



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**CIVIL SUIT NO. 13 OF 2021 (OS)**

**EMN.....PLAINTIFF**

**=VERSUS=**

**DNN.....DEFENDANT**

**RULING**

1. This suit was initiated by way of Originating Summons taken out by the Plaintiff herein dated 7<sup>th</sup> July, 2021. In the said Summons, the Plaintiff seeks the following orders:

**1) A declaration that the parties herein have equal rights of access, use and enjoyment of the matrimonial property herein more particularly described as Land Parcel Numbers Kangundo/Mbusyani/xxx, Matungulu/Kyaume/xxxx, Plot No. xx at Kawethei Market, Plot No.xxat Kawethei Market, a Portion of Kangundo/Mbusyani/xxx, Matungulu/Kawethei/xxxx, Matungulu/Kawethei/xxxx, a portion of Kangundo/Mbusyani/xxxx and House No. xxx at Umoja II.**

**2) An order that the said properties described as Land Parcel Numbers Kangundo/Mbusyani/xxx, Matungulu/Kyaume/xxxx, Plot No. xx at Kawethei Market, Plot No.xxat Kawethei Market, a Portion of Kangundo/Mbusyani/xxx, Matungulu/Kawethei/xxxx, Matungulu/Kawethei/xxxx, a portion of Kangundo/Mbusyani/xxxx and House No. xxx at Umoja II be shared equally between the plaintiff and the defendant; and that the plaintiff do retain the matrimonial home constructed on Land Parcel Number Kangundo/Mbusyani/xxx or alternatively, be compensated monetary wise to put up an equivalent house for herself.**

**3) An order that costs of this suit/Summons and proceedings thereon be paid by the defendant.**

**4) Any other order that this Honourable Court may deem fit and just to grant.**

2. According to the Plaintiff/Applicant herein, she got married to the Defendant herein in the year 1994 under the Kamba Customary Law and thereafter cohabited as husband and wife both at Nairobi and at Kawethei. According to the Plaintiff, before their marriage she was working as a teacher but resigned from employment in the year 1995 after the defendant forced her to do so, so as to take care of him and his children he had sired with his former wife with whom they had separated in view of the fact that his work involved a lot of travelling. Further to taking care of the children and doing the house wife duties, she also operated small businesses when the children were in school to supplement the family income.

3. It was averred that the said marriage was blessed with two children.

4. It was averred that upon the said marriage, the defendant and the Plaintiff established their matrimonial home on Land Parcel Number **Kangundo/Mbusyani/xxx** which land the defendant had acquired before the aforesaid marriage. However, the Plaintiff averred that she has since 1994, contributed both directly and indirectly towards the enhancement of its value by clearing, terracing and furrowing the land; planting hundreds of exotic trees which are mature now; fencing off the land and keeping it habitable; and extension of the house and renovations.

5. It was further averred that during the subsistence of the marriage, the couple jointly acquired several properties registered in the defendant's name but held in trust of the family which include:

**a. Kangundo/Mbusyani/xxx,**

**b. Matungulu/Kyaume/xxxx,**

- c. Plot **No. xx** at Kawethei Market,
- d. Plot **No.xx**at Kawethei Market,
- e. a Portion of Land Parcel Number **Kangundo/Mbusyani/xxx**,
- f. **Matungulu/Kawethei/xxxx**,
- g. **Matungulu/Kawethei/xxxx**,
- h. a portion of **Kangundo/Mbusyani/xxxx** and
- i. **House No. xxx** at Umoja II.

6. According to the Plaintiff, Plot Number xx at Kawethei market is fully developed whilst Land Parcel Number **Matungulu/Kyaume/xxxx** is under construction for Commercial Plots.

7. It was averred that in 2019, the Defendant filed a Petition for divorce of the said marriage, which although disputed by the Plaintiff, was granted on 5<sup>th</sup> December, 2019 and an appeal against the decision was subsequently disallowed. However, since December, 2019, the Defendant has been threatening to lock the Plaintiff out and/or evict her from the said matrimonial home, which threats have intensified after the aforesaid High Court Judgment, notwithstanding the fact that the Plaintiff has nowhere to go.

