



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MATRIMONIAL NO. 2 OF 2013

CW.....APPLICANT

V E R S U S

BG.....RESPONDENT

RULING

1. This ruling relates to an application dated 27/11/2018 which is filed by the applicant CW brought under Article 45 of the Constitution seeking an order that the court do nullify all the subdivision made in relation to matrimonial property number Kabare/Njuku L.R. xxx, the Sub-division being Kabare/Njuku/xxx-xxx as the same were done in contravention of the court order issued on 12/4/13. It is based on three grounds namely: -

a) That the suite herein relates to matrimonial property which through a court order granted on the 12th of April 2013 the court gave a restraining order

restraining the Respondent and his servants from alienating, transferring, wasting, damaging or otherwise interfering with the suite properties.

b) That whereas the said orders were served upon the Registrar of Lands and the Officer in Charge of Kerugoya Police Station, the Respondent has gone ahead with the assistant of an employee at the Land Registry known as Alex Muriithi Gakuru and subdivided one of the matrimonial properties being Kabare Njuku L.R xxx (4 Hacters) into 6 portions.

c) That the said subdivision was made without the court order being lifted and was manipulated by a land registry employee to defeat justice in the case.

2. The application is supported by the affidavit of the applicant CW sworn on 27/11/19.

Applicant's case

On 12/04/2013, she filed originating summons seeking division of matrimonial properties being **Inoi/Katheri/Plot No. xxx Kerugoya town, Kabare/Njuku/L.R xxx and Kabare/Njuku/L.R xxx**. On 26/03/2013 the court issued orders restraining the respondent and his servants from alienating, transferring, or otherwise interfering with the suit properties. The orders were served on the Land Registrar and officer in charge of Kerugoya police station. However, in November 2018, she was informed that the respondent had subdivided the land into 6 portions, 3 portions to different persons and the rest to himself. That he was assisted by a lands registry employee who is a beneficiary of the subdivisions as he received 2 portions.

Respondent's case

He stated that the restraining orders lapsed with dismissal of the case on 09/10/2017. Although the suit was reinstated, there was no order sought for reinstatement of the restraining orders. That the applicant is relying on injunction orders given on 12/04/2013 which lapsed by operation of the law in view of **Order 40 rule 6 of the Civil Procedure Rules**. That the suit land **Kabare/Njuku/L.R xxx** measures approximately 4.0 acres and the portions sold have cumulative area of 1.5 acres. That since her prayer she claims 50% of the suit properties, he is entitled to 2 acres out of **Kabare/Njuku/L.R xxx** yet he has only sold 1.5 acres.

3. That his reason for selling is to facilitate a loan taken from [Particulars Withheld] Sacco and Agricultural Finance Corporation which currently stands at Kshs.1,200,000/= which were used to develop **Plot No. xxx Kerugoya Town**.

4. The application was canvassed by way of written submissions. The applicant raised the following issues:-

a) Whether the interim orders issued on 12/4/13 and made absolute on 26/3/14 are still in force todate.

b) Whether the applicant is entitled to orders sought.

c) Whether the actions of the respondent have any effect in the court.

5. It is submitted that the orders issued on 26/3/14 were coached in a manner that they were to stay inforce until the hearing and determination of the suit. That as long as the case was yet to be heard and has yet to be determined, the orders shall still be inforce.

6. She further submits that at no time was the Land Registrar served with orders showing that the case had abated or dismissed or that the restraining orders issued thereof had been lifted. That the respondent who knew that the very foundation of the case was the property, intentionally sold it to defeat the applicant's interest in the matrimonial property.

7. On whether the applicant is entitled to the orders sought she relies on **Section 80(1) of Land Registration Act 2012** which provides:-

“Subject to subsection (2) the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

8. That the provision gives court discretion to issue instant orders, and in particular considering the fact that no orders were served on the Registrar of Lands directing that the earlier orders had been lifted. That it was obvious that any interested purchaser was fully aware of the existence of the orders before making the purchase.

9. She further relies on **Section 12 of the Matrimonial Property Act** which provides that *“A spouse shall not during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by an order of the court subject to Subsection (3) a spouse shall not be evicted from the matrimonial home by any person expect –*

a) On the sale of any estate or interest in the matrimonial home in execution of a decree.”

