly valued, sold and the net proceeds of the sale be shared between the Applicant and the 1<sup>st</sup> Respondent pro-rata.
- g. In the alternative to (f) above, an order do issue that either of the parties hereto reimburses the Applicant half the current value of the suit property.

As against the 2<sup>nd</sup> Respondent

- a. General damages for unlawful eviction.
- b. Special damages in the sum of Kshs.2,000,000/=
- c. Mesne profits

As against the Respondents jointly and severally

- a. A permanent injunction restraining the Respondents, their agents, their servants and/or any other party claiming under their title from alienating, encumbering or in any manner disposing of the said suit property.
- b. Costs of the suit.

4. Alongside the Plaint, the Applicant brought the instant application dated the 4<sup>th</sup> November, 2024 with a view to securing the subject matter of the suit. She sought the following orders;

1. Spent.
2. Spent.



3. A temporary injunction does issue, restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondent either by themselves, their officers, servants, agents or otherwise, from selling, charging or transferring the property known as IR No. 105905; LR No. 12715/4704 situated in Syokimau, pending the hearing and determination of this suit.
  4. Pending the hearing and determination of this suit, the Applicant be allowed entry into the suit property to enable her remove the rest of her belongings that remained on the suit property following the eviction process on 5/8/2024.
  5. The Officer Commanding Station at Syokimau Police Station or any other as may be just in the circumstances to supervise compliance with these orders and accord the Applicant the relevant protection she needs as she removes the remainder of her belongings from the suit property.
  6. Subsequently, pending the hearing and determination of this suit, status quo of the suit premises before eviction (i.e. the Applicant be in actual possession) for the sake of security and maintenance of the suit premises.
  7. Costs of the Application be provided for.
5. The application is supported by an affidavit dated 4<sup>th</sup> November, 2024 and sworn by the Applicant. She argued that the Court should issue a temporary injunction stopping the 2<sup>nd</sup> Respondent from selling, charging or transferring the suit property pending the hearing and determination of this suit. She argued that this prayer is warranted in the circumstances because there is an imminent threat by the 2<sup>nd</sup> Respondent to charge or sell the suit property. She argued that unless the temporary injunction is granted, the 2<sup>nd</sup> Respondent may sell the suit property before the determination of this suit and she will be greatly prejudiced.
  6. The Respondents filed a joint Replying affidavit dated 15<sup>th</sup> December, 2024, and sworn by the 1<sup>st</sup> Respondent on his behalf and on behalf of the 2<sup>nd</sup> Respondent. He stated that the Applicant does not warrant the prayers sought in the Application. He stated that the Applicant should not be allowed access to the suit property because she did not leave behind any of her belongings in the suit property. In addition, he stated that the prayer for temporary injunction is not warranted because the Applicant has not demonstrated beneficial interest in the suit property. He stated that the Applicant never contributed directly or indirectly towards its acquisition and development.
  7. He stated that the Applicant lived on the suit property as a mere tenant. He averred that they leased the suit property to the Applicant for a period of 2 years from December 2021 to January 2024. He attached a copy of a lease agreement dated 20<sup>th</sup> December, 2021 stating that the Applicant was leasing the suit property for 2 years on a monthly rent of Kshs.60,000/= . The Lease agreement is between the 2<sup>nd</sup> Respondent and the Applicant. He stated that the tenancy period expired in January 2024, and they evicted the Applicant upon the expiry of the lease and for failure to pay monthly rent. The 1<sup>st</sup> Respondent did not respond to the Applicant's claims that they had cohabited as a couple, but he admitted that the Applicant was his mistress for a while.
  8. The Applicant filed a Further Affidavit dated 10<sup>th</sup> February, 2025 and sworn by the Applicant. She stated that 80 % of her belongings are still in the house-suit property. She also refuted the 1<sup>st</sup> Respondent's averment that she was a tenant on the suit property. On the contrary, she stated that she resided on the suit property for over 10 years and she developed it as an owner with beneficial interest. She also stated that she has never signed a lease agreement with the 2<sup>nd</sup> Respondent over the suit property and that the copy of a lease agreement produced by the 1<sup>st</sup> Respondent was a forgery. She stated that she is still servicing a loan she took towards development of the suit property.