8. It is therefore the Plaintiff's prayer that the said properties ought to be shared equally between herself and the defendant, and the matrimonial home to be given to her. It was disclosed that the couple have several fully developed properties within Kawethei which are solely accessible by the defendant herein hence he will suffer no prejudice if the Plaintiff retains the matrimonial home since she has for the last 27 years utilized her income from the small businesses and contributed towards developing the said matrimonial home, where she has all along lived.

9. It was disclosed that during the said divorce proceedings, the Defendant acknowledged that the Plaintiff left her formal employment to take care of his children he had sired in his former marriage.

10. The Plaintiff therefore sought an order that she has an uninterrupted right to use, access and occupy their matrimonial home on Land Parcel Number **Kangundo/Mbusyani/xxx** and that the defendant cannot sale, dispose, transfer or otherwise alienate any of the matrimonial properties without her consent. In her view, she stands to suffer irreparably unless the orders sought herein are urgently granted.

11. Together with the said Summons the Plaintiff filed a Motion dated 7<sup>th</sup> July, 2021 in which she sought the following orders:

- 1) **THAT this application be certified as urgent and service be dispensed with in the first instance.**
- 2) **THAT an order of injunction do issue restraining the Respondent from evicting and/or denying the applicant free access, use and quiet occupation of the parties' matrimonial home constructed on Land Parcel Number Kangundo/Mbusyani/xxx pending the hearing and determination of the application herein.**
- 3) **THAT an order of injunction do issue restraining the Respondent from evicting and/or denying the applicant free access, use and quiet occupation of the parties' matrimonial home constructed on Land Parcel Number Kangundo/Mbusyani/xxx pending the hearing and determination the cause herein.**
- 4) **THAT the defendant be restrained either by himself or his agents and/or servants from selling, charging or transferring Land Parcels Numbers Kangundo/Mbusyani/xxx, Matungulu/Kyaume/xxxx, Plot No. xx at Kawethei Market, Plot No.xxat Kawethei Market, a Portion of Kangundo/Mbusyani/xxx, Matungulu/Kawethei/xxxx, Matungulu/Kawethei/xxxx, a portion of Kangundo/Mbusyani/xxxx and House No. xxx at Umoja II pending the hearing and determination of the cause herein.**
- 5) **THAT this Honourable Court do make any further orders as it may deem fit and just to grant.**
- 6) **THAT costs of this application be borne by the defendant/Respondent.**

12. In support of the application the Plaintiff reiterated the averments in the affidavit in support of the petition and added that the Respondent has thrown some of her personal belongings out hence her apprehension that the Defendant will proceed to forcefully evict her if not restrained by an order of this Court. She further averred that she is unwell and currently on bed rest hence unable to get an alternative accommodation if the Respondent succeeds in the threatened eviction. She therefore sought an order that she has an uninterrupted right to use, access and occupy their matrimonial home on Land Parcel Number **Kangundo/Mbusyani/xxx** and that the defendant cannot sale, dispose, transfer or otherwise alienate any of the matrimonial properties before the matter herein is heard and fully determined.

13. In her further affidavit, she averred that all along before, during and after the divorce proceedings she has been living at their matrimonial house built on **Kangundo/Mbusyani/xxx** and that she has no other house either at Kawethei market as alleged or at all. She stated that as at the time the Respondent threw out her items, she was at the hospital and as such the Respondent is blatantly lying to this Court that she was the one who moved them out. She denied that she threatened the Respondent herein and these allegations were never proved during the hearing of the divorce proceedings.

14. The Plaintiff disclosed that as at the time she was married, the Respondent had constructed a small house and she has both directly and indirectly contributed to its extension and renovation in order to enhance its value. According to the Plaintiff, since both herself and the Defendant have equal rights to the matrimonial home, she should not be evicted before the matter is heard and determined. Since the Respondent is the one in possession and control of other matrimonial properties which she cannot access, the Defendant averred that she has nowhere to go if the Respondent succeeds in his threats to evict her. Since the Defendant is also disposing off some of the properties named herein, she prayed that the Defendant should be restrained from doing so pending hearing and determination of the suit herein.

15. The application was, however, opposed by the Defendant. While admitting that he and the Plaintiff/Applicant herein were married which marriage had since been dissolved, in Kangundo Divorce cause number 7 of 2019 as confirmed by the High court in civil appeal number 164 Of 2019, he denied that he forced the Plaintiff/Applicant to resign from her job as a teacher in a village polytechnic where she taught wood work and masonry. According to him, the Plaintiff quit voluntarily. After quitting, the Defendant averred that he kept on starting businesses for the Plaintiff which she always run down and ended up closing.

