



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISII

E.L.C.A. NO. 8 OF 2020

JANE JEPYEGON MORWABE.....APPELLANT

VERSUS

GODFREY MORWABE ONKUNDI.....1ST RESPONDENT

THOMAS ONDIEKI MARIGWA2ND RESPONDENT

THE LAND REGISTRAR, NYAMIRA COUNTY3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

(An appeal from the Ruling and Order of Hon. M.C.Nyigei (S.R.M.) dated and delivered online on the 8th day of April 2020 in CMC ELC No. 55 of 2019,Nyamira)

JUDGMENT

INTRODUCTION

1. The Appellant is aggrieved with the trial court's dismissal of her application dated 19th August 2019, which was filed alongside her plaint. In that application, the Appellant sought orders that;

1. Spent;

2. Pending the hearing and determination of the instant application, the Honorable Court be pleased to grant an interim order of injunction restraining the 2nd Defendant/Respondent by himself, agents, servants and/or anyone claiming under the said 2nd Defendant/Respondent, from entering upon, trespassing onto, fencing, cutting down tea bushes, building on and / or other wise taking possession of LR No. North Mugirango/Bonyarorande/1929 or any portion thereof (herein after referred to as the suit property);

3. In the alternative and without prejudice to the foregoing, pending the hearing and determination of the instant Application the honourable court be pleased to order and/or direct the Maintenance of Status Quo, currently obtaining over and in respect of LR No. North Mugirango/Bonyarorande/1929 and more particularly, barring and/or prohibiting the 2nd Defendant/Respondent interfering with and/or in any other manner dealing with the suit property, that is, LR No. North Mugirango/Bonyarorande/1929 and/or any portion thereof.

4. Pending the hearing and determination of the instant application the honourable court be pleased to grant an order of inhibition, to restrain and/ or restrict further sale, disposal, alienation, charge and/ or mortgage and/or any other dealing over and in respect of the suit property, that is LR No. North Mugirango/Bonyarorande/1929;

5. The honourable court be pleased to grant an order of Temporary Injunction restraining the 2nd Defendant/Respondent by himself, agents, servants and/or anyone claiming under the said 2nd Defendant/Respondent, from entering upon, trespassing onto, fencing, cutting down tea bushes, building on and/ or otherwise taking possession of LR No. North Mugirango/Bonyarorande/1929 or any portion thereof (herein after referred to as the suit property), pending the hearing and determination of this suit.

6. The honourable court be pleased to order and/or direct the maintenance of status quo currently obtaining over and in respect of LR No. North Mugirango/Bonyarorande/1929 and more particularly, barring and/or prohibiting the 2nd Defendant/Respondent interfering with and/or in any other manner dealing with the suit property that is LR No. North Mugirango/Bonyarorande/1929

and/or any portion thereof, pending the hearing and determination of this suit;

7. The honourable court be pleased to grant an order of inhibition, to restrain and/or restrict further sale, disposal, alienation, charge and/or mortgage and/or any other dealing over and in respect of the suit property, that is LR No. North Mugirango/Bonyarorande/1929, pending the hearing and determination of the instant suit;

8. The O.C.S., Nyamira Police Station be ordered and/or directed to enforce and/or ensure compliance with the Court Orders herein;

9. Costs of this application be borne by the Defendants/Respondents jointly and/or severally; and

10. Such further and/or other orders be made as the court may deem fit and expedient.

2. The Appellant swore an affidavit in support of the application deposing that she is the lawful wife of the 1st respondent. She claims that during the subsistence of their marriage, she and the 1st Respondent agreed to obtain loan facilities to purchase land parcel No. North Mugirango/Bonyarorande/1929 (herein “the suit property”). She acquired a loan facility of Kshs. 150,000/= while the 1st Respondent obtained a loan facility of Kshs. 200,000/=. With the monies collected, they purchased the suit property which was registered in the name of the 1st Respondent to hold in trust for the appellant and their children. The Appellant avers that she and the 1st respondent constructed a three bedroomed home on the land and even planted 11,000 tea bushes and other assorted trees thereon.

3. She claims that all the above notwithstanding, the 1st Respondent sold off the property to the 2nd Respondent without her knowledge or consent. She is apprehensive that the sale of the suit property is bound to deprive her and the children of a home.

4. Other than the 2nd Respondent, the rest of the Respondents did not file any response to the appellant’s application.

5. The 2nd Respondent swore affidavits on 28th August 2019 and on 14th November 2019, in response to the application. He averred that before he purchased the land, he visited it and ascertained the state of the property and conducted an official search which confirmed that the 1st Respondent was the registered owner of the land. The records did not indicate that the land was being held in trust for the Applicant. He also claimed before they reduced their agreement into writing, the 1st Respondent reassured him that the property was neither ancestral land nor matrimonial property.

