REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 12 OF 2019

MILCAH NANGAMI .....PLAINTIFF

VERSUS

JULIUS KHAOYA WANYONYI..... 1ST DEFENDANT

AZINGA ANGELLA MANGWANA.....2ND DEFENDANT

DICKSON MACRAE LITALI ..... 3RD DEFENDANT

R U L I N G

The un-disputed facts in this case are that the land parcel **NO BUNGOMA /NDALU/28** (hereinafter the suit land) has been registered in the names of the 1st defendant since 24th November 1986. The 1st defendant is the husband to the plaintiff. By two agreements dated 9th April 2018 and 18th June 2018, the 1st defendant sold two portions out of the suit land measuring 1.5 acres and 1 acre to the 2nd and 3rd defendants respectively.

Irked by those two transactions, the plaintiff moved to this Court on 6th May 2019 seeking Judgment against the defendants in the following terms: -

1. **The sale of land agreements dated 9th April 2018 and 18th June 2018 are null and void.**

2. **That an injunction be issued restraining the 2nd and 3rd defendants, their agents, servants or any other person working on instructions from the 1st, 2nd and 3rd defendants from trespassing, ploughing, leasing building, planting or in any other way dealing with the suit land.**

3. **Costs of the suit.**

The basis of the plaintiff's claim is that she and the 1st defendant were married in 1960 and the suit land is their matrimonial property where they have established their home with their 10 children. However, the two sale agreements executed between the defendants were done without her consent or knowledge hence this suit.

The 1st defendant is yet to file any defence.

The 2nd defendant filed a defence dated 1st July 2019 denying the plaintiff's averments that the suit land is matrimonial property or that the agreement dated 18th June 2018 (her agreement is infact dated 9th April 2018) was without the plaintiff's consent. She added that the agreement between her and the 1st defendant was done procedurally with the plaintiff's consent and following several family meetings since the couple and their children who were witnesses to the agreement needed funds to settle debts. That the portion sold to her has now been developed substantially at a value that cannot be quantified. That in any event, the value of the property purchased by her does not exceed Kshs. 20,000,000/= and so this Court lacks jurisdiction to handle this suit which should be determined by a Subordinate Court and therefore, a Preliminary Objection would be raised that the suit be struck out for want of jurisdiction.

The 3rd defendant filed a defence and Counter – Claim dated 3rd July 2020 also denying that the plaintiff was not aware about the sale agreement between him and the 1st defendant. He added that following the said agreement, he paid the purchase price which was acknowledged.

In his Counter – Claim, he sought Judgment against the plaintiff as follows:-

> **1. A permanent injunction restraining the plaintiff from interfering with his possession and occupation of 1 acre excised from the suit land.**
>
> **2. A declaration that the 3rd defendant has legally acquired 1 acre out of the suit land and the same be transferred to him.**

From the record, it is clear that on 9th July 2020, the 3rd defendant filed a Notice of Motion seeking injunctive reliefs against the plaintiff with respect to the suit land. However, that application has not been brought up for hearing. What was transmitted to me by way of e-mail on 27th July 2020 in keeping with the **COVID – 19** guidelines was the plaintiff's Notice of Motion dated 23rd July 2020 on which I made directions that the same be canvassed by way of written submissions. That application is the subject of this ruling and obviously if I allow it, then the 3rd defendant's Notice of Motion dated 3rd July 2020 and filed on 9th July 2020 will be rendered superfluous.

By the Notice of Motion dated 23rd July 2020 and anchored on the provisions of **Order 40 Rule 1, 2, and 3 of the Civil Procedure Rules**, the plaintiff sought the following orders: -

> **1. Spent**
>
> **2. Spent**
>
> **3. That there be restraining orders restraining the defendants, their agents or servants from any other way interfering further with the suit property herein being land parcel NO BUNGOMA/NDALU/28 pending the hearing and determination of this suit.**
>
> **4. That the defendants be condemned to pay costs of this application.**

The application is premised on the grounds set out therein and supported by the plaintiff's affidavit dated 23rd July 2020.

The gravamen of the application is that the 2nd and 3rd defendants purport to have bought portions of the suit land from the 1st defendant and have embarked on demarcating the same yet no consent has been obtained from the Land Control Board. That the 1st defendant who is her husband has not obtained her consent yet the suit land is matrimonial property. That the Director of Public Prosecutions has declined to take any action against the defendants since the matter is already in Court. Annexed to the affidavit is a letter dated 29th May 2020 addressed to the plaintiff's Counsel by the Office of The Director of Public Prosecutions, Certificate of Search for the suit land and photographs of the plaintiff's home.

