



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 241 OF 2014 (OS)

VANASIA IRIMA NYAGA.....APPLICANT

VERSUS

GERALD NYAGA MWANIKI.....RESPONDENT

RULING

It is unfortunate that this application filed under certificate of urgency on 22nd December 2014 is being determined in May 2016. The explanation for that, however, is that there has been no Environment and Land Court Judge at Embu Court where this suit was filed and although **Bwonwonga J.** had invited submissions and fixed a ruling date for 12th May 2015, he could not deliver it his jurisdiction to do so having been questioned by the Court of Appeal's judgment in the case of **KARISA CHENGO & TWO OTHERS VS REPUBLIC C.A CRIMINAL APPEALS NO. 44, 45 and 76 of 2014 at Malindi.** The matter therefore came before me on 9th March 2016 when I started visiting Embu High Court to attend to the Environment and Land Court cases.

The applicant **VANASIA IRIMA NYAGA** moved this Court by way of Originating Summons seeking an order that the following properties are jointly owned by her and the respondent **GERALD NYAGA MWANIKI** i.e.:-

- a. ***Plot No. 910 Riachinia adjudication***
- b. ***Plot No. 5024 Riachinia adjudication***
- c. ***Plot No. 1947 Riachinia adjudication***
- d. ***Motor vehicle No. KAU 267 Q Lorry***
- e. ***Motor cycle No. KMCF 109 C***

It is her case that the said properties were jointly acquired during their marriage and all are registered in the name of the respondent except plot No. 1947 Riachinia adjudication which is in the applicant's name.

Simultaneously with that Originating Summons, the applicant filed a Notice of Motion seeking a temporary injunction restraining the respondent, his agents, servants or anybody claiming through him from selling, disposing, alienating or transferring the said properties for the reasons that the parties were married in 1998 under Kimbere custom until 2nd February 2014 when the respondent threw her and their children out of plot 910 Riachinia which was their matrimonial home. The applicant has petitioned for the dissolution of their marriage in **EMBU CHIEF MAGISTRATES'S COURT DIVORCE CAUSE No. 30 of 2014.** The respondent has refused to allow the applicant access to the said properties yet they were jointly acquired and developed and there is eminent danger that some of the properties may be sold to KENGEN Company. She also seeks a prohibitory order.

In resisting the application, the respondent filed a replying affidavit in which he deponed, inter alia, that

the plot No. 910 and 5024 at Riachinia are his having been given by the clan and having purchased them respectively. He also deponed that he purchased plot No. 1947 from Lawrence Kienga for Ksh. 30,000 while vehicle No. KAU 267 Q was purchased from one Peter Nyaga at Ksh. 650,000 while motor cycle registration No. KMCF 109 was purchased for Ksh. 68,000. He added that he has no intention of selling the properties and in any case, it was the applicant who left the matrimonial home on 1st February 2014 taking their children with her and he denied having chased them. Annexed to the replying affidavit are agreements for the purchase of a plot which is not identified and also an agreement for the purchase of the motor vehicle KAU 267 Q between him and Peter Nyaga. There is also a letter from the assistant chief to the effect that the applicant had escaped from home taking with her the respondent's properties and their two children.

In a further affidavit however, the applicant deponed that the respondent assaulted her and that is why she left the matrimonial home but she denied having taken his goods worth Ksh. 300,000 adding that plot No. 910 was given to the respondent by the clan but he holds it in trust for the family and that she contributed financially to the development of the said properties, She added that if indeed she had stolen the respondent's properties, he should have had her arrested.

Submissions have been filed both by Ms Njuguna advocate for the applicant and Ms Muthoni advocate for the respondent.

I have considered the application, the rival affidavits and annexures thereto and the submissions by counsel.

I must commence by stating that the jurisdiction of this Court is limited under **Section 13 (2) of the Environment and Land Court Act** to disputes relating to Land and the Environment. The orders sought in the application subject of this ruling also touch on a motor vehicle and motor cycle which are neither Land nor Environment and so it would be an improper assumption of jurisdiction for this Court to make any orders regarding them. The applicant will have to approach another forum for any remedy regarding them.

