



REPUBLIC OF KENYA



KENYA LAW
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**Sebastian v Omondi (Civil Suit E004 of 2024)
[2024] KEHC 12354 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT E004 OF 2024
E OMINDE, J
OCTOBER 16, 2024**

BETWEEN

CECILIA NGUNYA SEBASTIAN PETITIONER

AND

BENARD OTIENO OMONDI RESPONDENT

RULING

1. The Applicant approached this court by way of a Notice of Motion dated 20th May 2024 seeking the following orders;
 - i. Spent
 - ii. That the property land parcel Eldoret Municipality/block 21 (king'ong'o/4709) owned together by the plaintiff and Respondent herein but registered in the name of the Respondent be declared as matrimonial property.
 - iii. Spent
 - iv. The Respondent , his agents' representatives and or employees or any other person claiming through them be barred from interfering onto entering into or in any other manner interfering with or restricting the plaintiffs' rights occupation and or interest over the matrimonial home situated on land parcel Eldoret Municipality/block21 (King'ong'o/4709).
 - v. That this honourable court do make any such other further orders it deems fit and expedient to serve the best interest of justice pending the hearing and determination of the main cause.
 - vi. That costs of the Application be in the cause.
2. The Application is premised on the grounds on the face of it and the contents of the affidavit in support of the Application



3. The Applicant deposed that she and the Respondent are legally husband and wife and there is a divorce cause between them pending determination, being Eldoret Divorce cause No. E58 of 2024.
4. Further, that they bought land and subsequently built their home on land parcel No. Eldoret Municipality/Block 21 (King'ong'o/4709). She stated that the Respondent has threatened to sell their home and it is therefore necessary that the appropriate orders be granted by this court in order to safeguard the parcel of the land pending these proceedings. She urged that the Respondent will not be prejudiced as he lives and works for gain in Kakamega.
5. The Respondent opposed the Application vide a Replying Affidavit dated 11th July 2024. He deposed that on 26th March 2012, he purchased the property known as land parcel Eldoret municipality/Block 21 (King'ong'o/4709) from John Kaminja Mugui at a cost of Ks. 1,200,000/- where he set up his family home.
6. That he paid a deposit of Ks. 900,000/- as follows; Ks 500,000/- and Ks. 330,000 making a total of Ks. 830,000 was deposited in the vendors account on 26th March 2012. Further, Ks. 70,000 was given as cash giving a total of Ks. 900,000/ as agreed in the sale agreement which he annexed and marked as BOO-2. Additionally, he paid Ks. 1,000 to the firm of M/S Omollo Esikuri & Company Advocates for the sale agreement prepared in the material date.
7. The Respondent deposed that he made further payments on 13/07/2012 to clear the balance of the purchase price being two deposits of Ks. 110,000/- and Ks. 190,000/-. The seller acknowledged receipt of the purchase price and undertook the transfer in his name by 31st August 2012.
8. He stated that the Petitioner did not make any monetary contribution towards the purchase of this matrimonial property. Further, that he began taking loans from friends and colleagues in 2014 and an additional loan from National Bank of Kenya to enable him complete the project.
9. The Respondent further deposed that since 2019, the Respondent has been staying in the matrimonial home with their children and he has never threatened to sell the house. That the divorce proceedings are still pending before court in Eldoret Divorce Case E058 of 2024 and the issue of division of matrimonial property will only arise after conclusion of the divorce case. He stated that the Applicant has not proved that she made any monetary contribution and further, that the Petitioners' Application and suit fall short of the criteria for grant of an injunction.
10. The Applicant filed a supplementary affidavit dated 01/08/2024 where she deposed that in response to the replying affidavit. She urged that she would demonstrate her contribution at an opportune time and further, that the Respondent had jumped the gun by speaking to the issue of contribution at this point in time. She reiterated that the Respondent has on various occasions demanded that she and the children leave the matrimonial home so that he can sell the matrimonial home. This informed the Applicants' move to lodge a caution in order to safeguard her interests.

Hearing of the Application

11. The parties agreed to canvass the Application vide written submissions. The appellant filed submissions through the firm of M/S Njiru Kibaru & Co Advocates whereas the Respondent filed submissions through the firm of M/S Samba, Odek & Mulama Advocates.

Applicant's submissions

12. Learned counsel for the Applicant submitted that the issue of ownership and division of matrimonial property is subject to determination of divorce proceedings and subsequent filing of division of



matrimonial property by the parties herein. Further, that the mandate of the court at this point in time is to preserve the suit property and protect the parties' beneficial interest and proprietary interest on the said property by giving them equal opportunity to give prove their stake in the property.