The 1st and 3rd defendants did not file any responses to the application.

The 2nd defendant filed a replying affidavit dated 14th August 2020 describing the application as scandalous, frivolous, vexatious and not disclosing any cause of action against him. She also termed the application as a delaying tactic lacking in merit and meant only to delay this suit. While acknowledging that the plaintiff and 1st defendant are man and wife, the 2nd defendant deponed that prior to executing the agreement dated 9th April 2018, the plaintiff and 1st defendant had approached her to purchase a portion of the suit land measuring 1½ acres. They agreed on the purchase price of Kshs. 1.5 million which was paid in full with the consent of the plaintiff and her family on the basis of willing purchaser and seller. She is therefore surprised that after receiving the staggering sum of Kshs. 1.5 million, the plaintiff is now denying having been aware about the transaction. That she has done some developments including fencing the 1½ acres, erecting a small house and planting food crops and is surprised that the plaintiff's sons who were witnesses to the sale agreement are now supporting their mother. That the plaintiff has not established a prima facie case and has not come to Court with clean hands. That if this Court is to make any orders, it should maintain the status quo in terms of use and occupation of the 1½ acres pending the hearing and determination of the suit. Annexed to the affidavit is a copy of the sale agreement dated 9th April 2018 and photographs of structures.

Submissions were thereafter filed both by **MR NYAMU** instructed by the firm of **R. E. NYAMU & COMPANY ADVOCATES** for the plaintiff and by **MS CHUNGE** instructed by the firm of **ELIZABETH CHUNGE & COMPANY ADVOCATES** for the 2nd defendant.

I have considered the application, the rival affidavits and annextures thereto as well as the submissions by Counsel.

Before I delve into the application, I need to address an issue of jurisdiction which has been pleaded in paragraph 12 of the 2nd defendant's defence to the effect that the value of the suit land does not exceed Kshs. 20 million and therefore it is the Subordinate Court, and not this Court, which has jurisdiction and therefore, this suit should be struck out for want of jurisdiction.

An issue of jurisdiction must be determined before the Court embarks on any consideration of the dispute before it. As was stated by **NYARANGI J A** in **OWNERS OF MOTOR VEHICLE "LILLIAN S" .V. CALTEX OIL KENYA LTD 1989 K. L. R 1**: -

> **"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

And in **OWNERS & MASTERS OF THE MOTOR VESSEL "JOEY" .V. OWNERS & MASTERS OF THE MOTOR TUG**

"BARBARA" AND "STEVE B" 2008 1E.A 367, the Court of Appeal expressed itself as follows: -

> **"The question of jurisdiction is a threshold issue and must be determined by a Judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it."**

Ideally, the best evidence to prove the value of any property, including land, is a valuation report by a recognized valuer. Therefore, a party wishing to plead the value of land as the basis of jurisdiction should avail a valuer's report showing the value of the land. That notwithstanding, I have no doubt in my mind that the value of the 1½ acres which the 2nd defendant purchased taken together with the 1 acre that the 3rd defendant purchased puts this dispute within the pecuniary jurisdiction of the Subordinate Court. However, the fact that the value of property in dispute is within the pecuniary jurisdiction of a Subordinate Court does not mean the dispute cannot be handled by this Court. This Court, as provided by **Section 4(2) of the Environment and Land Court Act *"is a superior Court of record with the status of the High Court."*** It therefore enjoys unlimited original jurisdiction in civil matters germane to land and the environment unless qualified by judicial precedents or bestowed in specialized Tribunals. Certainly, however, this Court's jurisdiction is not circumscribed by the value of the property in dispute. It is worth noting that when this application was placed before me through electronic mail on 27th July 2020, all that I could glean was the Notice of Motion dated 23rd July 2020 which did not include the defence. And having made the directions that I did on that day in which I even fixed the date of ruling as 8th October 2020, I am obliged to deliver the ruling as directed. The bottom line however is that the claim that this Court lacks the jurisdiction to handle this dispute is not well founded. I reject it.

I shall now consider the application on it's merits.