9. The Application was canvassed by way of written submissions.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondent's Written Submissions**

10. The Respondents submitted that the Court should not grant the temporary injunction prohibiting the Respondents from leasing, charging, or selling the suit property. They argued that the owner of a property has absolute right to use the property in a way and manner that he deems fit. They submitted that the absolute ownership of any property vests power upon the owner to charge, lease, sell or effect transfer of any nature in a manner he so wishes. For these reasons, they argued that the 2<sup>nd</sup> Respondent, being the absolute owner of the suit property, has the right to lease, charge, or sale, and cause transfer of the suit property. They submitted that the temporary injunction should not be granted because it will prejudice the Respondents' rights over the suit property.
11. In addition, they submitted that the Applicant has not tendered evidence to show she has realizable interests in the suit property. The 1<sup>st</sup> Respondent stated that although he had an affair with the Applicant during the time tenancy, such affair never resulted to a marriage and that the Applicant was not at any point his wife. They also argued that the affair between the 1<sup>st</sup> Respondent and the Applicant commenced after the 1<sup>st</sup> and 2<sup>nd</sup> Respondent had already acquired and developed the suit property. For these reasons, they submitted that the Applicant has no capacity to stop any transaction related to the suit property.

### **Issues for Determination**

12. I have carefully considered the application, the various affidavits filed by the parties, and the respective submissions. I find that the singular issue that arises for disposal is whether the Applicant has met the threshold for grant of the orders sought.
13. In one of the prayers, the Applicant seeks temporary injunction restraining the Respondents from selling and or disposing off the suit property. There is a general agreement in case law on the definition of a temporary injunction, and the rationale of such injunctions in litigation. I associate myself with the definition offered by the court in *Chepsiror v National Bank of Kenya & another (Civil Case E26 of 2021)* [2022] KEHC 12242 (KLR) (27 June 2022) (Ruling), where the court said as follows;
- “A temporary injunction is a court order prohibiting an action by a party to a lawsuit until there has been a trial or other court action. Its purpose is to maintain the status quo and prevent irreparable damage or preserve the subject matter of the litigation until the trial is over”.
14. In Kenya, interlocutory injunctions are governed by the Civil Procedure Rules 2010, under Order 40 (1) (a) and (b) which provides as follows;
- “Where in any suit it is proved by affidavit or otherwise—
- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure cap. 21 [Subsidiary] C17 – 165;
  - b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary



injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”

15. Courts have established the conditions that a party must satisfy for the Court to grant an interlocutory injunction. The leading authority on this area is *Giella vs Cassman Brown & Company Limited* [1973] E A 358, where the Court expressed itself in the following terms;

“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.”

16. The Court in *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR commented on the rule established in *Giella vs Cassman Brown* and expressed itself as follows;

The above principles were authoritatively captured in the famous Canadian case of *R. J. R. Macdonald Vs. Canada (Attorney General)*[3] where the three part test of granting an injunction were established as follows:-

- a. Is there a serious issue to be tried?;
- b. Will the applicant suffer irreparable harm if the injunction is not granted?;
- c. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").

17. The Court is being invited to look at the facts of this case and make a determination on whether the Applicant has met the three conditions established by case law and discussed above.

### **Whether the Applicant has established a prima facie case with probability of success**

18. The first issue to evaluate is whether the Applicant has disclosed a prima facie case with a reasonable probability of success. Courts have also determined what constitutes a Prima Facie case in terms of the principle established in *Giella vs Cassman Brown*. In *Mrao Ltd Vs First American Bank of Kenya and 2 others* {2003} KLR125, the Court of Appeal described a Prima Facie case in the following terms;

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

19. The Court of Appeal in *Nguruman Ltd V. Jan Bonde Nielsen and 2 Others* [2014] eKLR described a Prima Facie case in the following terms;

“Prima facie” is a Latin phrase for “at first sight,” whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like “a serious question to be tried”, a question which is not vexatious or frivolous”, an arguable case” have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the American



Cyanamid Co. V Ethicon Ltd [1975] AC 396 is a case in point. The meaning of “prima facie case,” in our view, should not be too much stretched to land in the loss of real purpose”.