13. Counsel cited the case of *Giella vs Cassman Brown (1973) EACA* on the issue of whether injunctive orders sought should be issued, urging that both parties have confirmed to the court that they are indeed married and currently pursuing a divorce. Additionally, that they have confirmed that there is a matrimonial property currently being occupied by the Applicant and the children. That the Respondent has confirmed that the Applicant has since placed a caution on the property seeking to safeguard her interests and as such, she has demonstrated that there is a prima facie case.
14. Counsel urged that the Applicant is likely to suffer irreparably if the property is not preserved as the property is registered in the Respondents' name and he can therefore do as he wishes with the property. He prayed that the court observe the status quo and the Respondent be restrained by way of injunction from selling or transferring the suit land.

Respondents' submissions

15. Learned counsel for the Respondent submitted that the principles for granting an injunction were set out in the case of *Giella vs Cassman Brown (1973) EACA* where the court stated that the Applicants must show that they have a prima facie case with a probability of success and that they stand to suffer irreparable loss which may not be compensated by an award of damages. If the court is in doubt on the foregoing, it should decide the matter on a balance of convenience.
16. The Respondent submitted that a prima facie case was defined in *Black Laws Dictionary*, 9th edition p.1310 as 'the establishment of a legally required rebuttable presumption; a party's production of enough evidence to allow the fact trier to infer the fact at issue and rule in the party's favour'. Additionally, counsel cited the case of *Mrao Ltd versus First America Bank of Kenya Ltd & 2 others (2003) KLR 125* where the court defined a prima facie case.
17. Counsel urged that from the supplementary affidavit and submissions of the Applicant, she has abandoned prayer 2 and is now asking the court to preserve the suit property and protect the parties' beneficial interest. Further, that the Applicant has not placed any material evidence before the court that would make it conclude that there exists a right which has been infringed to call for an explanation or rebuttal.
18. He submitted that the Respondent has detailed how he purchased the property and that he has not threatened to sell the home as alleged by the Petitioner. Counsel submitted that the caution registered by the Applicant is to her favour and she is seeking to use the injunction to deny him entry in his home and bar him from visiting his children. Counsel maintained that the Applicant has not proved contribution to the purchase of the matrimonial home and therefore there is no prima facie case with probability of success.
19. Counsel cited the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others (2014)* on the issue of the requirement for an Applicant to prove to the court that they will suffer irreparable harm that would not be adequately compensated by an award of damages. He reiterated that the Applicant had registered a caution on the property in her favour and further, that she had not placed any evidence before the court on what injuries she would suffer in the event injunction orders are granted.
20. It is the Respondent's case that the balance of convenience falls in his favour based on the fact that the Applicant has failed to not only establish a prima facie case, but also failed to prove that she shall suffer



irreparable injury which would not be compensated adequately by an award of damages. He urged the court to dismiss the Application with costs to the Respondent.

Analysis & Determination

21. Upon considering the pleadings, responses and attendant submissions, it is my considered opinion that the following issue is the only one that arises for determination;
 - i. Whether the Application meets the requirements for grant of an interlocutory injunction
22. Interlocutory Injunctions are governed by Order 40 Rule 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides that: -

“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;
 - (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.”
23. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) EA 358, where the court expressed itself on the condition’s that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, 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.”
24. The test for granting of an interlocutory injunction was considered in the case of *American Cyanamid Co. v Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance namely;
 - i. There must be a serious/fair issue to be tried,
 - ii. Damages are not an adequate remedy,
 - iii. The balance of convenience lies in favour of granting or refusing the Application
25. It follows that the requirements for an Application for an interlocutory injunction to succeed are that the Applicant must show
 - i. Existence of a prima facie case with a probability of success
 - ii. The Applicant will suffer irreparable injury which cannot be compensated by damages.