16. It was averred by the Defendant that at the time of their marriage he was already working and had built his house in the year 1982 on land registered as Kangundo/Mbusyani/xxx where he was staying and the Plaintiff/Applicant only moved into an already built house 11 years later. It was his position that the Plaintiff/Applicant has never contributed either directly or indirectly towards the enhancement of the value of the house as alleged and that the trees shown on the photographs, the fence and extension of the house was done solely by himself. He was also unaware of any property that he acquired jointly with the Plaintiff/Applicant. He however denied that he is the owner of the properties listed by the Plaintiff/Applicant in her supporting affidavit. He categorically denied that plot number xx belongs to him and that he is in the process of developing Matungulu/Kyaume/xxxx as the same does not belong to him.

17. The Defendant denied that he threatened the Plaintiff/Applicant with eviction as alleged and averred that the reason he filed for divorce was that the Plaintiff/Applicant was adulterous, denied him conjugal rights, was engaged in witch craft with the intention of killing him and that used to desert him on numerous occasions. According to him, it was the Plaintiff who on numerous occasions, threatened him with death as a result of which he was constantly living in fear that she will make good her threats. He averred that the Plaintiff/Applicant poisoned him several times but he survived which led him to stop eating food prepared by her forcing to him cooking his own food and locking it in the bedroom where the Plaintiff/Applicant had no access.

18. The Defendant lamented that the Plaintiff/Applicant has been constantly lying to the courts that he is planning to evict her to obtain orders to continue tormenting him and planning to eliminate him despite her having another house at Kawethei Market where she stays and only goes to her house occasionally. The Defendant averred that the Plaintiff/Applicant does not live in the matrimonial home with the issues of the marriage as the said issues stay at Karatina and Kabete as they are in Karatina University and University of Nairobi and he solely pays their schools fees and accommodation.

19. The Defendant denied that he threw out the Plaintiff/Applicant's goods from the house averred that she voluntarily moved them in preparing to move out and only returned them when she got orders stopping her eviction.

20. It was submitted on behalf of the Plaintiff that the Plaintiff has established a prima facie to warrant grant of the orders of interlocutory injunction. While reiterating the foregoing, it was submitted that after the aforesaid Judgment, the Respondent threatened to evict the applicant from the matrimonial home pursuant (sic) to Article xx(3) of the Constitution of Kenya hence the purported actions by the Respondent to evict the applicant from the matrimonial home are illegal and against Section 12 of the **Matrimonial Property Act, 2013**.

21. According to the Plaintiff, a prima facie case has been explained to mean that a serious question is to be tried in the suit and in the event of success if the injunction is not granted, the plaintiff would suffer irreparable injury. It does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed and in support of this submission, the Plaintiff relied on the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** and submitted that the applicant has so far established her legal right over the property and that the applicant has proved to this court that the Respondent threatened to evict her from their matrimonial home notwithstanding that the applicant has nowhere else to go and threw some of her belongings outside.

22. It was further submitted that the applicant stands to suffer irreparably if the orders sought are not granted as there is eminent danger of the respondent evicting her from the only home she knows. The resultant possible embarrassment and physiological pain is irreparable injury that cannot be adequately compensated for in damages. If an injunction is not granted and the suit is ultimately decided in favour of the applicant, the inconvenience caused to the applicant would be irreparable.

23. According to the Plaintiff, the balance of convenience tilts in favour of the applicant since she is presently in occupation of the house, and has established her legal right over the property and has commenced legal proceedings to enforce her legal entitlement over the property. It was submitted that she is bound to suffer more inconvenience compared to the Respondent who is in control of all other matrimonial properties and can only be accessed by him and who stand to suffer no prejudice if the orders sought herein are granted.

24. On behalf of the Defendant it was submitted that the Plaintiff has not adduced any evidence showing that all the properties in question belong to the Defendant/Respondent who, in his replying affidavit has categorically stated that he is not aware of the properties listed by the Plaintiff/Applicant. In the absence of such evidence, it was submitted that this court's hands are tied as the court cannot issue orders stopping the Defendant/Respondent from interfering with properties that do not belong to him.