20. This Court is also guided by the observations of the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125, where the Court pronounced itself as to what constitutes a prima facie case in the following terms;

“In civil cases a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

21. Similarly, the court in *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR, made the following observations concerning the establishment of a Prima Facie case;

Steven Mason & McCathy Tetraut in their well-researched article entitled “Interlocutory Injunctions: Practical Considerations” have authoritatively stated as follows:-

“With some exceptions, the first branch of the injunction test is a low threshold.....” Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being “on the basis of common sense and a limited review of the case on the merits.” It is usually a brief examination of the facts and law.

22. The Applicant claimed that she cohabited with the 1<sup>st</sup> Respondent as a couple and that the suit property was purchased and developed during the said cohabitation. She claimed that she lived with the 1<sup>st</sup> Respondent in the suit property for about 10 years. She also claimed that they contracted a customary marriage in 2019. She attached photos allegedly taken during the said customary wedding ceremony. I have seen the photos and the 1<sup>st</sup> Respondent appears in the said photographs. The Applicant also produced a copy of a handwritten document showing the minutes of the alleged dowry payment ceremony. The document shows that the said ceremony was attended by relatives from the Applicant and the 1<sup>st</sup> Respondent’s side.
23. The 1<sup>st</sup> Respondent was served with the Application and annexures which included the photographs and the minutes of the alleged ceremony. However, he did not respond to the issue of the alleged customary marriage in his Replying affidavit or at all. He left it unchallenged and did not question the photos and the minutes of the alleged customary marriage. Instead, he only stated that the Applicant had been his mistress for a while. He also did not rebut the Applicant’s claim that they lived together in the suit property from 2013/2014 to 2021.
24. The Applicant also claimed that she lived on the suit property for 10 years as the owner and a person with beneficial interest on it. On the other hand, the 1<sup>st</sup> Respondent claimed that the Applicant lived on the suit property as a mere tenant. He produced a copy of a lease agreement showing that the Applicant leased the suit property for 2 years from December 2021 at a monthly rent of Kshs.60,000/= . I note that this tenancy might explain how the Applicant was on the suit property between December 2021 and January 2024. However, the 1<sup>st</sup> Respondent did not offer any explanation on the circumstances



under which the Applicant came to occupy the suit property in 2013/2014 to 2021, which period clearly preceded the disputed tenancy agreement.

25. The above is just a brief examination of the facts. It is a limited review of the merits of the case, based on the available materials. The Respondents are yet to file their Defense to the main suit. They will probably file the defense and counter the Applicant's claims with more documentary evidence. However, this court is satisfied that the application is neither vexatious nor frivolous. In my view, and based on the materials availed at this stage, the Applicant has established a prima facie case with a probability of success.

#### **Whether The Plaintiff/applicant Will Suffer Irreparable Loss Which Would Not Be Adequately Compensated by an Award of Damages**

26. I now turn to the second test for determination which is whether the Applicant will suffer irreparable loss if the injunction is not granted. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR gave guidance on how to determine whether an Applicant was likely to suffer irreparable loss. The court held as follows;

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

27. This Court also associates itself with the reasoning of the Court in *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR, where the Court interrogated the same issue and held as follows;

“The second test for determination is whether the applicant will suffer irreparable loss. The following paragraph in *Halsbury's Laws of England*[14] is instructive. It reads:-

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

28. The Applicant claimed that the Respondents are likely to sell, lease, charge, or transfer the suit property with a view to frustrating her claim. She claimed that she is still servicing a loan taken towards



development of the suit property, and that she does not have the same energy she had then to start all over again and raise funds to purchase a home for her children. She also claimed that it has taken her time-10 years- to bring the suit property to its current condition. She submitted that the loss of the property will render her destitute and lose years of investment.

29. I have carefully looked at the facts and documents filed in Court to access whether the Applicant stands to suffer irreparable harm if the temporary injunction is not granted. I have seen numerous receipts dated between 2014 and 2021 showing Applicant's payment for construction materials and house fixtures like doors, windows, locks, frames, cement, among other things. This court cannot confirm the authenticity of the said receipts at this stage and this will be determined in the hearing of the main suit. I have also seen that the Applicant took out a loan at Standard Chartered in 2018 although it was not shown, at this stage, whether the said loan went into the development of the suit property.
30. However, this Court is in doubt as to whether the Applicant is likely to suffer irreparable loss or harm if the injunction is not granted. The Applicant does not live on the suit property, although she questions the manner in which she was evicted therefrom. In my view, any possible harm that might be suffered by the Applicant can be adequately compensated by way of payment of damages.

