



**Kariuki v Mwirika & another (Environment and Land Case
294 of 2017) [2017] KEELC 3876 (KLR) (11 July 2017) (Ruling)**
Eunice Njeri Kariuki v James Mwangi Mwirika & another [2017] eKLR
Neutral citation: [2017] KEELC 3876 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND CASE 294 OF 2017

JG KEMEL, J
JULY 11, 2017

BETWEEN

EUNICE NJERI KARIUKI APPLICANT

AND

JAMES MWANGI MWIRIKA 1ST DEFENDANT

SAMUEL NDUATI MACHARIA 2ND DEFENDANT

RULING

1. The Applicant filed a suit against the Respondents seeking among other orders, a permanent injunction restraining the 1st defendant from selling, transferring, interfering, dealing or alienating land parcel No. Loc2/Kangari/4675 [hereinafter called the suit property]. She also urged this Court to permanently restrain the 1st Defendant from interfering with her quiet possession and enjoyment of the suit property.
2. Simultaneously the applicant filed a Notice of Motion seeking a temporary injunction against the 1st defendant, his agents, assignees, lessees, servants and or consignees from selling transferring interfering dealing or alienating the suit property pending the hearing and determination of the suit. The application is premised on two grounds to wit; that she is the wife of the 1st defendant having been married under Kikuyu Customary Law and secondly that the 1st defendant has illegally sold the suit land to the 2nd defendant who is in the process of effecting the registration of the same without any color or right.
3. The Applicants case is supported by her affidavit sworn on the 6th March 2017 together with her oral evidence adduced at the hearing of the application which was held on the 11th April 2017. She avers that she is the legal wife of the 1st defendant having been married from 2008 under Kikuyu Customary Law and together have been blessed with two children aged 8 years and 6 months respectively. She alleges



- that the 1st defendant has left the matrimonial home and is living with another woman in Nairobi. She confirms that the suit property is registered in the name of the 1st defendant, the same having been given to him by his grandfather in 2013.
4. That sometime in December 2016 it came to her knowledge that the suit property was in the process of being sold by the 1st defendant to the 2nd defendant and she lodged a caution on the same on 28th December 2016 at the Land Registry, Muranga to stop the sale claiming beneficial interest. That similarly she sought help from the local chief, Kangari as well as the Deputy County Commissioner, Kigumo Sub- County and County Commissioner -Muranga to halt the transaction. In addition, she filed this application to injunct the transaction which is incomplete pending the issuance of the Land Control Board consent, the suit land being agricultural property.
 5. The applicant depones that unless a temporary injunction is granted by this Court she stands to lose the only source of livelihood for herself and her children. That the land being an inheritance from the 1st Defendant's grandfather, her children equally have a right to inherit it from their father, the 1st defendant and therefore should not be sold off to third parties. That prior to the month of March this year, she had been enjoying economic benefit from the land through sale of green leaf which she plucks from the land and sells to the local factory but through her mother- in- law's account. Though she admitted that she does not reside on the suit property, she is entitled to its enjoyment of livelihood. That she currently lives with her mother in law on another parcel of land separate from the suit property.
 6. The application was opposed by the 1st defendant who confirms that he is the registered owner of the suit land having inherited it from his grandfather. He swore that he is not married to the Applicant and that the suit land is neither family nor matrimonial property. He however accedes to the fact that they he had a relationship with the applicant and that he sired a son with her [the first child]. He confirmed that he is in the process of selling the suit land to the 2nd defendant who has paid him Kshs. 600,000/- as deposit pending completion of the transaction. That the transaction is not complete as it was interrupted by the caution lodged by the applicant. It is pending the Land Control Board Consent. That the applicant has come to court with unclean hands and with ill intention and is therefore not entitled to the interlocutory injunction being sought.
 7. The 2nd defendant reiterated the terms of the agreement for sale between him and the 1st defendant. That the 1st defendant swore an affidavit on the 22nd December 2016 to the effect that he is unmarried and therefore spousal consent would not applicable to the transaction. That he is an innocent purchaser for value without notice and therefore is a stranger to the issues between the applicant and the 1st defendant. In furtherance of his prayer to dismiss the application, the 2nd defendant has an alternative prayer that the Court to order that the 1st defendant refunds of Kshs. 600,000/- deposit already paid to the 1st defendant towards the purchase price of the suit property.
 8. The learned counsel for the 2nd defendant submitted that the transaction is that of a willing buyer willing seller. That the 2nd defendant took prudent steps to carry out due diligence before entering into the agreement of sale with the 1st defendant dated 22nd December 2016. That the applicant does not merit the interlocutory injunction in the absence of any grounds to entitle her the same.
 9. The issue for determination before this Court is whether the applicant has met the requirements of granting an injunction as stated in the celebrated case of *Giella v Cassman Brown and Co. Ltd* [1973] EA 358 which are: that firstly, 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 be compensated by an award of damages, and thirdly, if the court is in doubt, it will decide an application on a balance of convenience.



