



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 39 OF 2017**

**MARY WAMBUI KURIA.....PLAINTIFF**

**VERSUS**

**TITUS MWANGI NJOROGE.....1<sup>ST</sup> DEFENDANT**

**DUNCAN GITHUI.....2<sup>ND</sup> DEFENDANT**

**NANCY NJERI MUCHIRI.....3<sup>RD</sup> DEFENDANT**

**MILIKA MUCHO.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. By a plaint dated and filed on 24<sup>th</sup> February 2017 the plaintiff sought the following reliefs against the Defendants;

*a. A declaration that plot (sic) identified as No. 1957 Karuku Village in Embu County is matrimonial property and cancellation of the transaction of selling the suit land between the 1<sup>st</sup> Defendant and 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants or any other party and the said plot do revert to the 1<sup>st</sup> Defendant’s name and a permanent injunction do issue restraining the 1<sup>st</sup> Defendant from selling the plot without the Plaintiff’s consent.*

*b. Costs of the suit and interest.*

2. It was pleaded in the plaint that sometime in 1977 the Plaintiff got married to the 1<sup>st</sup> Defendant under Kikuyu customary law and were blessed with 3 children. It was also stated that during their marriage, the Plaintiff and the 1<sup>st</sup> Defendant contributed towards the acquisition of plot No. 1957 in Karuku village in Embu (hereinafter the ‘suit property’). The Plaintiff also stated that the 1<sup>st</sup> Defendant had since chased her out of the matrimonial home and sold of the suit property to the rest of the Defendants without her knowledge or consent. She further pleaded that the 1<sup>st</sup> Defendant’s said actions had rendered her and her children destitute as they had no other home.

3. Simultaneously with the filing of the suit, the Plaintiff filed a notice of motion under **Order 40 of the Civil Procedure Rules** under certificate of urgency seeking the following reliefs;

*a. Spent*

*b. Spent*

c. That a temporary injunction do issue restraining the Defendants/Respondents, their servants, agents, assignees or anybody claiming under them from selling/disposing off, developing, interfering with or alienating plot No. 1957 Karuku village in Embu County pending hearing and determination of this suit or further orders of this Honourable court.

d. That the rents collected in the premises (sic) be deposited in a joint interest earning account of the Plaintiff and 1<sup>st</sup> Defendant until this suit is determined.

4. The said application was supported by the Plaintiff's affidavit which reiterated the averments in the plaint. The said application was also supported by the Plaintiff's further affidavit sworn on 4<sup>th</sup> May 2017 in response to the 1<sup>st</sup> Defendant's replying affidavit. In the said further affidavit, the Plaintiff annexed copies of her ID card, a medical report, a letter from a Chief, affidavit of marriage and children's birth certificates.

5. The said application was opposed by the 1<sup>st</sup> Defendant who filed a replying affidavit sworn on 31<sup>st</sup> March 2017 and a further affidavit sworn on 5<sup>th</sup> June 2017 in which he denied the existence of any marriage but admitted fathering two children with the Plaintiff. He denied that the suit property was purchased jointly with the Plaintiff and generally accused the Plaintiff of being a gold digger. He urged the court to dismiss the said application.

6. The 3<sup>rd</sup> Defendant filed a replying affidavit sworn on 5<sup>th</sup> May 2017 in opposition to the said application. She annexed a copy of a sale agreement indicating that she bought a portion of the suit property from the 1<sup>st</sup> Defendant vide a sale agreement dated 19<sup>th</sup> October 2016 and had fully paid for it and taken possession thereof. She also stated that she had no knowledge of the alleged marriage between the Plaintiff and the 1<sup>st</sup> Defendant. She therefore asked the court to dismiss the said application.

7. The 2<sup>nd</sup> Defendant also filed a replying affidavit sworn on 4<sup>th</sup> April 2017 in opposition to the Plaintiff's said application. He also claimed to have bought a portion of the suit property vide a sale agreement dated 5<sup>th</sup> August 2015 from the 1<sup>st</sup> Defendant. It is not clear whether this is the same property the 3<sup>rd</sup> Defendant bought or if it was another subdivision of the original suit property.

8. By consent of the parties, it was agreed that the 1<sup>st</sup> Plaintiff's said application shall be disposed of through written submissions. According to the record, only the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their written submissions. The court shall nonetheless proceed to determine that application.

9. The main issue for determination is whether the Plaintiff has satisfied the requirements for the grant of an interlocutory injunction as set out in the case of **Giella Vs Cassman Brown & Co Ltd (1973) [EA] 358**. So, has the Plaintiff demonstrated a *prima facie* case with a probability of success at the trial? The Plaintiff has demonstrated that the 1<sup>st</sup> Defendant sired some children with her although the existence of customary marriage is disputed. To be fair to the Plaintiff, this is an issue which would require oral evidence at the trial to establish or disapprove. It is quite possible that she may establish the existence of customary marriage at the trial. However, the Plaintiff has not adduced evidence of her contribution towards the acquisition of the suit properties. In my opinion, the 1<sup>st</sup> principle has not been satisfied.

10. It is also on record that some third parties namely the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have acquired an interest in the suit property through purchase. It has not been demonstrated that they had notice of any encumbrance or knowledge of the alleged customary marriage. The Plaintiff does not appear to have taken any diligent steps to protect her alleged interest in the suit properties for at least 2 years. The first portion of the suit property appears to have been sold in 2015. The court is, therefore, not satisfied that a *prima facie* case with a probability of success at the trial has been made out because innocent purchasers for value without notice of any defect in title are usually protected by law.

11. The 2<sup>nd</sup> principle relates to adequacy of damages. An injunction will not normally be issued unless

the applicant might otherwise suffer irreparable damage which cannot be adequately compensated by an award of monetary damages. It would appear that the suit premises consist of same rental buildings from which some of the Defendants are drawing rent. The Plaintiff does not reside on the suit premises. The value of the property and the monetary rent it can fetch are quantifiable in my view. In fact, the Plaintiff is asking for an order for the rent accruing from the suit premises to be deposited in a joint interest earning account. In my opinion, it has not been demonstrated that the Plaintiff would otherwise suffer irreparable loss if the injunction is not granted.

12. The court is therefore of the view that the Plaintiff has failed to satisfy the 1<sup>st</sup> and 2<sup>nd</sup> principles for the grant of an order of injunction. In those circumstances, it is not necessary for the court to consider the 3<sup>rd</sup> principle on balance of convenience. The court is also of the opinion that the Plaintiff having failed to satisfy the said two principles, there would be no basis for granting the order sought for the rent accruing from the suit premises to be deposited in a joint interest earning account. The Plaintiff may still recover any financial loss she may suffer now if she ultimately succeeds at the trial.

13. The upshot of the foregoing is that the Plaintiff's notice of motion dated 24<sup>th</sup> February 2017 is disallowed. Costs of the application shall be in the cause.

14. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **12<sup>th</sup>** day of **OCTOBER, 2017**

In the presence of Mr A.P. Kariithi holding brief for Ms Anne Thungu for the Plaintiff and Ms Nbwiria holding brief for Mr Chris Maina for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants but in the absence of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Court clerk Njue/Leadys.

**Y. M. ANGIMA**

**JUDGE**

**12.10.17**