### **In Whose Favour Does The Balance Of Convenience Tilt In?**

31. I now turn to the third test for determination. The question under this limb is to determine which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits. It is also known as balance of convenience. This question is usually answered by determining whether the balance of convenience lies in favour of granting or refusing the application.
32. Courts have established that this third limb comes into play where the Court is in doubt on whether the Applicant is likely to suffer irreparable loss. This rule was recently applied in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the Court of Appeal held as follows;

“...It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

33. I have relooked at the facts to see whether the Respondents are likely to dispose of the suit property in the absence of the temporary injunction. I have noted that the 1<sup>st</sup> Respondent obtained a provisional certificate of title to the suit property on 30<sup>th</sup> September, 2021. I have also noted that he, almost immediately, transferred the property to the 2<sup>nd</sup> Respondent on 30<sup>th</sup> November, 2021. He claimed that he transferred the suit property to the 2<sup>nd</sup> Respondent out of love and affection. I also appreciate that, being the absolute owner of the suit property, he had the rights to effect the transfer.
34. However, the Applicant questioned the manner and the circumstances in which the 1<sup>st</sup> Respondent effected the transfer. She argued that the transfer was collusion between the Respondents and a scheme to frustrate her claims to the suit property. She claimed that the provisional title deed was obtained illegally. She stated that the original title had not been lost and that she still retains it.
35. While as these are disputed facts and remain to be determined at the main hearing, this Court notes something peculiar with the events of 2021. The Applicant claims that the 1<sup>st</sup> Respondent deserted their joint home on the suit property in 2021. In the same year, the 1<sup>st</sup> Respondent obtained a provisional certificate of title on 30<sup>th</sup> July. He transferred the suit property to the 2<sup>nd</sup> Respondent on 30<sup>th</sup> November, 2021, which was within 4 months after obtaining the provisional certificate. The 2<sup>nd</sup>



Respondent claims she entered into a lease agreement with the Applicant on 20<sup>th</sup> December, 2021, which was within 20 days after the transfer had been effected in her favor. The Applicant has disputed the said lease agreement and described it as a forgery.

36. This Court notes that all these events happened in a quick succession within 6 months between July 2021 and December 2021. In my view, and based on this factual background, it is more likely that the Respondents will do many more on the suit property if a temporary injunction is not granted pending the hearing and determination of the main suit. For these reasons, I find that the balance of convenience lies in granting the temporary injunction.

37. In arriving at this conclusion, I am guided by the Court of Appeal's decision in *Esso Kenya Limited v Mark Makwata Okiya Civil Appeal No 69 of 1991*, where the Court stated as follows concerning the objective of a temporary injunction:

“...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgment in his favor the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgment nugatory...”

38. In the end, I find that the Applicant's Application dated the 4<sup>th</sup> November, 2024 has merit and is hereby allowed, though partially.

39. Parties are directed to take necessary steps for the swift resolution of the matter.

### **Disposition**

40. The Application partially succeeds. Prayers 3, 4, and 5 of the Application are granted. Prayers 6 and 7 are declined/disallowed.

41. These are the final orders of the Court;

1. A temporary injunction does issue, restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondent either by themselves, their officers, servants, agents or otherwise, from selling, charging or transferring the property known as IR No. 105905; LR No. 12715/4704 situated in Syokimau, pending the hearing and determination of this suit.
2. Pending the hearing and determination of this suit, the Applicant be allowed entry into the suit property to enable her remove the rest of her belongings that remained on the suit property following the eviction process on 5<sup>th</sup> August, 2024.
3. The Officer Commanding Station at Syokimau Police Station or any other as may be necessary in the circumstances to supervise compliance with these orders and accord the Applicant the relevant protection she needs as she removes the remainder of her belongings from the suit property.
4. No order as to costs.

42. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 9<sup>TH</sup> DAY OF MAY, 2025.**

.....  
**C. KENDAGOR**



## **JUDGE**

In the presence of:

Court Assistant: Beryl

Advocate Netia for Plaintiff

No attendance for Defendants