The plaintiff seeks an order of temporary injunction pending trial. The principles that guide a Court considering an application such as this one were set out in the case of **GIELLA .V. CASSMAN BROWN & CO LTD 1973 E.A 358** as follows: -

> **1. The Applicant must establish a prima facie case with a probability of success.**
>
> **2. An interlocutory injunction will not be granted unless the Applicant shows that he will suffer irreparable injury which cannot otherwise be adequately compensated by an award of damages.**
>
> **3. If in doubt, the Court will determine the application on the balance of convenience.**

A prima facie case was defined in the case of **MRAO .V. FIRST AMERICAN BANK OF KENYA LTD & OTHERS C.A CIVIL APPEAL No 39 of 2002 [2003 eKLR]** as: -

> **"…….. a case 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 as to call for an explanation or rebuttal from the latter."**

And in **NGURUMAN .V. JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No 77 of 2012** the Court stated that: -

> **"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 of, or as otherwise put, on a preponderance of probabilities. This means no more than the Court takes the view that on the face of it, the Applicant's case is more likely than not to ultimately succeed."**

The Court then went on to add as follows: -

> **"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."**

Finally, in **FILMS ROVER INTERNATIONAL LTD .V. CANNON FILMS SALES LTD 1986 3 ALL. E. R 772**, the Court added that while considering such an application, the Court should take the route or course that appears to carry the lower risk of injustice should it turn out to have been ***"wrong."*** An interlocutory injunction is also an equitable remedy and the party seeking it must approach the Court with clean hands. This Court will be guided by the above principles among other and the relevant laws.

As to whether the plaintiff has established a prima facie case with a probability of success, her case is that she married the 1st defendant in 1960 and the suit land was acquired during the existence of the said marriage and it is therefore matrimonial property part of which the 1st defendant has disposed off without her consent or knowledge. Among the documents that she has filed is the certificate of Search indicating that the suit land was first registered in the names of the 1st defendant on 24th November 1986 which was some 26 years after they were married. That the plaintiff is the 1st defendant's spouse is not in doubt. It is also clear that the suit land was acquired during the subsistence of their marriage which is still subsisting. This suit was filed in 2019 and the **Matrimonial Property Act No 49 of 2013** which came into force on 16th January2014 defines matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage. **Section 7 of the Act** provides for ownership of matrimonial property and states as follows: -

"Subject to Section 6(3) ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved."

Section 6(1)(a) of the Matrimonial Property Act defines Matrimonial Property to mean: -

6(1)(a) "The matrimonial home or homes."

Section 12(1) of the same Act provides that an interest in matrimonial property shall not be alienated during the subsistence of a monogamous marriage by way of sale, gift, lease, mortgage or otherwise **"without the consent of both spouses."**

In response to the plaintiff's averment in paragraph 3 of her supporting affidavit that the 1st defendant sold portions of the suit land to the 2nd and 3rd defendants without her **"consent and or knowledge,"** the 2nd defendant in her replying affidavit at paragraph 17 states as follows: -

17. "That I remember well that there was no objection to the sale herein at all at the time of such negotiations and at the time of preparing the agreement from the plaintiff or defendant's sons herein."

Although in my directions dated 27th July 2020, I granted the plaintiff leave to file any supplementary affidavit if need be, none was filed. Therefore, the averments that the plaintiff was aware about the transfer of portions of the suit land to the defendants and raised no objections to the same have not been rebutted. In paragraphs 11, 12, 18 and 19 of the said replying affidavit, the 2nd defendant makes these averments which have again not been rebutted by any supplementary affidavit: -

11: "That the said sale was with the authority and consent of the plaintiff and his (sic) family members"

12: "That the land sale agreement herein was entered on a willing purchaser and seller on voluntary basis without any coercion, duress or force and it was done prior to several meetings and consultations between me and the plaintiff and the 1st defendant and his sons."

18: "That immediately after the sale agreement herein, I was shown the land and given vacant possession by the consent of the plaintiff, the 1st defendant and some of their sons.

19: "That I assumed vacant possession and exclusive use to date after the boundaries of the 1½ acres due to me was earmarked on the ground by the 1st defendant and the plaintiff and a few of their sons to distinguish my land from other surrounding land especially the applicant, the defendant's and other buyers in the suit land."

