



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 164 OF 2014

FLORENCE KABALIKA ASIRIGWAPLAINTIFF/APPLICANT

VERSUS

TIMOTHY ASIRIGWA ASENDIDEFENDANT/RESPONDENT

RULING

The application is dated 29th May 2014 and is brought under order 37 rule 1 of the Civil Procedure Rules and Section 28(h) of the Land Registration Act seeking the following orders;

1. THAT pending the hearing and determination of this originating summons an inhibition order be issued against title NO. KAKAMEGA/IGUHU/1303.
2. THAT the respondent be stopped by temporary injunction from selling the parcel of land afore quoted KAKAMEGA/IGUHU/1303.
3. The costs of this summons be borne by the respondent.

The applicant submitted that, the respondent is her husband (Attached is a copy of marriage certificate marked "FKA-f"). That land parcel NO. KAKAMEGA/IGUHU/1303 is their family land. That she recently learned that the respondent is preparing to sell the land to the CDF Ikolomani. She tried to lodge a caution against the said title but the same was quickly removed. (Attached is a copy of the caution marked "FKA-2") That should the land be sold, they shall have nowhere to stay as they do not have an alternative parcel of land. The said parcel of land is family land and she has equal rights to it as her husband. They bought the said parcel of land jointly with her husband. Her husband has turned violent and even chased her from their matrimonial home. She approached their area chief who advised her to lodge a caution against the said title. (Attached is a copy of the letter dated 9th January 2013 marked "FKA-3"). She did a letter to the manager, CDF Ikolomani voicing her complainant but the same has elicited no response. (Attached is a copy of the letter marked "FKA-4").

In support of the application, the applicant swore an affidavit on the same dated the application was filed. She stated that she is the legal wife of the respondent and attached a marriage certificate to that effect. As such her consent was vital before any sale of their matrimonial property could occur. Section 12 of the Matrimonial property Act 2013 is clear as it states;

'An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.'

The respondent did not seek consent from the applicant before the sale of the subject matter herein. The purported letter attached by the respondent alleging to have sought consent from the applicant dated 21st May, 2014 is not genuine. The letter lacks the names of the applicant and her signature. The witnesses in the said letter did not sign against their names too, hence a clear indication of forgery of the letter by the respondent. No consent was sought from the applicant and if indeed there was consent the one purported to be sought in 2009 it did not materialize into a sale. The purpose of the same which was to get school fees for the children had already been over taken by events because all the children had cleared their education hence no need of selling the land five years down the line (2009 to 2015).

The applicant further submitted that, the respondent goes ahead to say that he bought the said parcel of land alone and hence he is the sole proprietor of the same. That is not true that the applicant made some monetary contributions to the said purchase. The applicant made a contribution of Ksh. 3,500/=. Even if the applicant's contribution was not true but which is not the case, the applicant still has an interest in the said parcel of land as evident in the Matrimonial Property Act 2013, section 14, which goes ahead to give presumptions as to property acquired during marriage in sub section (a)

“Where matrimonial property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.”

The same act in section 2 interprets what ‘contribution’ means and it states ‘Contribution means monetary and non-monetary and includes;

- a. Child care.
- b. Companionship.
- c. Management of family business or property and
- d. Farm work.

All of which the applicant has been doing. Section 28 of the Land Registration Act, 2012; deals with overriding interests i.e. that even if the property is registered in the names of one party, the other party has overriding interests over the property. On the issue of ownership it is evident that both parties owned the property jointly and as such it was vital for the respondent to seek the consent of the applicant before conducting the sale. It is not right for the respondent to state other property they own together with the applicant, evidencing that the applicant will not lack a place to stay because of the sale of one of their property without the applicant's consent. It is required by law for spouses to seek each other's consent before disposing off matrimonial property or dealing with it in any other way, despite the fact that there is more than one property in their joint ownership.

The applicant also seeks a temporary injunction to restrain the respondent from selling the parcel of land afore quoted KAKAMEGA/IGUHIU/1003. They relied on the case of **Giella vs. Cassman Brown Co. Ltd. 1973 EA 358** in support of this prayer. They have attached an authority for perusal in support of the applicant's application. **ELC No. 1437 of 2013 Edith Nyambura Mwanjera vs. Symon Mwanjera Ndara and 2 Others.** They pray that the applicant's application dated 29th May, 2014 be allowed.

