



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 110 OF 2018**

**STK.....PLAINTIFF**

**VERSUS**

**CA.....DEFENDANT**

**RULING**

1. The Notice of Motion dated **11<sup>th</sup> December, 2018** seeks the following orders:

(1) .....spent

(2) .....spent

(3) **That upon *inter partes* hearing and determination of this application, this honourable court be pleased to confirm the temporary injunction while pending the hearing and determination of the suit herein**

(c) **Costs of this application be provided for.**

2. The Notice of Motion is founded on the grounds set out at the foot of the application and in the supporting affidavit of the plaintiff sworn on **11/12/2018**. These are that the plaintiff and the defendant are a wife and husband; that the applicant is a [particulars withheld] employed by the Teachers Service Commission with effect from **1986** while the respondent is a retired [particulars withheld]; that during the subsistence of their marriage the parties herein jointly contributed money that purchased the land now comprised in Title No. **West Pokot/Keringet [...]**, and which got registered in the sole name of the respondent; that both the applicant and the respondent jointly developed the suit property by constructing their residential house therein, and they also constructed rental units in the said property and which is occupied by the applicant and the children of the marriage, and several tenants, but the respondent does not reside in the property; that the suit land and the development standing thereon is matrimonial property; that the respondent without the involvement and the consent of the applicant has endeavoured to secretly sell the suit property; that the applicant on **4/10/2018** objected to the intended sale of the suit property and the Kapenguria Land Control Board upheld the objection and refused to give consent; that the applicant has lodged a caution against the title of **West Pokot/Keringet [...]** and that the suit property is under imminent danger of being disposed and that would overtake these proceedings and render the same nugatory.

3. The replying affidavit to the application was filed on **30/1/2019** by the defendant who avers that he purchased the land **1984** before he and the applicant got married and the land is not matrimonial property; that they got married in **1984** and he developed suit land in order to accommodate the family by putting up three rooms that later on he developed the property further while the applicant deserted him in **2011**; that applicant returned in **2018** forcefully occupied some three rooms on the property and caused a caution to be registered against the title; that the property was acquired and developed through a Sacco loan taken by the respondent and without any contribution from the applicant; that the applicant has another Plot No. **West Pokot/Keringet [...]** which she has developed; that the purpose of selling the suit land which he described as a commercial plot was to enable him buy land in Maili Saba where he put up a matrimonial home. Photographs of that house are exhibited. Lastly, the respondent avers an injunction is not a proper remedy because the event sought to be injuncted has already taken place. He avers that if an injunction issues it would disrupt the status quo since the property in question has been sold.

4. In a further affidavit dated **7/3/2019** the applicant responds to the respondent's replying affidavit and states that her marriage to the respondent was "*perfected*" in **1982** and exhibit the birth certificate of their first born child which shows he was born on **9<sup>th</sup> January, 1984**; that between **1982** and **1984** the applicant was employed and used to earn a salary; that in August **1984** she contributed **3000/=** towards the purchase of the suit land; that in **1987** she contributed to development of the house on the land and purchased some home items; that her **3<sup>rd</sup>** and **4<sup>th</sup>** children were born thereon; that while settled thereon she and the respondent engaged in business of buying and selling real properties; that through that business she acquired the plot **West Pokot/Keringet [...]** in **1993** which she developed with her father's help while the respondent also acquired **West Pokot/Keringet [...]**; that with knowledge of the respondent she sold the said plot and part of the proceeds were utilized to further develop the suit land; that her being away from the respondent was occasioned by long period of sickness necessitating long period of hospitalisation and during the period of sickness she resided with her parents due to hostility of the respondent;

that the couple's matrimonial home as well as several rental premises were located on the suit property. She disputes the respondent's statement by saying that the respondent used retirement benefits rather than proceeds of sale of the suit property to purchase and develop Maili Saba plot in **February, 2017** while the sale agreement in respect of the suit property was drawn one year later in **February, 2018**.