6. Thereafter, the 2nd Respondent paid the entire purchase price of Kshs. 2,050,000/= and the suit property was transferred into his name. He claimed that he took possession of the suit land and carried out substantial developments thereon including fencing the property, constructing a pit latrine, planting crops and about 600 Eucalyptus trees among others. He also claimed that he had trimmed the tea bushes on the land and acquired a grower’s number at Kebirigo buying centre.

7. The 2nd Respondent pointed out that the Appellant had not produced any evidence to prove that she was the 1st Respondent’s spouse or that she had contributed to the purchase of the land. He also stated that the Appellant had never raised an issue while he carried out the developments publicly. He deposed that the suit property had not been in use before he purchased it and he was the one that had put it to good use. The Respondent claims that he obtained a loan to purchase the property and he will suffer substantial loss if the application is allowed.

8. In the decision challenged, the court found that since it was not disputed that the appellant is the lawful wife of the 1st Respondent or that he was the registered owner of the suit land who then sold it to the 2nd Defendant/Respondent without a spousal consent, a *prima facie* case had been established.

9. The court then proceeded to find that the Appellant had not demonstrated that she would not be adequately compensated with damages, if the orders sought were not granted. The trial court was concerned that the 1st Respondent had been mum to the allegations levelled against him. He had, in the trial court’s words, pocketed the purchase money of over 2 million which the Appellant had benefited from if they resided together. That therefore, the issue of the Appellant suffering irreparable harm if injunction was not granted did not fall into consideration so long as the matter was fast tracked. The court also held that 1st Respondent stood to benefit whichever way the court decided and therefore, the case was best determined by setting it down for hearing on priority basis.

10. The memorandum of appeal set out the following grounds of appeal;

1) The Learned Trial Magistrate erred in fact and law in dismissing and/or disallowing the appellant’s application dated 19th day of August 2019 while overwhelming evidence was tendered in support of the Notice of Motion Application dated 19th day of August 2019;

2) The learned Trial Magistrate correctly found that the Appellant had established a *prima facie* case with a high chance of success but failed to consider the various submissions submitted by the Appellant on the other two conditions laid down for grant of an order of interlocutory injunction to issue;

3) The learned trial magistrate erred in fact and law by drawing an inference on the appellant and the 1st respondent that the 1st respondent had pocketed the purchase price of over Kshs. 2,000,000/= and that there was a likelihood that the appellant and the 1st Respondent had benefited from the said money; without ascertaining the truth and/or veracity of the same hence the conclusion of the trial magistrate was hypothetical;

- 4) The learned trial magistrate erred in fact and law by disallowing the notice of motion dated 19th day of August 2019 on grounds the Appellant and the 1st respondent had pocketed the purchase price of LR No. North Mugirango/Bonyarorande/1929 (hereinafter referred to as the suit property) of over Kshs. 2,000,000/= while this assertion could only be proved and/or ascertained during the trial stage;
- 5) The learned trial magistrate erred in fact and law by drawing an inference and/or passing judgment on the 1st Respondent as to the sale of land transaction entered into by the 1st Respondent and the 2nd Respondent by concluding that the 1st Respondent had pocketed the purchase price and the appellant being the spouse to the 1st respondent also benefited while it was clear that the 1st respondent had not entered appearance in the suit in the subordinate court;
- 6) The learned trial magistrate erred in fact and law by arriving at a slanted decision particularly deeming the Appellant and the 1st Respondent as one entity and/or party by virtue of the said parties being married to each other while ignoring the fact that the suit before it had been lodged by the Appellant against the 1st Respondent hence it was not the place or the appellant to beg and/ or persuade the 1st Respondent to lodge his pleadings in court;
- 7) The learned trial magistrate erred in fact by exercising her discretion whimsically by disallowing the Notice of Motion application dated 19th day of August 2019 in the original suit hence exposing the appellant to eminent threat of eviction by the 2nd respondent;
- 8) The learned trial magistrate erred in fact and law by approaching and/or dealing with the Notice of Motion Application dated 19th day of August 2019 as if same was determining the main suit hence arriving at determinations that could only have been made after the hearing of the main suit;
- 9) The learned trial magistrate failed to cumulatively and/or exhaustively evaluate the entire documentary evidence on record and hence failed to capture and decipher the salient issues and/or features of the application before her(trial magistrate) and thus arrived at an erroneous conclusion;
- 10) The learned trial magistrate erred in fact and law in ordering that the original suit was best determined by setting down for hearing on priority basis ignoring and/or disregarding the current state of affairs in the Republic of Kenya as regards the COVID-19 pandemic thus disallowing the Notice of Motion application dated 19th day of August 2019;
11. The ruling of the learned trial magistrate does not capture the issues(s) for determination, the determination thereof and the reasons for such determination. Consequently, the ruling of the learned trial magistrate contravenes the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010.

