



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CIVIL CASE NO. 8 OF 2014 (O.S)**

*In the Matter of:-*

*Matrimonial Property Act, 2013; Article 45(3) of the Constitution  
of Kenya; and Order 37 of the Civil Procedure Rules, 2010*

*Between*

**CELINA KANONO KAMAKIA.....PLAINTIFF**

**AND**

**PAUL MUTHENGI NJAU.....DEFENDANT**

**RULING**

**Two applications: Temporary Injunction and Contempt**

[1] I have two applications before me; one is dated 15<sup>th</sup> May 2014 and the other 28<sup>th</sup> July 2014 for Temporary Injunction and Contempt of Court, respectively. With the consent of parties, on 7<sup>th</sup> July 2015 the court directed; (1) that both applications shall be canvassed by way of written submissions; and (2) that parties shall file their respective submissions within 30 days. When this matter came up for mention on 17<sup>th</sup> November 2015, only the Applicant had filed submissions- the Respondent had not filed his as ordered by the court on 7<sup>th</sup> July 2015. Nevertheless, the court reluctantly allowed the Respondent the last chance to file his submissions within 14 days from 17<sup>th</sup> November 2015. Again, on 9<sup>th</sup> December 2015 when the matter was mentioned before me, the Respondent had not filed his submissions. On 17<sup>th</sup> July 2015, the court was quite categorical in its directions that should the Respondent fail to file his submissions within the time allowed, the court would decide the two applications on the material before the court. The said order was duly served on the advocate for the Respondent on 4<sup>th</sup> December 2015 and an affidavit of service sworn on 8<sup>th</sup> December 2015 was filed in court. I will proceed on that basis and determine the applications before me.

**Application for Temporary Injunction**

[2] I will not re-invent the wheel on temporary injunctions. In deciding whether or not to grant a temporary injunction, the court will be guided by the circumstances of the case but will also be guided by the accepted principles for the grant of temporary injunction that were set out in the famous case of

***Giella vs. Cassman Brown***. On this I am content to cite the case of ***Suleiman vs Amboseli Resort Ltd (2004) e KLR 589*** where Ojwang Ag. J (as he then was) at page 607 delivered himself thus:-

***‘.....counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:-***

***“ A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”....”***

***Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella Vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.***

***i. Is there a prima facie case....***

***ii. Does the applicant stand to suffer irreparable harm...***

***iii. On which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....***

[3] I will apply the above test to the facts of this case. The application is based on Matrimonial Property Act. The Applicant claims that she was married to the Respondent under Kitharaka Customary Law; the Respondent paid dowry in 2006, i.e. 5 heads of cattle as dowry which was counted as 35 goats. She also claimed that the said marriage was blessed with one issue, living namely Prudent Gakii whom the Respondent has acknowledged and pays school fees for. She submitted that in any event the long cohabitation with the Respondent would still give rise to a presumption of marriage in law. She claimed that the properties in issue, although registered in the name of the Respondent, were acquired by the Applicant and the Respondent jointly during their said marriage. Therefore, she has a beneficial interest in those properties under the Matrimonial Property Act. According to her, this interest constitutes a *prima facie* case for which a temporary injunction should issue to restrain the sale of these properties by the Respondent pending resolution of this case. She was sure that the Respondent will continue to sell these properties, and she anticipates suffering irreparable damage as a result thereof. In sum, she said that the balance of convenience lies on her side. She cited judicial authorities and the relevant statute to support her arguments namely;-

***(a) Margaret Doreen Atieno Adongo vs. Benjamin Adongo Adieya & others [2006] eKLR;***

***(b) Board of Governors, Moi High School, Kabarak & another vs. Malcom Bell [2013] eKLR;***

***(c) The Constitution, 2010;***

***(d) The Matrimonial Property Act, 2013***

[4] The Respondent did not file submissions but he filed a Replying Affidavit sworn on 29<sup>th</sup> May 2014. He deposed that he married Margaret Wanjiru, now deceased, in 1987 through African Christian Marriage and Divorce Act. His said wife died in 2001. Upon the death of his first wife, he married Lucy Wanyaga Ngari on 30<sup>th</sup> March 2002. He annexed marriage certificate for each marriage in evidence. The two holy unions were blessed with issues. According to the Respondent, section 11 of the Marriage Act declares any other marriage contracted during the subsistence of another marriage to be null and void. As

such, he averred that the alleged marriage to the Applicant would be null and void. He denied having paid any dowry to the parents of the Applicant. He only acknowledged that his relationship with the Applicant was that of sexual acquaintance and former employee. But, he does not deny the child born of this sexual contact- he still pays school fees for her. The Respondent carried very unkind words and description of the Applicant in his affidavit, but I will not delve into this aspect as it is not important for purposes of this application. On the properties, he stated that he has sold almost all his assets, except plot number 31 B Marimanti on which his petrol station is built and from which he ekes a living for his care, subsistence and medical bills. He asserted that he sold the said properties with the consent of his only lawfully wedded wife- Lucy Wanyaga Ngari. On these facts, he prayed for the injunction application to be dismissed by the court.