25. It was further submitted that Kangundo/Mbusyani/xxx is ancestral land belonging to the Defendant/Respondent's clan and that the Defendant/Respondent is yet to formally acquire the same. The Defendant/Respondent built his house on the said parcel of land in the year 1982 long before he got married to the Plaintiff/Applicant and that the Plaintiff/Applicant moved into the house sometimes in the year 1993 and did not at all contribute to the construction of the matrimonial home nor contribute in any way to the developments of the same. It was noted that no evidence has been attached to show how she contributed to the renovations and that mere allegations not backed by evidence cannot be used to prove contribution.

26. According to the Defendant, the test in the case of Giella vs Cassman Brown Ltd E. A 1973, American Cynamid vs Ethicon Limited [1975] AC396 and Mrao Limited vs. First American Bank of Kenya Ltd & 2 Others Civil Appeal No 39 of 2002 have not been satisfied.

27. Based on Family Bank Limited vs. Tassels Enterprises Limited & 2 Others [2021] eKLR which cited the ruling of the Court of Appeal in Nguruman Limited vs. Jane Bonde Nielsen & 2 Others [2014] eKLR, it was submitted that speculative injury or unfounded fear cannot be termed as irreparable damage as the injury must be grave and irreparable. It must be actual, substantial and demonstrable. In this case it was submitted that the Plaintiff/Applicant has not demonstrated any grave and irreparable injury she stands to suffer if the orders sought are not granted since she has not demonstrated any contribution made to the acquisition of the suit properties and stands to suffer no loss as she did not contribute to the acquisition of the same and secondly the said properties do not belong to the Defendant/Respondent.

28. As regards the balance of convenience, reliance was placed on Pius Kipchirchir Kogo vs. Frank Kimeli Tenai [2018] eKLR and submitted that the balance of convenience in this matter will automatically tilt in favour of the Defendant/Respondent as against the Plaintiff/Applicant since the Plaintiff/Applicant has not shown how she will suffer if the orders sought are not granted.

29. It was therefore submitted that the Plaintiff/Applicant has miserably failed in meeting the condition for grant of temporary injunction and the Court was urged to find that the application dated 7<sup>th</sup> July, 2021 is devoid of merit and should be dismissed with costs to the Defendant/Respondent.

### **Determination**

30. I have considered the application, the affidavits both in support of the application and in opposition thereto, the submissions and the authorities relied upon and this is the view I form of the matter.

31. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in East African Industries vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court restated the law as follows:

**“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**

- (a) establish his case only at a *prima facie* level,**
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and**
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.**

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit “*leap-frogging*” by the applicant to injunction directly without crossing the other hurdles in between. 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.”

32. The Court of Appeal in the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR further opined that:

**“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.”**

33. While reiterating the said principles, Ringera, J (as he then was) in Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002 stated that in an interlocutory application 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 propositions of law. That was the same position adopted in the dicta in Nairobi High Court Civil Case No. 517 of 2014 – Lucy Nungari Ngigi & 4 Others -vs- National Bank of Kenya Limited & Anor (eKLR) where it was stated:

**“...I am also aware that the 1<sup>st</sup> Defendant has raised issues in respect of the mortgage herein, their right to exercise the statutory power of sale, breach of the addendum, default of repayment of the loan etc. They have also raised some accountability issues from the 2<sup>nd</sup> Defendant on the purchase price. But even these queries should be reserved for and**

determined at the trial. These issues are in direct conflict with issues raised by the Plaintiffs and the 2<sup>nd</sup> Defendant. At this stage I should not make any comments or findings, or express opinions on the substantive issues in controversy in order to avoid hurting the trial herein.....”

34. However, 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 affidavit has stated on oath which is not true, for example, when he denies being served with the statutory notices and considering the already exposed untruth of the applicant with regard to service of statutory notices one is not inspired to have much confidence in the truth of her deposition that she did not appear before an advocate to execute the charge and have the effects of the pertinent provisions of law explained to her.

35. It was therefore held by Ringera, J (as he then was) in Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001:

“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a *prima facie* case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.”

36. According to the Court of Appeal in Eso Kenya Limited. vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991:

“The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff’s alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...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 on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.”

37. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of section 1A(2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A(1) of the said Act in 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.

