



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 86 OF 2018

RAHAB MUTHONI MBATIA.....PLAINTIFF/ APPLICANT

VERSUS

JOB KARANJA NGUGI.....1ST DEFENDANT/RESPONDENT

FRANCIS MUHIA GACHUGU.....2ND DEFENDANT/FRESPONDENT

LAND REGISTRAR KIAMBU.....3RD DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated **12th March 2018**, by the Plaintiff/ Applicant seeking for orders that;

- 1. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the Defendants/ Respondents from evicting the Plaintiff/ Applicant from all that parcel of land No. Komathai/Gathugu/T.126.**
- 2. A declaration that parcel No. Komathai/ Gathugu/T.126, constitute matrimonial property within the meaning of section 6 of the Matrimonial Property Act, 2013, and that the 1st defendant was merely holding the same in trust for the Plaintiff in terms of section 14 (a) of the Matrimonial Property Act, 2013.**
- 3. A Declaration that the sale and transfer by the 1st Defendant to the 2nd Defendant of land parcel No. Komathai / Gathugu /T.126 is null and void ab initio for want of spousal consent in terms of section 12 of the Matrimonial Property Act, 2013.**
- 4. An order directing the Registrar of Title to cancel transfer of land parcel No. Komathai/Gathugu/T.126 to the 2nd Defendant at the Defendants costs.**
- 5. That this Honourable Court be pleased to order the officer commanding station (OCS) , Komathai Police Station to enforce and supervise the compliance of the orders herein.**
- 6. That the costs of this Application be provided for.**

The Application is premised on the following grounds; that the Plaintiff/ Applicant is the wife of the 1st Defendant/ Respondent who inherited the suit land vide **Kiambu Succession Cause No. 284 of 1999**, and therefore by virtue of their marriage, the Plaintiff/Applicant has an overriding interest over the suit land which is matrimonial property. That the Plaintiff/ Applicant learnt that the **1st Defendant/ Respondent**, sold the suit property to the **2nd Defendant/Respondent**, without her prior consent. Further that the **2nd Defendant/Respondent**, is threatening her with eviction and unless restrained, the Plaintiff/Applicant together with her children and grandchildren will be evicted from the Matrimonial property, while the **1st Defendant/ Respondent** would squander the money. Further that the **Plaintiff/Applicant**, would be rendered destitute unless the transfer of land to the **2nd Defendant/ Respondent** is cancelled.

In her Supporting Affidavit the Plaintiff/ Applicant **Rahab Muthoni Mbatia**, reiterated the contents of the grounds on the face of the Application and also averred that she is the wife of the **1st Defendant/ Respondent**, herein having gotten married in the year **1984**, and they are blessed with two issues. She further contended that they have constructed their **matrimonial home** on the suit land where she resides wither children and grandchildren. It was her contention that she has at all times cultivated and planted trees on the suit land which have grown to maturity and she is fearful that the **2nd Defendant/ Respondent**, is going to cut them down. Further that she is apprehensive that the **Defendants/ Respondents**, may further **alienate, sell, transfer** or otherwise **deal** with the suit property to her detriment.

The Application is opposed and the 1st Defendant / Respondent **Job Karanja Ngugi** filed a Replying Affidavit and denied that he is the Plaintiff's/ Applicant's husband and also averred that he did not need her consent to sell the suit property. It was his contention that the suit land is not a matrimonial property and that he did not need anyone's consent to sell it. He denied that there were any threats of eviction upon the Plaintiff/Applicant. Further that the Plaintiff/ Applicant filed the instant suit when there was another pending suit, that had not been heard and determination. He contended that the Application is brought in bad faith and ought to be dismissed.

The 2nd Defendant/Respondent, **Francis Muhia Gachugu**, also filed a Replying Affidavit on the **6th of July 2018**, and averred that he is the owner of the suit property and therefore not a party to the dispute between the Plaintiff/ Applicant and the 1st Defendant/ Respondent. He contended that he bought the suit property and began farming activities which he has continued to do until he was served with the instant Application. He further contended that the Plaintiff/ Applicant is not a member of the family and therefore has no right or claim over the suit land. Therefore, this Application is brought to defraud the **2nd Defendant/ Respondent** and the same should be dismissed entirely.

The Application was canvassed by way of written submissions which this Court has carefully read and considered. The Court finds the issue for determination **is whether the Plaintiff/ Applicant is entitled to the orders sought.**

In her Application, the Plaintiff/Applicant has sought for various orders, amongst them a declaration that the suit property constitutes matrimonial property; a declaration that the sale and transfer of the suit property was illegal and that the Court should order cancellation of the title registered in the name of the 2nd Defendant/ Respondent herein.