5. The applicant filed her submissions on the application on **7/3/2019**.

6. The applicant relies on the cases of **HC Milimani (Family Division) Civil Case No. 66/2012 NCK -vs-GVK eKLR and HC Milimani (Family Division) Civil Case No. 17/2015 BWK -vs- EMG eKLR**.

7. The respondent filed his submissions on **15/3/2019**. He relies on the cases of **Eldoret ELC No. 221 of 2017 between Pius Kipchirchir Kogo -vs- Frank Kimeli Tena and Giella -vs- Cassman brown 1973 EA 358** and also **Kalya Sio Farmers Co-operative Society -vs- Paul Kirui & Kenya Forest Services**

8. This court must determine if the injunction sought can issue. The conditions for issuance of temporary injunctions were set out in the case of **Giella vs Cassman Brown 1973 EA 358**. They are that the applicant must demonstrate a prima facie case and the likelihood of substantial loss. If the court is in doubt it will rule on the application on a balance of convenience.

9. The applicant's case is that the land comprised in title number West Pokot/Keringet [...] is matrimonial property. This court has to determine from the evidence given at the hearing of the suit whether the same is matrimonial property under the meaning assigned to that term in the **Land Act and the Matrimonial Property Act**.

10. I will examine the definitions in so far as they are relevant to this suit. The latter Act defines matrimonial property as **“(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.”**

11. In the instant suit it is common ground that the plaintiff and the defendant are married to each other. There is no evidence of divorce. It is common ground that they lived together as husband and wife on the suit property and begot children there in the **1980s**. The date of the marriage under customary law is disputed. The applicant avers that it was in **1982** while the respondent maintains that it was in **1984**. The applicant produces birth certificate showing that one of the issues of the marriage was born on **9<sup>th</sup> January 1984**. I have not heard the respondent to say that the said child was not born then, or out of wedlock.

12. It is not disputed that the applicant also purchased some home items while they lived there. However the issue of whether the applicant contributed any resources in the purchase of the suit property is strongly disputed by the respondent. That is as far as this court can go in analyzing the affidavit evidence at this interlocutory stage. However it is clear that the applicant has demonstrated that she was earning a salary from the year **1982** onwards. It is also not in dispute that by the time she sold the plot number **West Pokot/Keringet [...]** in **2009**, the alleged desertion had not occurred. It will be a matter of evidence whether, as she alleges in her affidavit, she invested part of the proceeds of that sale in the development of the suit property. She has also explained what her husband calls desertion by stating that she was ill at the time desertion is alleged to have occurred and had to be hospitalized. Whether they affect the status of the property or not, these are matters that would have to be proved by way of evidence at the hearing.

13. However for now I am of the view that the applicant has on the basis of the evidence presented before this court established a prima facie case with a probability of success.

14. As to whether she would suffer substantial loss that would not be compensated for by way of damages, I refer to the admission by the respondent that the applicant has returned to the premises and taken up three rooms albeit allegedly by use of force. She is nevertheless in occupation of the suit property which she regards as matrimonial property. The only other property that she had bought has been sold, and it is alleged that part of the proceeds were employed in the development of the suit property. Though the applicant concedes that he has constructed a *matrimonial home* elsewhere, this dispute is in regard to *matrimonial property*. He has not also indicated that he has settled the applicant on the newly built matrimonial home.

15. For the purposes of the instant application I find that the applicant has established a prima facie case with a probability of success. As to whether she would suffer loss that cannot be compensated for by way of damages, I refer to the newly finished construction of a matrimonial home, from which she does not assert that she has been excluded, and I find that she would not suffer such loss.

16. However on a balance of convenience I find that it is necessary to preserve the status of the suit property pending the hearing and determination of this suit.

17. I therefore grant the application dated **11/12/2018** and issue the following orders:

**(a) That the temporary injunction issued earlier in this suit is hereby confirmed pending the hearing and determination of the suit herein;**

**(b) Costs of this application shall be in the cause.**

**Dated, signed and delivered at Kitale on this 28<sup>th</sup> day of March, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**28/03/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for applicant/plaintiff

Ms. Munialo for respondent

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**28/03/2019**