

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 890 OF 2013

SERAH VAATI KASAMU.....APPLICANT

VERSUS

JACKSON KASAMU KAVISU 1ST DEFENDANT

LUCY WANJIRU MUCHAI.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 17th July 2013 in which the Plaintiff/Applicant seeks for orders of an interlocutory injunction restraining the Defendants from selling, alienating or transferring or otherwise dealing with the parcel of land identified as Kajiado/Kaputiei North/7911 (hereinafter referred to as the “Suit Property”) pending the determination of this suit and that an order of prohibition be issued stopping all further registration or leasing, allotment, user, occupation or possession or any kind of right and interest of the Suit Property at Kajiado land registry together with costs.

The application is supported by the grounds appearing on the face of it as well as the Supporting Affidavit of Serah Vaati Kasamu sworn on 17th July 2013 in which she stated that she is the first wife of the 1st Defendant, that together they have been blessed with three children and that they solemnized their marriage at Rehoboth Church on 17th May 1998. She produced a copy of their certificate of marriage. She further swore that through hard work, struggle and sacrifices coupled with savings, she together with her husband managed to purchase the Suit Property at a cost of Kshs. 600,000/- out of which her contribution was Kshs. 450,000/- and that the Suit Property was registered in the name of the 1st Defendant alone. She further averred that she together with the 1st Defendant agreed that the family would construct a house on the Suit Property to accommodate both her family as well as the family of her co-wife. She further averred that she has constructed two iron sheet rooms on the Suit Property to house their gardeners. She further disclosed that she found a sale agreement dated 24th May 2012 between the two defendants whereby the 1st Defendant was purporting to sell the Suit Property to the 2nd Defendant at Kshs. 3 million without consulting the family. She further indicated that if the 1st Defendant is allowed to sell the Suit Property, she, her co-wife and their children will be left destitute.

The Application is not contested. Despite being duly served with all the pleadings and documents in this suit, neither of the two Defendants filed any response.

In determining whether or not to give the Plaintiff/Applicant the orders she seeks of an interlocutory injunction, I will refer to and rely on the principles laid down in the celebrated case of ***Giella versus Cassman Brown (1973) EA 358*** as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally

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.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of ***MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125***, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is 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.”

Has the Plaintiff/Applicant established a ‘genuine and arguable case? The applicant has conceded that the 1st Defendant is the sole registered proprietor of the Suit Property. The law is clear as to the rights and privileges that appertain to being a registered proprietor of land and these include the right to sell the land to any willing and able buyer. However, the Plaintiff/Applicant must convince this court that this is a case in which her husband should be denied that right. This would be by establishing her rights over the Suit Property by demonstrating that her husband holds the same in trust for her and that she is a beneficial owner thereof. She has sworn that out of the purchase price of Kshs. 600,000/- for the Suit Property, she contributed Kshs. 450,000/-. However, she has not produced any proof to support that assertion. We also do not have the benefit of the 1st Defendant’s response to that assertion. Section 107 of the Evidence Act places the burden of proof to the party who asserts a fact. In this case, the Plaintiff/Applicant has failed to prove this fact at this juncture of these proceedings. Accordingly, I am not convinced that the Plaintiff/Applicant has shown that she has any beneficial interest in the Suit Property which is capable of being preserved or protected by means of an interlocutory injunction as we await the conclusion of this case. Accordingly, I find that the Plaintiff/Applicant has not established a prima facie case with a probability of success at the main trial. That being my finding, I see no need to further interrogate whether the other two conditions for the grant of an interlocutory injunction have been satisfied.

In light of the foregoing, the application is hereby dismissed with no order as to costs.

SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF NOVEMBER 2013.

MARY M. GITUMBI

JUDGE