38. What then constitutes a *prima facie* case? In the case of Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, the Court of Appeal held as follows:

“The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show *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...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “*prima facie* case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “*prima facie*” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, 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 in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a *prima facie* case, the former being the lesser standard of the two...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."**

39. While adopting the same position the Court of Appeal in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR added 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. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. 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."**

40. Rule 20(2) of the Matrimonial Properties Act 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***

41. In this case, the Plaintiff and the Defendant were husband and wife until their marriage was dissolved. The Plaintiff alleged that during their marriage the couple established their matrimonial home on Land Parcel Number Kangundo/Mbusyani/xxx which, though was acquired by the Defendant before their marriage, the Plaintiff contributed both directly and indirectly towards the enhancement of its value by clearing, terracing and furrowing the land; planting hundreds of exotic trees which are mature now; fencing off the land and keeping it habitable; and extension of the house and renovations. Section 9 of the *Matrimonial Property Act* provides that:

***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.***

42. It follows that even if Land Parcel Number Kangundo/Mbusyani/xxx is ancestral land belonging to the Defendant/Respondent's clan, if the same was for all intents and purposes treated as the matrimonial home by the Plaintiff and the Defendant, the Plaintiff's claim regarding her contribution towards its development cannot be termed as a frivolous one. It is therefore my view that the Plaintiff has established a prima facie case as regards the said property.

43. It was further averred by the Plaintiff that during the subsistence of the marriage, the couple jointly acquired several properties registered in the defendant's name but held in trust for the family. Particulars of the said properties were set out by the Plaintiff. However, the Defendant denied that the said properties belong to him. Though the Plaintiff filed a further affidavit, she did not adduce any evidence regarding the propriety of the said properties. However, as the Defendant denies any interest therein, he stands to suffer no prejudice even if the injunction sought is granted since an order restraining him from disposing of a property which he does not own and cannot dispose of cannot be prejudicial to him.

44. Having considered the issues raised by the Plaintiff, I find that she has established a prima facie case for the purposes of the grant of an injunction pending the hearing and determination of the suit. That does not necessarily mean that the Plaintiff will succeed. What it means is that there is a basis upon which this Court can restrain the Defendant from disposing of the said properties.

45. However, as was held in the case of Kenya Commercial Finance Co. Ltd vs. Afraha Education Society [2001] Vol. 1 EA (quoted in the Nguruman Limited case (supra)), the triple requirements in an interlocutory injunction application are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent and all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.

46. As regards the second condition, whether the Plaintiff stands to suffer irreparable loss, it was held in Nguruman Limited case (supra) expressed itself as hereunder:

**"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 facie, 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."**

47. In this case the Plaintiff's case is that she has nowhere else to go and if evicted she has no other home. If that is true then it is clear that in the event that she is evicted, she may find herself under the mercy of the vagaries of nature. Accordingly, I agree that the Plaintiff has surmounted the second condition.

48. As regards the issue of balance of convenience, I associate myself with the decision in **Pius Kipchirchir Kogo vs. Frank Kimeli Tenai [2018] eKLR** where it was held as follows:

**“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”**

49. In light of my findings above, I am satisfied that the Plaintiff has satisfied the conditions necessary for the grant of the injunctory orders sought. In the premises I find merit in the application dated a Motion dated 7<sup>th</sup> July, 2021 and grant the following order:

**a) An order of injunction restraining the Defendant/Respondent from evicting and/or denying the applicant free access, use and quiet occupation of the parties' matrimonial home constructed on Land Parcel Number Kangundo/Mbusyani/xxx pending the hearing and determination the cause herein.**

**b) An order of injunction restraining the Defendant/Respondent either by himself or his agents and/or servants from selling, charging or transferring Land Parcels Numbers Kangundo/Mbusyani/xxx, Matungulu/Kyaume/xxxx, Plot No. xx at Kawethei Market, Plot No.xxat Kawethei Market, a Portion of Kangundo/Mbusyani/xxx, Matungulu/Kawethei/xxxx, Matungulu/Kawethei/xxxx, a portion of Kangundo/Mbusyani/xxxx and House No. xxx at Umoja II pending the hearing and determination of the cause herein.**

50. The costs of this application will be in the cause.

51. Orders accordingly.

**RULING READ, SIGNED AND DELIVERED AT MACHAKOS THIS 11TH DAY OF NOVEMBER, 2021.**

**G.V. ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Nyaata for the Plaintiff**

**Mr Muema for the Defendant**

**CA Susan**