10. That from the above provision a matrimonial home can only be sold with an order of the court, every person as presumed to know the law and any person who purports to buy a matrimonial home without an express decree of the same is in violation of court order.

11. For the respondent, it is submitted that the land parcels No. Kabare/Njiku/xxx, xxx and xxx are in the names of persons who are not parties to this suit. There are no application seeking to enjoin them in the suit and it would be contrary to the rules of natural justice to condemn them unheard. This would also contravene the provisions of **Article 50 of the Constitution**.

12. That Kabare/Njiku/xx and Kabare/Njuku/xxx are not matrimonial properties as they were inherited from the respondent's father. That the family has never lived on the land. That the orders which were issued on 12/4/2014 and confirmed on 26/3/14 cannot assist the applicant as they were not registered in the Land Office to preserve the suit. That the suit was dismissed and when it was reinstated there was no application to reinstate the orders. That under **Order 40 rule 6 Civil Procedure Rules** the orders of injunction lapsed on 25/3/15 – the rule provides: -

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of Twelve Months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

13. The Respondent relies on *Simon Njagi Njoka –v- James Gatimu Muriithi and 5 Others Kerugoya ELC Case No. 414/2013*. Where it was stated that – *“My understanding of this provision is that once an injunction has been granted, the suit upon which that injunction is premised must be heard and determined within a period of Twelve months. If for some reason the suit cannot be heard and determined within that period, then the onus is on the party in whose favour it was issued to go back to the court with sufficient reason seeking an extension of the said orders otherwise it “shall lapse” automatically by effluxion of time.”*

14. I have considered the application and the submissions. I will proceed to consider the issues which arise for determination.

1. Whether the restraining orders lapsed

Order 40 rule 6 of the Civil Procedure Rules provides:

Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & another [2018] eKLR

The Court of Appeal held that the words *“pending the hearing and determination of this suit”* could not have constituted sufficient reason to justify the extension of the interlocutory injunction beyond the period of 12 months. It stated;

A plain reading of Order 40 Rule 6 shows that the Rule is couched in mandatory terms, and that the only situation in which

an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not so lapse.....

The order made by the court on 22nd February 2011 remained subject to Order 40 Rule 6 that required that such an interlocutory order remain in force for a period of 12 months only, but subject to the court having the power to extend the interlocutory order beyond the 12 months, if there is sufficient reason for it to do so. In our view, such an extension cannot be done by way of a blanket order at the time the interlocutory order is issued. The need for the extension must be addressed by the court and justified at the opportune time.....

We reiterate what this Court stated in *Erick Kimingichi Wapang'ana & Another v. Equity Bank Limited & Another [2015] eKLR* that:

“Rule 6 Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months “unless”, as the Rule provides, “for any sufficient reason the court orders otherwise.....In this case there was no subsequent order extending the injunction. Having been issued on 11th October 2011, the injunction lapsed on 12th October 2012”.

15. The order which the applicant is seeking to enforce was issued on 26/3/2014 one year later which was in 2015, the injunction lapsed. Though the suit was still pending the applicant did not seek extension of the orders. For the order to be valid after Twelve months the applicant is required to show sufficient reason for the court to order otherwise. Where the court has not ordered otherwise, the orders lapse as provided under the law.

16. At the time the respondent sub-divided the land, the injunctive orders had long lapsed and the respondent was not in violation of any court order.

2. Failure to enjoin third.

Parties. It is a principle of natural justice that no order can be made or enforced against any person who is not a party to the proceedings in which the order was made and has not been given an opportunity to be heard – simply stated, no person should be condemned unheard. The order the applicant is seeking will affect persons who have not been made party to the suit. It would be an injustice to allow the application without giving all those affected an opportunity to be heard.

17. The applicant has brought this application under **Article 45 of the Constitution** which deals with family. It touches on issues which are pending determination in the suit. For the preservation of the matrimonial properties, there has to be valid orders which can be enforced. Orders which have lapsed are no longer valid and cannot be enforced against a party or even third parties.

The universality of justice is that it cuts two ways. One cannot seek justice to do injustice to persons who are not sued and are not party to the dispute before court.

18. I find that this application is without merits as it seeks to enforce an order that had lapsed and to obtain orders which will affect persons who are not party to the suit. For these reasons I dismiss the application. Costs to the respondent.

Dated at Kerugoya this 17th day of October, 2019.

L. W. GITARI

JUDGE