



**Mathai v Ndiangui (Civil Case E002 of 2023)
[2024] KEHC 10922 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10922 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL CASE E002 OF 2023
MA ODERO, J
SEPTEMBER 20, 2024**

BETWEEN

ELIZABETH WAIRIMU MATHAI APPLICANT

AND

JOSEPH MATHAI NDIANGUI RESPONDENT

RULING

1. Before this court for determination is the Amended Notice of Motion dated 19th April 2023 by which the Applicant Elizabeth Wairimu Mathai seeks the following orders;-
 - a. Pending the interpartes hearing and/or determination of this application, suit (Originating Summons) and or further orders of the court and order of temporary injunction do issue restraining the Respondent/defendant either by himself and his authorized agents, servants or employees, anyone claiming through him or otherwise whatsoever from harvesting/cutting down trees, alienating, registering transferring to third parties the ownership and possession of all those properties known as Nyeri/Endarasha 1670, ensuing subdivision of Nyeri/Warazo 1096 to 1100, 432, 628, Laikipia Solio Ranch/185(v4) and or dealing with the said parcel of land in any manner detrimental to the applicant's interests.
 - b. Costs of the application be borne by the Respondents.
2. The application was premised upon Orders 51, Order 40, 1, 2, and 3 of the Civil procedure Rules 2010, Section 1A, B, 3A and 63E of the Civil Procedure Act Cap 21 Laws of Kenya and all enabling provisions of law was supported by the Affidavit of even date sworn by the Applicant.
3. The Application was based upon the following grounds;-
 - a. The applicant is the legal wife of the defendant having been married on 1/12/1990 and acquired the matrimonial properties during the subsistence of the marriage being Nyeri/



Endarasha 1670 on 3/6/1996, Nyeri/Warazo/407 on 10/12/2009, Nyeri/Warazo /432 on 28/3/2011 and Laikipia Solio Ranch/185(v4) on 14/4/2016 which are registered in the name of the defendant.

- b. That the Applicant on 18/7/2023 requested for a copy of the green for Nyeri/Warazo/1670 and that the same had been subdivided without the consent of the Applicant in new numbers Nyeri/Warazo 1096 to 1100 as at 3rd January 2023 and two parcels thereof Nyeri/Warazo/1096 and 1097 transferred to the 3rd and 4th Respondents.
 - c. That the said marriage has been gruesome and the Respondent forced the applicant out of the matrimonial home since 13th March 2022 which informed the applicant to put cautions on the suit land after realizing that the Respondent had commenced selling the suit land without the consent of the Applicant.
 - d. That he Respondent fraudulently and without informing the applicant removed the cautions over the suit property via Nyeri Misc Application 11 of 2022 which was granted.
 - e. That the Applicant is apprehensive that the suit land will be sold and the overriding interest shall be negated unless orders issue.
 - f. That the respondent has been harvesting trees on the suit land without sharing proceeds with the Applicant
 - g. That the suit land is matrimonial property acquired during the subsistence of the marriage and hence the same cannot be transacted upon without compliance with Section 93 of the Land Registration Act and Matrimonial Property Act 2014 as the properties are held in trust for the Applicant. That no spousal consent was obtained from her.
 - h. That the Applicant and Respondent have jointly developed the land and established matrimonial homes in Nyeri Endarasha/1670 and Nyeri/Warazo/407
 - i. That the Applicant took care of all the dealings in the lands and domestic affairs including bringing up adult children Daniel Ndiangui Maathai, Boniface Ndirangu Mathai, Grace Mukami Mathai when he defendant was not at home.
 - j. That the Applicant is now elderly and is likely to suffer irreparable loss as it is clear that there is imminent jeopardy of being deprived right to property place of abode and he attempt to sell and or transfer the suit land are adverse to the applicant overriding interest in the land.
 - k. That it is in the interest of justice that the restraining orders sought be granted otherwise the main suit shall be rendered nugatory.
 - l. That the jurisdiction to issue interlocutory orders.
4. The Respondents opposed the application through the Replying Affidavit dated 17th March 2023 sworn by the 1st Respondent Joseph Mathai Ndiangui.
 5. The 1st Respondent stated that the Applicant was his estranged wife and that she had voluntarily moved out of the matrimonial home at Solio Plot No. 413 which home had been constructed by their children.
 6. The 1st Respondent asserted that all the properties listed in the Originating Summons belonged to him as he had purchased them personally without any contribution from the Applicant. That the Applicant was all along a house wife and had never worked.