The plaintiff's main complaint is that the sale of portions of the suit land to the 2nd and 3rd defendants was done without her consent. I have perused the sale agreements dated 9th April 2018 and 18th June 2018 and it is true that the plaintiff was neither a party nor a witness to the same. However, I find it strange that it took her a whole year to file this suit and another year to file this application. Bearing in mind the 2nd defendant's averment that she took possession of the 1 ½ acre out of the suit land and had the boundary marked as far back as April 2018, the plaintiff cannot be heard to allege 2 years later that she was kept in the dark about the sale of the portions of land to the defendants. The 2nd defendant annexed to her replying affidavit photographs of structures that she has constructed on her portion which really means that she has been a neighbour to the plaintiff and her family for 2 years now. Surely it cannot be possible that it has taken her that long to discover that the 2nd defendant, and indeed even the 3rd defendant who did not file a response to the application, have been ***"interfering"*** with the suit land. The only plausible explanation is that she must have known about the transactions involving the defendants over the suit land all along but for some reasons well known to herself, she decided to take no action.

Her other complaint is that infact the sale agreements were not consented to by the Land Control Board. That is true because if such consent was granted, it has not been produced. However, notwithstanding the fact that the lack of such consent renders the agreements dated 9th April 2018 and 18th June 2018 void, the jurisprudence emanating from cases such as **WILLY KIMUTAI KITILIT .V. MICHAEL KIBE T 2018 eKLR** is that doctrines of trust and proprietary estoppel can apply in favour of the purchasers in such cases.

Given the above circumstances, I am not persuaded that the plaintiff has established a prima facie case to warrant the grant of the orders sought in her Notice of Motion.

That finding should be sufficient to dispose off the application. That is because, as was held in **NGURUMAN .V. JAN BONDE NIELSEN** (supra): -

"If prima facie case is not established, then irreparable injury and balance of convenience need no consideration"

See **also AMERICAN CYNAMID .V. ETHICON LTD 1975 A.C 396** where **LORD DIPLOCK** stated thus: -

"If there is not prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief."

The above decision has been affirmed by superior Courts in this Country including in **NAFTALI RUTHI KINYUA .V. PATRICK**

Having said so, I have nevertheless considered what irreparable injury the plaintiff will suffer that cannot be compensated by an award of damages. Nowhere in her 15-paragraph supporting affidavit has the plaintiff suggested what irreparable injury, if any, she will suffer that will not be capable of adequately being compensated by an award of damages should her application not be granted. She only makes reference to the fact that the defendants are causing ***"confusion on the suit property and it's in the best interest of justice that the orders sought herein be granted"*** and also that the defendants ***"will not be prejudiced"*** if the orders sought are granted. **MS CHUNGE** has submitted, and rightly so in my view, that the plaintiff has not demonstrated that she will suffer irreparable loss that cannot be adequately compensated by an award of damages and therefore, the application should be dismissed. The defendants have been in open and exclusive occupation of their respective portions of the suit land for 2 years now. They do not as yet have titles to the said portions because, as averred in paragraph 24 of the 2nd defendant's replying affidavit, ***"the process of acquiring a Land Control Board Consent to transfer has been frustrated by the plaintiff and his (sic) sons who are using (sic) every effort the 1st defendant is making to transfer the said land in my name."*** There is no likelihood, and it has not been suggested by the plaintiff, that the defendants may dispose of their respective portions of the suit land out of the plaintiff's reach by the time this suit is heard and determined. The defendants are also only utilizing their respective portions. Clearly, the plaintiff has also failed to surmount the second limb in the **GIELLA .V. CASSMAN BROWN** case (supra).

Even if I was in doubt, which I am not, and was to determine this application on the balance of convenience, I would exercise my discretion by dismissing it. This is because, the defendants are in occupation and possession of their respective portions the suit land and to grant the orders sought by the plaintiff would amount to evicting them from parcels of land which they have occupied now for 2 years. Guided by **FILMS ROVER INTERNATIONAL .V. CANNON FILM SALES LTD** (supra), the route that appears to carry the lower risk of injustice is to decline the application. It would also not be prudent to restrain the 1st defendant from interfering with the suit property which is not only registered in his names but is also his matrimonial home.

The up – shot of the above is that the plaintiff's Notice of Motion dated 23rd July 2020 is dismissed with costs to the 2nd defendant.

If the 3rd defendant is still desirous of prosecuting his Notice of Motion dated 3rd July 2020 and filed herein on 9th July 2020, it be served upon the plaintiff within 7 days of this ruling together with written submissions. The plaintiff shall have 14 days from the date of service to file her response and submissions.

The case shall thereafter be mentioned on 29th October 2020 for further directions on the said application.

Boaz N. Olao.

J U D G E

8th October 2020.

Ruling dated, signed and delivered at **BUNGOMA** this 8th day of October 2020 by way of electronic mail as was advised to the parties in my directions dated 27th July 2020.

Boaz N. Olao.

J U D G E

8th October 2020.