In his Replying Affidavit, the **1st Defendant/Respondent** denied that the Plaintiff/Applicant was his spouse and further went ahead to deny that the suit property is matrimonial property. Therefore, this Court finds that the issue of whether or not the suit property is matrimonial property and whether the court should order for cancellation of the transfer for being illegal are issues that ought to be canvassed with during the main trial. Therefore, the court finds that these prayers cannot be canvassed and issued at this Juncture. It is this Court considered view that the said prayers as sought at this interlocutory stage are premature as the same are also contained in the Plaintiff. For this Court to make a finding over these issues, evidence will have to be called and tested during cross examination to enable the Court make a proper finding. Consequently, the Court finds and holds that the said prayers are not merited and are therefore disallowed.

Further it is evident that the Plaintiff/ Applicant herein has sought for injunctive order which is governed by **Order 40 Rules 1(A) & (B)** of the **Civil Procedure Rules**, 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

(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 orders.

The above provisions of law grants the Court discretion to issue temporary injunction in instances where the property in dispute is in danger of being **wasted, damaged** or **alienated**. Further, in determining whether to grant or not to grant the Orders sought, the Court will be guided by the principles set out in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973 EA 358**, wherein the Court held as follows;

*a) The Applicant must establish that he has a **prima facie** case with probability of success.*

b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.

c) When the Court is in doubt, to decide the case on a balance of convenience.

Has the Applicant herein established the above stated criteria to warrant the Court grants the orders sought?

Firstly the Applicant needed to establish that she has a **prima facie** case with probability of success at the trial. In the case of **Mrao Ltd ... Vs... First American Bank of Kenya Ltd & 2 others {2003}** the Court held that:

“So what is a prima facie case? I would say that it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

This Court will therefore interrogate whether the Applicant has any right over the sit property that has been infringed upon. It is the Applicant's claim that the suit property is matrimonial property since the **1st Defendant/ Respondent** allegedly inherited it from his father and that is where she has built their home and also she stays with her children and grandchildren. Though the **1st Defendant/ Respondent** denied that the Plaintiff /Applicant is his spouse, she produced a letter from the Chief and an Affidavit indicating that the two were married under **Kikuyu Customary Law** in the year **1989**. With the above evidence unless contrary evidence is availed to rebut the same, the Court is inclined to agree with the Plaintiff/ Applicant that she is the 1st defendant's / Respondent's wife.

According to the provisions of the **Matrimonial Property Act 2013**, matrimonial property means, either the matrimonial home, household goods and effects in the matrimonial home, any movable property jointly owned and or acquired during the marriage. As the Plaintiff/Applicant has alleged that the suit property is matrimonial property, the act of transferring the same without her consent amounts to infringement of her rights. Therefore, it is this Court's considered view that the Plaintiff/Applicant has established a prima facie case with a probability of success.

On the second limb if the order is not granted, the Applicant will suffer irreparable loss which cannot be adequately compensated by an award of damages, this Court will echo the findings in the case of ***Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR***, wherein the Court held that:-

“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction”.

Equally, the Applicant herein crystalized right herein cannot be adequately compensated by an award of damages, but can only be cushioned only by order of injunction. The Court says so because if the applicant is evicted from the suit property before her claim is heard and determined, then she is likely to be made a destitute together with her family thus suffering irreparable loss and damage.

*When the Court is in doubt, then it is called upon to decide the case on a balance of convenience. As already stated, the Plaintiff/Applicant has claimed to be in possession of the suit property. The 2nd Defendant/ Respondent too has claimed to be in possession of the same suit property and that he is cultivating the same. None of the parties herein has produced any evidence to back these allegations. However the Court finds that the balance of convenience herein tilts in favour of **maintaining status quo**. It is evident that the Plaintiff/ Applicant has sought for a temporary injunction to prevent the 2nd defendant/Respondent from evicting her from the suit property. If the Plaintiff/Applicant was not in possession, there would be no need of seeking such an order. Taking into account the above consideration, the Court finds that the balance of convenience tilts in favour of allowing the temporary injunction as sought by the Plaintiff/Applicant.*

Having now carefully considered the pleadings herein, the instant **Notice of Motion** application and the written submissions, the Court finds that the said Application dated **12th March 2018, is partially merited** and is allowed in terms of prayer **No.3 only with costs being in the cause.**

It is so ordered.

Dated, Signed and Delivered at Thika this 12th day of March 2020

L. GACHERU

JUDGE

12.3.2020

In the presence of

No appearance for the Plaintiff/Applicant

No appearance for the 1st Defendant/Respondent

No appearance for the 2nd Defendant/Respondent

No appearance for the 3rd Defendant/Respondent

Lucy - Court Assistant

L. GACHERU

JUDGE

12.3.2020