7. The 1st Respondent further stated that he had fallen ill and had been hospitalized severally requiring him to take expensive drugs. Due to the burden of medical costs the 1st Respondent decided to sell part of his properties to finance his medical treatment. That the Applicant has incited their children against the 1st Respondent claiming that he is only feigning illness and that his family have abandoned him at his time of need. That he has been left all alone in the matrimonial home.
8. The 1st Respondent states that the Applicant currently resides in a house put up for her by their children on Parcel no. 413 Solio. He denies the Applicants allegations that she faces eviction from that home.
9. The 1st Respondent states that he has only sold half ($\frac{1}{2}$) an acre out of an aggregate ten (10) acres of land. He reiterates that he is the registered owner of the suit land and ought to be allowed to deal with his property as he wishes. Finally the 1st Respondent prays that this application for stay be dismissed in its entirety.
10. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 8th April 2024 whilst the 2nd and 4th Respondents relied on their written submissions dated 8th July 2022

Analysis And Determination

11. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by the parties.
12. The Applicant is seeking an interim injunction to prevent any dealings in the properties which she claims are 'Matrimonial properties' pending the hearing and determination of the originating summons seeking division of matrimonial properties.
13. The question of whether or not the cited properties constitute matrimonial property and the question of what share if any of he said properties the Applicant is entitled to cannot be determined at this stage. These are issues which can only be determined after hearing of the main suit at which evidence will be adduced by both parties. At this stage the court is only required to determine whether there exists a 'prima facie case' to merit the temporary injunction prayed.
14. In the case of Sylvester Momanyi Maribe -vs- Guizar Ahmed Motari and Another [2012] eKLR Hon. Justice George Odunga (as he then was) stated as follows:-

In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law most certainly not on the basis of contradictory affidavit evidence or disputed prepositions of law and that in an application for injunction although the court cannot find conclusively who is to be believed or not, the court is not excluded from expressing a prima facie view of the matter and the court is entitled to consider what else the deponent to the supporting affidavits has stated on oath which is not true.
15. The grounds upon which an interlocutory injunction may be granted were set out in the case of Giela -vs- Casman Brown [1973] EA as follows

“The conditions for the grant of an interlocutory injunction are 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 on application on the balance of convenience.”

16. The definition of a Prima Facie case was given in the case of Mrao Ltd -vs- First American Bank Of Kenya Ltd & 2 Others [2003] eKLR as follows:-

“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. This is clearly a standard which is higher than an arguable case.

17. It is not in dispute that the Applicant and the 1st Respondent are a Married who are now estranged the Applicant having left the matrimonial home.
18. The Applicant claims that she is entitled to a share of the properties which were acquired during the subsistence of the marriage. The 1st Respondent counters that he purchased the properties alone without any contribution from the Applicant and is therefore entitled to utilize the said properties as he wishes.
19. As stated earlier the issues revolving around what share if any the Applicant is entitled to cannot be determined under the auspices of this application. Suffice to say if the 1st Respondent continues to sell, transfer and/or otherwise dispose of the suit properties then the subject matter of the suit may be dissipated. This will be detrimental to the Applicant as in effect there would be nothing left for her to claim and/or own.
20. In the premises I am satisfied that a prima facie case has been established by the Applicant. I note however the Parcel of land known as Nyeri/Warazo/407 was subdivided by the 1st respondent. That out of the said subdivision three (3) plots of 50 x 100 have been sold and transferred to third parties. The Applicant in her Affidavit confirms that subdivisions Nyeri/Warazo/1096 and 1097 have been transferred to the 2nd and 3rd Respondents respectively.
21. This court will not interfere with the properties which have already been sold and transferred. If the main suit is decided in favour of the Applicants then the 1st Respondent may be ordered to refund to the Applicant her share (if any) of the proceeds of sale.
22. In my considered opinion the balance of convenience in this matter tilts in favour of the Applicant. In the case of Mina Achendid -vs- National Bank Of Kenya Limited [2017] eKR the court held as Follows -

“As to whether the balance of convenience is in favour of the Plaintiff, the decision of the Court of Appeal in Charter House investments *Ltd vs. Simon K. Sang and Others Civil Appeal No. 315 of 2004* is instructive that: “injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and the third party.”



23. Finally I find merit in this application and make the following orders.
1. Pending the interpartes hearing and determination of the Amended Originating Summons dated 1st February 2023 an order of temporary injunction be and is hereby issued restraining the 1st respondent Joseph Mathai Ndiangui, either by himself, his authorized agents, servants employed and/or any one claiming through him from alienating, transferring, charging, and/or in any other manner whatsoever dealing with the properties known as Nyeri/Endarasha 1670, Laikipia Solio Ranch/ 185(V4) as well as the ensuing subdivisions out of Nyeri Warazo 407 being Nyeri Warazo 1098-1100 Nyeri/Warazo/432 and Nyeri/Warazo 628 only.
 2. This being a family matter each party will bear their own costs.

DATED AT NYERI THIS 20TH DAY OF SEPTEMBER, 2024

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MAUREEN A. ODERO
JUDGE