- iii. Where the balance of convenience lies
26. The definition of a prima facie case was given in *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”.
27. At this point in time the court is required to determine whether there is a prima facie case warranting issuance of interlocutory orders. In *Silvester Momanyi Maribe -vs- Guizar Ahmed Motari & Another* (2012) eKLR Hon. Justice 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 act or law. Most certainly not on the basis of contradictory Affidavit evidence or disputed propositions 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”.
28. The parties herein were indisputably a married couple whose union is currently before a court in a divorce cause. The applicant has brought this motion on the premise that whereas the Respondent lives in Kakamega, she lives on the matrimonial home which is situate upon the suit land together with the issues to the marriage.
29. That she is apprehensive that the Respondent who has threatened to sell the their matrimonial home whose purchase and establishment she contributed to, may make good his threat and sell and/or dispose of the said home to her detriment and that of the children and in a sense steal a match against her in the pending divorce proceedings.
30. As deposed by the Respondent in his Replying Affidavit, the Applicant admits that she did in fact place a caution over the suit premises sometime on 30th June 2021 in her favour claiming spousal interest and that the said caution is still in place. She deposes that she took this action because of the constant threats by the Respondent to dispose of the matrimonial home to her detriment and that of the children
31. Section 6 of the *Matrimonial Property Act* 2013 defines matrimonial property as follows;
- “6(1) For purposes of this Act Matrimonial Property means –
- a. The matrimonial home or homes.
 - b. Household goods and effects in the matrimonial home or homes; or
 - c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage”.
32. Since it is not in dispute that the suit premises is the place where the Applicant lives with the issues to the marriage between herself and the Respondent, without going into the issue of who contributed



what towards its establishment, an issue which does not fall within the realm of these proceedings, the Court finds that prima facie, the Applicant has established that the suit premises is their matrimonial home.

32. However, the next question that the Court need to address its mind to is whether this fact alone entitles the Applicant to a grant of interim orders of injunction.
32. As per the holding in the case of Mrao Limited (Supra), for a prima facie case to be established, an Applicant must demonstrate that not only does there exist a right, but a party must also demonstrate that the said right has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.
32. That holding goes further to state that it is not sufficient to raise issues but the evidence must show an infringement of a right.
32. In the instant Application, apart from simply stating that the Respondent has threatened to dispose of the suit premises by way of sale and thus dispossessing the Applicant and her children of a home, I am of the finding that she has not in any way demonstrated how the Respondent has gone ahead to actualize this threat.
32. Further to the above, the Applicant has already secured her spousal interest by way of placement of a caution upon the suit land in a bid to secure her spousal interest and has not at all alluded to the fact and/or demonstrated that the Respondent has in any way and/or at all attempted to vacate the said caution in a bid to dispose of the suit land.
32. Because it is a matter of Judicial Notice and Public Notoriety that once a caution is placed on any parcel of land, no transactions of whatever nature can be done over such land until that caution is removed by the person who placed it or by an order of the Court, I find that for the Applicant has already sufficiently secured the suit land and that this application is superfluous.
32. My finding above is further buttressed by the fact of my careful perusal of the orders that the Applicant seeks and more particularly in prayer iv) of the Notice of Motion, the applicant having abandoned prayer ii), and prayer iii) having been spent. The said prayer is as follows;

iv. The Respondent, his agents, representatives and or employees or any other person claiming through them be barred from interfering onto entering into or in any other manner interfering with or restricting the plaintiffs' rights occupation and or interest over the matrimonial home situated on land parcel Eldoret Municipality/block 21 (king'ong'o/4709).

32. On the face of it, this prayer does not at all have anything to do with preserving the suit premises as matrimonial property. Instead, it has everything to do with barring the Respondent from entering into and/or interfering with the Applicant and the matrimonial home either by himself or by any other person claiming through him.
32. Further to this, because it is common ground that the Applicant lives on the suit premises with the children to the marriage, it obviously follows that if the Respondent is barred from the suit premises, then he is also barred from and denied access to the children.
32. The Respondent has deposed that he has not at all threatened to dispose of the suit property by way of sale to the detriment of the Applicant and the children and that this suit has nothing to do with the preservation of the matrimonial property but has everything to do with denying him access to the children and in light of my findings above, I am inclined to agree with the Respondent in this regard.



32. Given the sum total of my findings as above, I am well satisfied that save to demonstrate that the suit is matrimonial property, the Applicant has failed to establish a prima facie case within the parameters set out in the case of Mrao Ltd vs First America an Bank of Kenya Ltd & 2 Others (2003) eKLR as herein above demonstrated.
32. In the case of Nguruman Limited vs Jan Bonde Nielsen & 2 others (2014), the Court of Appeal held that if a Court is satisfied that a prima facie case has not been established, then the it need not make any finding on the two subsequent requirements that an applicant is required to sequentially surmount to wit irreparable harm that cannot be adequately compensated for by way of damages and balance of convenience. I shall therefore not delve into these two parameters.

In light of the above, it is my finding that the Applicant's application lacks merit and the same is accordingly dismissed in its entirety with costs to the Respondents.

READ DATED AND SIGNED AT ELDORET ON 16TH DAY OF OCTOBER 2024

E. OMINDE

JUDGE

