



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.562 OF 2017

AGNES WARUIRU KAMAU.....PLAINTIFF/APPLICANT

-VERSUS-

MOSES MWAURA MUHUHU.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff's/Applicant's **Notice of Motion** application dated **11th April 2017** brought under **Order 40 Rules 1 & 2, Order 51 Rule 1** and **Sections 1A, 1B, 3 & 3A** of the **Civil Procedure Act** and all other enabling provisions of law. The Applicant has sought for the following orders:-

- 1. That pending the inter-partes hearing and determination of this suit, the Defendant either by himself, his agents, servants or in any manner howsoever be restrained from selling, dealing with, conveying, charging, selling, subdividing, leasing Plot No.Ruiru/Kiu Block 4/1 along the by-pass, Mwihoko Plot No.1 measuring 50x80 ft LR.No.10901130 near KDF Store and Plot near the Muigai Inn along Thika Road past Ruiru and/or interfering with the Plaintiff's equitable presumptive interests and rights thereon.**
- 2. That pending the inter-partes hearing and determination of this suit, the Defendant to render full, true and accurate account of all the earnings, income and rental proceeds from Plot No.Ruiru/Kiu Block 4/1 Plot 1 along the by-pass, Mwihoko Plot No.1 measuring 50x80 ft LR.No.10901130 near KDF Store and Plot next to Muigai Inn along Thika Road past Ruiru together audited accounts and records of the revenue, profit and/or income of Lumo Investment & Footmark Enterprises.**
- 3. That the costs of this application be paid by the Defendant/Respondent.**

The application is supported on the grounds stated on the face of the application and the **Supporting Affidavit** of the Applicant herein.

The grounds in support are that;- **The Plaintiff and the Defendant were married under Kikuyu Customary Law and they have a child Lauryne Wambui born on 24th January 2012 during the pendency of their marriage.** Further that the Plaintiff and the Defendant opted to inject capital and started a business together known as **Lumo Investment and Footwork Enterprises**. Further that in the **year 2011**, the Plaintiff guaranteed the Defendant who took a loan from **Equity Bank** for the purposes of increasing stock and growing the business. That the Plaintiff also contributed cash from the savings and earnings and together with the Defendant, they purchased plots **No.Ruiru/Kiu Block 1, Mwihoko Plot No.1 measuring 50 x 80ft,** and a **plot next to Muigai Inn** along **Thika Road**. However the Plaintiff/Applicant allowed the Defendant/Respondent to be registered solely in the ownership documents of the above stated plots and thus the Defendant is holding the said plots in trust for her and their family. However, the Defendant unilaterally sold the business to his sister and further moved out of the matrimonial home. That the Defendant has started to sell the said plots contrary to the fact that the Defendant is only registered as the owner of the plots on **constructive trust** basis and **equitable trust**. The Applicant has therefore urged the Court to allow her instant application.

The application is vehemently opposed. **Moses Mwaura Muhuhu**, the Defendant filed his **Replying Affidavit** on **8th February 2018** and averred that the instant application lacks merit and is misconceived and an abuse of the court process. He denied that he has ever been married to the Plaintiff/Applicant herein. He however admitted to have fathered the Plaintiff's child **Lauryne Wambui** who was born on **24th January 2012**. It was his contention that the said child was born out of wedlock and its custody and maintenance is the subject of a pending Children's Case between himself and the Plaintiff at **Nairobi Childrens' Court being Case No.1636 of 2014**. Further that there is no evidence advanced to proof that the properties mentioned are matrimonial properties. He also admitted to have co-habited with the Plaintiff in a casual manner until **December 2014** when the Plaintiff left and entered into another relationship with a gentleman called **Kariuki**, whom they sired a daughter together in **September 2015** and she is still co-habiting with him todate.

He contended that he purchased the subject properties while he was a bachelor and not a husband to the Plaintiff/Applicant. Further that **Plot No.Mwihoko Plot No.1** and **LR.No.1090/30** were developed by him without any input or financial assistance from the Plaintiff. However

plots known as **Ruiru/Kiu Block 4/1 Plot 1** and **Plot near Muigai Inn along Thika Road** are unknown to him as he does not own such properties and he did not put the Plaintiff to strict proof. He also contended that the business known as **Footmark Enterprises** is no longer owned by himself since he sold the same to his sister as a going concern and the sale proceeds were shared with the Plaintiff who then opened a clothes boutique at **Jeevanjee Shopping Mall**. Further that he has been informed by his advocate that this court deals with land issues and any matters on issues as to ownership on shares in a business can only be determined in a Civil or Commercial Court. He urged the Court to dismiss the instant application.

The application was canvassed by way of written submissions. The **Law Firm of Moses Odawa & Co. Advocates** for the Plaintiff/Applicant filed the submissions on **13th April 2018** and urged the Court to allow the instant application as the Applicant has established all the principles laid out in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973**.

The **Law Firm of Mungai Kalande & Co. Advocates** for the Defendant/Respondent filed their written submissions on **16th May 2018** and urged the Court to dismiss the instant application as the averments made by the Plaintiff/Applicant were unsubstantiated and there was no evidence that Plaintiff/Applicant was ever married to the Defendant under **Kikuyu Customary Laws**.