10. The Court of Appeal in *Mrao v First American Bank of Kenya Ltd & Two Others* C.A. No. 39 OF 2002 [2003 eK.L.R.] defined a prima facie case in the following terms;
- “A prima facie case in a civil application include 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”.
11. The parties do not dispute that the 1st defendant is the registered proprietor of the suit property. Section 25 of the *Land Registration Act* No 3 of 2012 as amended by the Land Laws [Amendment] Act, 2016 states that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to the liabilities, rights and interests stated in section 28 of the *Act*. Section 28 of the *Act* was amended in 2016 to remove spousal rights over matrimonial property being counted as part of overriding interests on registered land. These rights are now found in the *Matrimonial Property Act* No. 49 of 2013.
12. That being the case, the issue of whether or not a suit property is a matrimonial property is then dealt with under section 93 of the *Registered Land Act* which states as follows;
- “subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Act.”
13. The Matrimonial *Act No 49 of 2013* defines matrimonial property as follows:-
- [a] the matrimonial home or homes;
 - [b] household goods and effects in the matrimonial home or homes;
 - [c] any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
14. Whether there exists a customary marriage under Kikuyu Customary traditions remains a fact to be proved in evidence in the trial of the main suit. There is no material that has been placed before this court to determine the issue one way or another. The adage that he who alleges has the burden of proof is tenable. In this case the applicant must remove the doubt on that allegation at the trial. Having said that, this Court has taken note of the admission by the 1st defendant that there existed a relationship between him and the applicant as a result of which he sired a child or children with her. This then lends credence to the nexus between the Applicant and the 1st defendant and the matter of whether or not she is a spouse for purposes of spousal consent to the transaction at hand. Again as stated above this is a matter reserved for the trial.
15. Before the court can determine whether or not the suit property is matrimonial as to require spousal consent, the matter of the existence or otherwise of a marriage between the applicant and the 1st defendant must be determined. It is clear from the *Matrimonial Property Act* that spousal consent



is mandatory, where matrimonial property is applicable, as seen in the use of the word “shall” in the following section 12[1];

“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 issue of existence or otherwise of a marriage is a matter for trial.

16. In respect to adequacy of damages as compensation the Court of Appeal in the case of *Muiruri v Bank of Baroda [Kenya] Ltd* 2001 e K L R 183 had this to say;

“besides, disputes over land in Kenya evoke a lot of emotions and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”. Will the applicant suffer irreparable damage if the interlocutory injunction is not granted? The applicant has stated that she stands to lose her source of livelihood if the injunction is not granted. However it is on record from the evidence of the 1st defendant that he has another parcel of land which he defines as family land. If it is found that the applicant is indeed a spouse, the question will be whether that other land could be available for use by the applicant and her children. The 1st defendant has not demonstrated if he is able to compensate the applicant in the event that she suffers irreparable harm if the injunction is not granted.

17. In the circumstances, the balance of convenience tilts in favour of the Court ordering a status quo. Exercising the power given to me by Order 40 rule 1 of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act* and in the interest of justice I order that the status quo on the suit property to be maintained. For purposes of clarity the 1st defendant is hereby restrained either by himself, agents, lessees, assignees, servants or consignees from disposing leasing charging selling or interfering in whatever manner with the Loc2/Kangari/4675 until the hearing and determination of this suit. Costs to abide the outcome of the main suit.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH JULY 2017.

J. G. KEMEI

JUDGE

11.7.17

Before Hon. Jemutai G. Kemei [J]

Court Assistant – Susan

Plaintiff: Present in person

1st Defendant: Absent

2nd Defendant: Absent

Ms Eunice Njeri Kariuki: am here for the delivery of the ruling.

Court: Ruling delivered in the presence of the:

Applicant – Present in person

1st Defendant – Absent



2nd Defendant – Absent

Court Assistant – Susan/Kuiyaki

J. G. KEMEI

JUDGE