[5] Upon careful consideration of the rival standpoints taken by each party, the law and the facts of this case, I take the following view of the matter. This case presents very unique issues of law and fact. At some point, there was a relationship between the two persons in this dispute, and a child was born out of it. There seems to have been another relationship between the two; the Respondent calls it employer-employee relation; the Applicant asserts that she was not an employee of the Respondent but an equal partner in the business which she ran for the benefit of their marriage- and this she said was the source of her contribution towards the purchase of the properties in question. I am profoundly warned that, at this interlocutory stage, often one would easily fall into the unforgivable error of invading the merits of the substantive Originating Summons: such course would take away the power of the trial judge to try the main cause. I will, therefore, say only enough for the purpose of a decision on the request for a temporary injunction. Let me state that, at this stage, I do not want to assign the relationship between the two parties any vitality of a marriage or reduce it into mere acquaintance- this will be resolved upon hearing all evidence. Similarly, at this stage, I do not also wish to determine whether the properties herein are matrimonial properties in the sense of the law. I note, however, that the Applicant has denied that she was an employee of the Respondent; she stated that she was a partner and so she ran the petrol station as their business. The significant inference in this case is that there was a relationship between these parties. During the said relationship a child was born and properties were purchased by the two parties. Therein lies *prima facie* case requiring in-depth interrogation in a trial. And as such, I do not think the request for an injunction by the Applicant is baseless or an idle venture especially for a limited purpose of preserving the suit properties to avoid this suit from being rendered otiose as a result of possible dissipation of the properties in question. In the face of possible dissipation of the suit properties, I am convinced she will suffer irreparable damage unless an injunction is issued. Accordingly, I find that the Applicant has established sufficient *prima facie* case for issuance of a temporary injunction. Except I reckon that the Respondent has claimed that he has already sold most of the properties except one. It is clear in the mind of the court that there could be interests of third parties which may as well be crying for protection. Nonetheless, the issues to be resolved are substantial-which tilts the balance of convenience in favour of issuing an injunction. However, I will fashion orders which are appropriate as follows:-

***(a) That this application as well as the orders made thereto shall immediately be served upon all persons to whom the Respondent has alleged to have sold some suit properties. The Respondent shall identify and serve the would-be third parties in this suit.***

***(b) Given the possibility that some properties may have been sold already or are in the process of being sold or transferred, I hereby issue an inhibition to stop any dealings in the properties in the Schedule of Properties dated 15<sup>th</sup> May 2014. I note there are already inhibitions on these properties.***

***(c) The Respondent is hereby restrained from evicting the Applicant or closing the premises occupied by her or doing anything which is inconsistent with these orders.***

***(d) In light of the foregoing concerns, these orders will last until further orders of the court. This is to give room for any party or would-be party to apply for further orders at any time. It is so ordered.***

***(e) Meanwhile, I will direct parties to file witness statements and documents within 14 days in***

***preparation for the hearing of the main cause. It is so ordered. Accordingly, the application dated 15<sup>th</sup> May 2014 is allowed in the manner and to the extent expressly stated above.***

**Application for contempt of court**

[6] Of application dated 28<sup>th</sup> July 2014, I note that the court granted order 2 of the said application on 30<sup>th</sup> July 2014 as is. The order was issued...***until further orders of this court or until this suit is heard and determined***". This order is for security during, re-entry and taking occupation of Plot 27B Marimanti. That notwithstanding, I note that the Respondent in his affidavit sworn on 24<sup>th</sup> February 2015 averred in paragraph 8 that the Applicant has taken advantage of the court order to take occupation and collect rent from tenants in his property. Accordingly, whereas I agree with the Applicant that court orders must be obeyed to avoid chaos and anarchy in the country as well as in the administration of justice, nevertheless, given the nature of the application for committal to jail for disobedience of a court order, and the foregoing averments, it will be in the best interest of justice for the court to establish; (a) whether the Applicant is in occupation of plot number 27B Marimanti; (2) if so, when she took occupation; and (3) who is taking the rents in the premises. The result of this inquiry will be considered in determining this application. Accordingly, I direct parties to address the court on these aspects. If necessary, the court will send appropriate officer of the court to the suit property to ascertain the situation on the ground and file a report on these issues. I believe tenants in the suit premise will become source of useful information. I will, therefore, defer my decision on the application dated 28<sup>th</sup> July 2014 until these matters are covered appropriately. It is so ordered.

**Dated, signed and delivered in open court at Meru this 11<sup>th</sup> day of February 2016**

**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Kiogora Arithi advocate for M/s. Rimita Advocate for plaintiff.

Mr. Mutegi advocate for Kiogora Mugambi and Kijaro for defendants

-----

**F. GIKONYO**

**JUDGE**