The Court has now carefully considered the instant **Notice of Motion** application and the written submissions filed herein. The Court too has considered the cited authorities and the relevant provisions of law and makes the following findings:-

The Applicant/Plaintiff herein has sought for injunctive reliefs granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **Nyutu & Others...Vs...Gatheru & Others (1990) KLR 554**, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised”.

Further, the Court will take into account that at this interlocutory stage, the court is not called upon to decide the disputed issues with a finality. All that is needed at this stage is to determine whether the Applicant is deserving of the injunctive orders sought based on the usual criteria. See the case of **Edwin Kamau Muriu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is to determine whether the Applicant is entitled to an Injunction sought on the usual criteria---”

The criteria that will guide this Court is the one held in the case of **Giella...Vs...Cassman Brown & Co. Ltd (1973) EA 358** and later repeated in the other various judicial pronouncements. See the case of **Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, where the Court held that:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the 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 might 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. See also E.A Industries ..Vs..Trufoods (1972) EA 420.”

Firstly, the Applicant needed to establish that she has a *prima-facie* case with probability of success at the trial. In the case of **Mrao Ltd... Vs... First American Bank Ltd & 2 others (2003) eKLR 125**, *Prima-facie* case was described as:-

“A case which on the material presented to the Court or a tribunal property directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation on rebuttal from the latter”

Has the Applicant herein established that she had a *prima-facie* case with probability of success at the trial?

The Applicant has alleged that she was married to the Defendant/Respondent under **Kikuyu Customary Marriage**. However the Defendant/Respondent has denied ever having contracted any form of marriage with the Applicant. He however admitted to having sired a baby with the Applicant but the said conception was out of wedlock and that there is a case of **Child Maintenance** at the **Nairobi Childrens' Court** being **Case No.1636 of 2014**. The Applicant has not denied the pendency of the Child Maintenance case in the Childrens' Court. The issue of whether the Applicant was married to the Respondent is an issue that can only be determined after calling of evidence. The said disputed issue cannot be resolved through affidavit evidence. See the case of **Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & Others, Civil Appeal No.213 of 1999**, where the Court held that:-

“In an application for injunction, the Court should not delve into substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

Further the Applicant has alleged that the properties in issue are all matrimonial properties. However, the Respondent has denied the same and alleged that the only properties he purchased as a bachelor but not as husband of the Applicant are **Mwihoko Plot No.1 and LR.No.1090/130** near KDF Store. He further denied knowledge of the other properties being **Ruiru/Kiu Block 4/1 Plot 1** and **Plot next to Muigai Inn** along Thika Road. The Court finds that the issue of whether all the properties mentioned are matrimonial properties are issues that can be determined after calling of evidence. The said disputed issues cannot be determined at this interlocutory stage through affidavits evidence.

Further on whether the Respondent owns **Plots No.Ruiru/Kiu Block 4/1** and the **Plot next to Muigai Inn along Thika Road**, the Applicant will need to avail evidence of existence of the said plots and evidence of who owns the same. Without that evidence, this Court would be very reluctant to hold that indeed the said plots are owned by the Defendant/Respondent herein.

Therefore, this Court finds that the Applicant has failed to establish the existence of any *prima-facie* case with probability of success at the trial.

Having found that the Applicant has not established a *prima-facie* case, the Court finds no need of dealing with the other principles laid down in the **Giella Case (supra)** as the said principles are sequential. See the case of **Kenya Commercial Finance Co. Limited..Vs.. Afraha Education Society (2001) 1EA 87**, where the court held that”-

“The conditions in the case of Giella ..Vs.. Cassman Brown for granting of temporary injunction are sequential so that the second condition can only be addressed if the first one is satisfied and when the Court is in doubt, then the third condition can be addressed.”

Further, this Court finds that the Plaintiff’s/Applicant’s claim is hinged on the issues of matrimonial properties which issues are governed by **Matrimonial Properties Act No.49 of 2013**. The Court herein is an Environment and Land Court which is created by **Article 162 (2)** of the **Constitution of Kenya 2010** and governed by the **Environment and Land Court Act No.12 of 2012**. The jurisdiction of the court is provided by **Section 13** of the said **Environment and Land Court Act**, which provides:-

“The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.”

From the above provisions of law, the division of Matrimonial Properties is not a matter that falls under the purview of this Court. For the above reasons, the Court finds that it has no jurisdiction to deal with the issues raised by the Plaintiff/Applicant herein.

Though the best option would have to down my tools, the Court finds that for the interest of justice and as guided by **Article 159 (2)(d)** of the **Constitution** and **Section 3A** of the **Civil Procedure Act**, the necessary orders herein is to direct that this suit be transferred to the **Magistrate’s Court**. Consequently, the Court directs and orders that the suit herein be transferred to **Thika Chief Magistrate’s Court** for further orders and final hearing and determination of the same.

It is so ordered.

Dated, Signed and Delivered at Thika this 2nd day of November 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Madegwa holding brief for Mr. Odawa for Plaintiff/Applicant

Mr. Karuga holding brief Mr. Mungai for Defendant/Respondent

Lucy - Court clerk

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

2/11/2018