



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 31 OF 2018**

**FREDRICK MWARO.....APPLICANT**

**VERSUS**

**CLARE AKUKU MWARO.....1<sup>ST</sup> RESPONDENT**

**KHALIF ABIR MADHOBE.....2<sup>ND</sup> RESPONDENT**

**FARMVIEW HOTEL LTD.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. What is before me for determination at this stage is the Notice of Motion dated 17/4/2018 filed here on the same date by the Applicant – **FREDRICK MWARO** – who is the Plaintiff in the suit herein. It is brought against the three Respondents – **CLARE AKUKU MWARO**, **KHALIF ABIR MADHOBE** and **FARMVIEW HOTEL LTD** – who are 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively. The law invoked includes Section 1A (1) and (2), Section 3A of Civil Procedure Act (cap 21) and Order 40 Rule 1 and 2 of the Civil Procedure Rules, 2010.

2. The application has four prayers but some of them – prayers 1 and 2 – are now moot, having been intended for consideration at an earlier stage. For consideration now are prayers 3 and 4, which are as follows:

Prayer 3: That the Defendants/Respondents by themselves, their agents, servants and/or employees be restrained by way of an interim injunction order of this honourable court from alienating, selling, disposing and/or in any other way interfering with land parcel No. BUKHAYO/MUNDIKA/12760 and 12761 pending the hearing and determination of this suit.

Prayer 4: That the costs of this application be provided for.

3. At the centre of the dispute is land parcel No. BUKHAYO/MUNDIKA 2405 which the 1<sup>st</sup> Respondent is said to have sub-divided into parcels Nos BUKHAYO/MUNDIKA/12760 and BUKHAYO/MUNDIKA/12671 and sold to 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Applicant says that the 1<sup>st</sup> Respondent is his wife and the land sold was matrimonial property. He contests the sale on the basis that his consent as a spouse was not obtained.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents responded vide grounds of opposition filed on 13/6/2018. They faulted the application for making reference to land parcels 12760 and 12761 which the plaint does not mention at all. They averred that land parcel No 2405 no longer exists. Further, the 1<sup>st</sup> Respondent was said never to have been the Applicant's wife and parcel No. 2405 was therefore never matrimonial property. The application was said to fall short of meeting the threshold for granting a temporary injunction.

5. The 3<sup>rd</sup> Respondent responded by way of a replying affidavit filed on 15/5/2018. From the response, it is clear that the 3<sup>rd</sup> Respondent bought land parcel No. 12761 in 2016. It was averred that due diligence was followed and the Applicant never featured anywhere as owner. The Applicant was said also not to have demonstrated the existence of a marriage between him and 1<sup>st</sup> Respondent. Like the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the 3<sup>rd</sup> Respondent averred that the Applicant has not met the threshold for granting a temporary injunction.

6. The Applicant filed a supplementary affidavit on 24/7/2018 deposing, *inter alia*, that indeed the 1<sup>st</sup> Respondent was his wife, with her last name, Mwaro, being the name of the Applicant. Together, Applicant further deposed, they had a child, Sheila Mwaro. He also said he has paid dowry on her.

7. The application was canvassed by way of written submissions. The Applicants submissions were filed on 25/9/2018. The Applicant generally reiterated what his application contains and submitted, *inter alia*, that the threshold set in **Giela Vs Cassman Brown & Co. Ltd [1973] EA 358** has been met. To the Applicant, a *prima facie* case is demonstrated. He had an overriding interest in the property yet it was sold without his consent. He also said he stands to suffer irreparable loss as he had contributed to the acquisition of the property.

8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submissions were filed on 27/8/2018. Much of it reiterates what the grounds of opposition filed by them contain. The right of the Applicants as owners of the property was emphasised and it was reiterated that no marriage ever existed between 1<sup>st</sup> Respondent and the Applicant. Also emphasised was that the threshold set in Giela's case (ante), which involves establishing a *prima facie* case, demonstrating likelihood of irreparable loss not compensable in damages and/or considering balance of convenience, has not been met. The Applicant's supplementary affidavit was faulted as it was filed without leave of court.

9. The 3<sup>rd</sup> Respondent's submissions were filed on 22/10/2018. It was submitted that the 3<sup>rd</sup> Respondent was a bonafide purchaser for value and the suit as filed is against it **"is incompetent in law, scandalous, frivolous, and an abuse of the process of court"**.

10. I have considered the application, the responses made, and the rival submissions. I have also had a look at the suit as filed. It is true that the plaint makes no reference to land parcels No.12760 and 12761. Infact, only parcels No. 2405 is mentioned. Pleadings forms the foundation of a case and if there is a disconnect between pleadings and interlocutory proceedings based on them, that constitutes a serious omission.

11. It seems also clear that the bone of contention surrounding the property squarely relates to the Applicant and 1<sup>st</sup> Respondent. The other two – 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondents – are people to whom the land was sold and/or transferred. The Applicant does not allege any collusion, conniving, or conspiracy between the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to defeat the interest he alleges to have in the land. Yet in all likelihood, any restraining order issued is bound to affect these two Respondents more than the 1<sup>st</sup> Respondent. The 3<sup>rd</sup> Respondent in particular is said to have a hotel on the land sold to it. A restraining order of the kind sought by the Applicant may likely cripple the operations of the hotel.

12. I note the real likelihood of the fact that the Applicant and the 1<sup>st</sup> Respondent may not be living together. Infact the 1<sup>st</sup> Respondent denies ever being a wife to the Applicant. From the records, it appears that the land was registered in the 1<sup>st</sup> Respondent's name. The alleged interest of the Applicant was not noted in the ownership register and it was not therefore obvious to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that such interest existed at the time the land was sub-divided and transferred to them. I would therefore be reluctant to grant an order that affects them in the circumstances.

13. The Applicant alleged that he has established a *prima facie* case. It is not easy to agree with him. As pointed out earlier, the problem herein is essentially between him and the 1<sup>st</sup> Respondent, with a failed or failing marriage seemingly at the centre of it. The other two parties seem to be a bit far from this grievance. At this stage, the explanations given by these two Respondents seem reasonable. It is also crucial to appreciate that the property seems to have been sold in the year 2016. The case herein was filed in April 2018. The Applicant says that he will suffer irreparable loss. One is bound to ask: For the two or so years that he has stayed without a temporary injunction, what irreparable loss has he suffered? I think the Applicant needed to explain this in order to convince the court.

14. And given that the property has already changed hands, I think it was incumbent on the Applicant to undertake to pay damages should he ultimately happen to be in the wrong. In **GATI Vs BARCLAYS BANK (K) LTD [2001] KLR 528**, the court held, *inter alia*, that an undertaking to pay damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue.

15. Given the observations I have made heretofore, it is clear that I am not persuaded that the application has merits. I make a finding therefore that the application herein is unmeritorious and I hereby dismiss it with costs.

**Dated, signed and delivered at Busia this 6<sup>th</sup> day of December, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant: Present

1<sup>st</sup> Respondent: Present

2<sup>nd</sup> Respondent: Absent

3<sup>rd</sup> Respondent: Absent

Counsel for Applicant: Absent

Counsel for 1<sup>st</sup> and 2<sup>nd</sup> Respondents: Present

Counsel for 3<sup>rd</sup> Respondent: Absent

Court Assistant: Nelson Odame