THE PARTIES' SUBMISSIONS

11. The Appellant's learned counsel agrees with the trial court that the Appellant established a *prima facie* case with a high chance of success. On the second condition of irreparable loss, counsel contends that the trial court disregarded the evidence of the Appellant that she and the children of the marriage were on the verge of being rendered destitute. He submits that the appellant resides in Nairobi and occasionally returns to the suit property which is the matrimonial home. That no amount of damages would compensate the Appellant if the suit property was charged to a financial institution or alienated to third parties.
12. The trial court's finding that the matter could be fast tracked for hearing did not augur well with the appellant's counsel in light of the situation in the country at the time due to the Covid 19 pandemic which led to a scaling down of court operations.
13. Regarding the balance of convenience, learned counsel argues that the trial court ventured into issues that could only be canvassed during trial. He complains that the trial magistrate made final findings in her decision by alluding that the appellant was part of the transaction and pocketed the purchase price yet there was no evidence to that effect. Counsel submits that having demonstrated that the suit property was matrimonial property, the balance of convenience was in favour of the appellant.
14. The trial court is also faulted for ignoring the doctrine of *lis pendens* which had been raised in the appellant's submissions. It is urged that having failed to exercise her discretion judiciously, the learned magistrate's decision must be interfered with.
15. Counsel for the 2nd Respondent on the other hand contends that there was no proof to support the claim that the suit property is matrimonial property or that the Applicant had contributed to the purchase of the property. Citing the cases of *Kidbrooke Investment Ltd vs Isaac Meangi (2016) eKLR*, *Alice Wanja Munji v Samuel Munji Kihanya & 2 Others (2014)eKLR* and *Sarah Ayitso Kuria v Peter Andrew Kuria HCCC No. 7 of 2010*, *Linus Ngetich vs Cecilia Chelangat Ngetich & 2 Others [2018]eKLR* learned counsel submitted that proof had to be adduced to demonstrate that the property qualified to be matrimonial property.
16. It is argued that the Respondent is an innocent purchaser for value with title over the property and he has already assumed possession. Counsel contends that allowing the appeal will greatly prejudice the 2nd Respondent. That if the court is inclined to allow the appeal, it should be on condition of the Appellant depositing the entire purchase price together with costs of all developments amounting to Kshs. 3,000,000/= in a joint interest earning account in the names of the advocates for the parties pending the hearing and determination of the main suit.
17. On grounds 10 and 11, counsel submits that the appellant fails to take cognizance of the fact that the judiciary has been up-scaling court activities.

ANALYSIS AND DETERMINATION

18. Having considered the learned counsels' submissions and the material before this court including the memorandum of appeal and the record of appeal, I find that the central issue for determination is whether the trial magistrate erred in refusing to grant the orders of injunction sought by the Appellant.

19. The decision to grant or refuse an injunction is discretionary in nature. On appeal, the court will interrogate whether the trial court misdirected itself on the law, misapprehended the facts, took account of considerations which he should not have taken into account or failed to take account of considerations which he should have taken into account or that the decision, albeit a discretionary one was plainly wrong. It is only then that an appellate court can interfere with the decision of the lower court to grant or refuse to grant injunctive orders. (See ***Mrao Ltd v First American Bank of Kenya Ltd & 2 others CA MSA Civil Appeal No 39 of 2002 [2003] eKLR***)

20. In the application before the trial court, the Appellant sought interim orders to preserve the suit property on the grounds that the land is matrimonial property. The Appellant claims that LR No. North Mugirango/Bonyarorande/1929 was sold off to the 2nd Respondent by her husband, the 1st Respondent without her consent as a spouse.

21. The conditions for granting of temporary injunctions were set out in the *locus classicus*, ***Giella vs Cassman Brown & Company Limited (1973) E A 358***, where the court held that :-

"First, 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."

22. The trial court's finding that the Appellant had established a *prima facie* case with a likelihood of success has not been contested in this appeal. What is contested is the finding that the other conditions for allowing an application for interlocutory injunction had not been met.

23. The Appellant argues that if injunctive orders are not granted she is likely to suffer irreparable loss as the suit property constitutes matrimonial property and she and the children of the marriage are on the verge of being rendered destitute.

24. The definition of matrimonial property is found in **section 6** of the **Matrimonial Property Act** which provides;

6 (1)For the 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.

25. It is agreed that the 1st Respondent sold the suit property to the 2nd Respondent. It is also common ground that no spousal consent was obtained before the sale of the land to the 2nd Respondent. Although the trial court found that there was no dispute that the Appellant was the lawful wife of the 1st Defendant, it is apparent that the 2nd Respondent questioned that assertion in his statement of defence.