The respondent in his replying affidavit stated that it is not true that the suit land is family land, to the contrary he purchased the land solely in 1974 at the time when he had taken the applicant to Kaimosi Teachers Training College and as a student she cannot allege she contributed in any way in purchase of the said land. It is also not true that he sold the suit land to CDF Ikolomani, to the contrary he disposed off the said land on the basis of an agreement signed by the applicant herein on 7th July 2009 and he has already surrendered the said land to Ishianji Primary School with the full knowledge of the applicant herein. Annexed are the said agreements marked TAA 1(A) & (B). That it is not true that a caution was hurriedly removed from the said land, to the contrary relevant notices were issued regarding the caution lodged on the same land and since there was no basis and also on recommendation by the letter from the area chief, the Land Registrar had no alternative but lift the said caution. Annexed is a copy of the chief

letter and Land Registrars Notices marked TAA 2 (a), (b) and (c). That it is not true that if the suit land is sold as he has already done so the applicant will have nowhere to stay due to lack of alternative land. He has never chased away the applicant from the matrimonial home and neither was he violent, it is the respondent who moved out of the matrimonial home after breaking into their posho mill and stealing the grinding machine. The area Administration Assistant Chief, Chief and police have tried to intervene but she has remained adamant. Annexed is the copy of O/B letters by the Assistant Chief, TAA 4 (a) (b) & (c). The applicant has therefore sought orders in a vacuum as there is no material placed before the court for which the court can rely on to grant the orders sought. The orders sought herein have already been overtaken by events and the land in question has already been disposed to a 3rd party who has taken possession.

A court of law, it is said, shall not act in vain. Be that as it may, they also submit that the application by the applicant does not meet the threshold set in the locus classicus case of **Giella vs. Cassman Brown & Co. Ltd (973) E.A. 358** that an applicant for a temporary mandatory injunction must demonstrate that he has:

“..... a prima facie case against the respondent with a probability of success, and that unless the order is granted, he shall suffer irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience”.

The plaintiff has not shown that she has a prima facie case which is described in **Mrao vs. First American Bank of Kenya and Two others [2003] KLR 125**, as a;

..... 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 to call for an explanation or rebuttal from the latter

Firstly, the applicant has not presented any evidence or document before the court to show that she has any interest in the said land. Even if she has unregistered interests as the wife of the respondent the same has been disapproved by the respondent through his annexure marked T.A.E. – 1 which is an agreement duly executed by the applicant consenting to the selling of the land.

Further the applicant has not shown or stated if there is any of her rights which have been infringed or is likely to be infringed which might then require the intervention of the court. She has not shown any attachment she has on the land that if it is sold would be infringing on her rights or interests. Vide her annexure marked FKA-4 a letter from her area chief shows that she left the area, which is apparently the area the land is located, way back in 2012 when their marriage experienced some small hiccups just the way any family does.

The applicant only stated on the face of the application that she will suffer irreparable harm if the activities on the land are allowed to go on. She has not however averred so in her supporting affidavit. That can be taken to mean that there will be no irreparable harm that cannot be compensated by way of monetary value. They submitted under it that the balance of convenience is in favour of the respondent who sold the land to take care of their children’s school fees. The application should be dismissed with costs to the defendant/respondent.

This court has carefully considered both the applicant’s and the respondent’s submissions and the annexures therein. The principals governing the grant of interlocutory injunction are clear beyond peradventure. As stated in the case of **Giella vs. Cassman Brown (1973) EA 358**.

“The conditions of granting an 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 normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Furthermore, as elaborated in the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others (2003)** Hon Bosire J.A. held that:

“So what is a prima facie case? I would say that it is a case in which on the material presented to the court or 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”

Further he goes on to state that *“..... a prime facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”*

Plaintiff/applicant sought orders that pending the hearing of the application inter parties and the hearing of the suit there be an order of temporary injunction restraining the defendant/respondents, their agents, employees, workers and assigns or any other person working under their instructions from selling, alienating, constructing on or in any other manner interfering with the ownership of land parcel No. KAKAMEGA/IGUHU/1303. The grounds on the face of the application are that the suit property is a family land which was jointly acquired by the applicant and the respondent as a wife and a husband and that the respondent has sold the land without the consent of the applicant and as such applicant’s children have been denied inheritance. In the end the applicant avers that as a result she and her children stand to suffer irreparable loss and damages unless the orders sought are granted. The respondent did not seek consent from the applicant before the sale of the subject matter herein. The purported letter attached by the respondent alleging to have sought consent from the applicant dated 21st May, 2014 is not genuine. The letter lacks the names of the applicant and her signature. The witnesses in the said letter did not sign against their names too, hence a clear indication of forgery of the letter by the respondent.

The respondent in his replying affidavit stated that it is not true that the suit land is family land, to the contrary he purchased the land solely in 1974 at the time when he had taken the applicant to Kaimosi Teachers Training College and as a student she cannot allege she contributed in any way in purchase of the said land. It is also not true that he sold the suit land to CDF Ikolomani, to the contrary he disposed off the said land on the basis of an agreement signed by the applicant herein on 7th July 2009 and he has already surrendered the said land to Ishianji Primary School with the full knowledge of the applicant herein. It is not disputed that the suit land has already been sold to a third party. The applicant’s case is that, the respondent did not seek consent from the applicant before the sale of the subject matter herein. That the purported letter attached by the respondent alleging to have sought consent from the applicant dated 21st May, 2014 is not genuine. Be that as it may, I find that the applicant has shown a prima facie case with a probability of success and I grant the following orders;

1. That pending the hearing and determination of this originating summons an inhibition order be issued against title NO. KAKAMEGA/IGUHU/1303.
2. The costs of this application to be in the cause.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 6TH DAY OF FEBRUARY 2018.

N.A. MATHEKA

JUDGE