26. The Appellant's claim that she contributed to the acquisition of the property has also been vigorously challenged by the 2nd Respondent. The Appellant claimed that she had obtained a loan facility and contributed towards the purchase of the land together with the 1st Respondent. She also averred that she and her husband took possession of the land and carried various developments thereon including constructing a three bed roomed house where they cohabited.

27. Contribution is a necessary ingredient in establishing whether property is matrimonial property. Contribution, under **section 2** of the **Matrimonial Property Act** could be monetary or non- monetary. In order to prove that the suit is matrimonial property it will be necessary for the appellant to ascertain her contribution to the acquisition and development of the property. This will only be possible at the trial.

28. The Appellant's claim that she and the children of the marriage live on the suit property and are likely to be rendered destitute if the orders sought are not granted has also been sufficiently rebutted by the 2nd Respondent. The material before this court supports the 2nd Respondent's claim that he has been in occupation of the suit property.

29. Is the Appellant likely to suffer damage which cannot be adequately compensated by damages if the orders sought are not granted? I think not. The value of the suit property can be easily ascertained by way of valuation at the conclusion of the trial.

30. Considering the circumstances of this case it is necessary for the court to consider the balance of convenience. I find that it would be in the best interest of justice to preserve the suit property pending the hearing of the suit. I am guided by the English case of ***Films Rover International 1986 3 All ER 772*** cited by the court in ***Amir Suleiman v Amboseli Resort Limited [2004] eKLR*** where the court held;

"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".

31. The Appellant invoked the doctrine of *lis pendens* in her submissions before the trial court but the court did not address the issue. In endorsing the application of the common law principle of *lis pendens*, the Court of Appeal in **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another Civil Appeal No. 44 of 2014 [2015] eKLR** held;

Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of *lis pendens*, Turner L. J, in **Bellamy vs Sabine [1857] 1 De J 566** held as follows:-

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

.....

The necessity of the doctrine of *lis pendens* in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of section 52 of the ITPA by the Land Registration Act (LRA) Number 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of Section 107 (1) of the LRA which provides the saving and transitional provisions of this Act ...

The effect of this provision [section 107 (1) of the LRA] is to allow for the continued applicability of the rights and interests ensuing from legislation that governed titles of properties established prior to the repeal of such legislation. Given that the concerned property involved land eligible for registration under the Registration of Titles Act (now repealed), having regard to section 107 (1) of the LRA, it is evident the rights flowing from section 52 of the ITPA including those under doctrine of *lis pendens* would remain applicable to the circumstances of this case.

32. The superior court also found that being a common law principle, the doctrine was part and parcel of the laws in the Kenyan context by virtue of **section 3 (1)** of the **Judicature Act**.

33. Guided by the above authorities, I find that the doctrine of *lis pendens* is applicable in this case and the trial court erred in failing to consider the said principle.

34. Before I conclude, I must point out that I did not see anything on record to support the trial court’s conclusion that the appellant could have benefited from the monies paid to the 2nd respondent when he sold off the suit property. The 1st respondent did not enter appearance or file a response to the application. It is unclear why the court would find that the 1st respondent would benefit whether or not the court granted an interlocutory injunction. I find that the trial court took into account extraneous factors in exercising its discretion. The court also seemed to condemn the appellant unheard by finding that she profited from the transaction.

35. The Court of Appeal cautioned against such conclusions at interlocutory stage in the case of **Agip (K) Ltd. vs Vora [2000] 2 EA 285**. The Court held;

“In our view, the Commissioner was not entitled to delve into substantive issues and make finally concluded views of the dispute.

He was not at that interlocutory stage of the matter, to condemn one of the parties before hearing oral evidence that party being condemned had in opposition to the claims in the suit.”

36. For the reasons given above, I set aside the ruling and order of the subordinate court dismissing the application dated 19th August 2019. I substitute it with an order allowing the application in the terms earlier agreed to by the counsels in this appeal on 22nd May 2020, adjusted accordingly.

37. This appeal is hereby allowed in the following terms;

1. An injunction is hereby granted restraining the 2nd Respondent from selling, disposing of, charging, alienating, carrying out any development and/or constructions of whatever nature on LR No. North Mugirango/Bonyarorande/1929 pending the hearing and determination of the suit before the magistrate’s court.

2. The 2nd Respondent shall continue to pluck the tea on the suit property and he shall on a monthly basis render an account including but not limited to cash receipts, delivery and /or collection documents to the appellant in respect of the tea leaves plucked from LR No. North Mugirango/Bonyarorande/1929 and delivered at Kebirigo Tea Factory Limited and/or any other tea factory, pending the hearing and determination of the suit before the magistrate’s court;

3. The main suit shall be listed for hearing on priority basis.

4. Costs shall abide the determination of the main suit.

Dated, signed and delivered at Kisii this 9th day of October 2020.

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J.M. ONYANGO

JUDGE