An application for temporary injunction has to be determined within the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 C.A 358** which are:-

1. ***The applicant must show a prima facie case with a probability of success.***
2. ***An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.***
3. ***When in doubt, the Court will decide the application on the balance of convenience.***

A prima facie case on the other hand was defined by the Court of Appeal in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS 2003 K.L.R 125** as follows:-

“A prima facie 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 as to call for an explanation or rebuttal from the latter”.

Being an equitable relief, a party approaching the Court for a temporary injunction must do so with clean hands. Finally, as was held in the case of **FILMS ROVER INTERNATIONAL VS CANNON FILMS SALES LTD 1986 3 ALL ER 776;**

“A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”....”

I will be guided by the above broad principles in considering this application bearing in mind that at this stage, I cannot make definite findings of fact. Those are matters for the trial Court.

It is not in dispute that the parties were married under Kimbere Customary Law in 1998 and cohabited as man and wife until 2014 when they parted ways. It is also not in dispute that the plot No. 1947 Riachinia is registered in the applicant's names. That leaves us only with plot numbers 910 and 5024 Riachinia which are in the respondent's names and which he says he was given by the clan (plot 910) and purchased from Kyenge Lawrence (plot 5024) respectively. The applicant on the other hand claims that plot No. 910 is their matrimonial home estimated at Ksh. 300,000 and on which they grew tomatoes, kales and other vegetables thus generating an income from which they purchased plot No, 5024. The respondent has annexed to his replying affidavit sale agreements relating to some un-identified plots. Those agreements are dated 3rd January 2008 and 5th June 2008 which is evidence therefore that those plots were acquired during the parties marriage. Even if plot No. 910 was given to the respondent by the clan, the applicant's case is that she contributed towards its development. It is now well settled that contribution need not be monetary only. Taking care of the family or working on the land etc amounts to contribution. Matrimonial property under the **Matrimonial Property Act of 2013** includes the matrimonial home or homes and other immovable and movable property jointly acquired during the subsistence of the marriage. And where such property is in the names of one spouse, there shall be a rebuttable presumption that the said property is held in trust for the other spouse.

It is also clear from the provisions of the **Land Registration Act** specifically **Section 93 (2)** that where land is held in the name of one spouse but the other spouse contributes by labour or other means towards its development or improvement, that spouse shall be deemed to have acquired an interest in the land. That is the applicant's case.

From all the above therefore, it is clear that the plots No. 910, 5024 and 1947 and 1947 Riachinia adjudication were all acquired during the subsistence of their marriage. At least the evidence availed by way of agreement is dated 2008 when the parties were living as man and wife and so the applicant's claim that the respondent holds them in trust is well founded. I am therefore persuaded that she has established a prima facie case with a probability of success.

The applicant has deponed in paragraph 13 of her supporting affidavit that she stands to “***suffer irreparably***” if the orders sought are not granted. On this, I stand guided by the Court of Appeal's decision in the case of **MUIRURI VS BANK OF BARODA (KENYA) LTD 2001 K.L.R 183** where at **page 188**, the Court said:-

“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”

The Court was not giving a general bar that damages are not adequate compensation in land cases. However, in appropriate cases, damages may be adequate compensation even in land cases. Each case must be considered on its own particular circumstance. In this case, part of the property in dispute appears to be matrimonial property and I think in such circumstances, I would not be averse to granting an injunction until the suit is heard and determined.

Ultimately therefore, having considered all the facts herein, I am satisfied that the applicant is entitled to the orders sought in her Notice of Motion dated 23rd December 2014. I therefore make the following orders:-

- 1. A temporary order of injunction is issued restraining the respondent by himself, his agents, servants or anybody else claiming through him from selling, disposing, alienating or transferring plots No. 910, 5024 and 1947 Riachinia pending the hearing of this suit.***
- 2. A prohibition order is also issued in respect to the above plots to be served upon the Land Adjudication officer Riachinia to remain in force pending the hearing of this suit.***
- 3. Each party to bear their own costs.***
- 4. I further direct that the parties expedite compliance with the pre-trial procedure so that this suit can be heard and determined in the next 12 months.***

It is so ordered.

B.N. OLAO

JUDGE

13TH MAY, 2016

Ruling delivered, dated and signed in open Court this 13th day of May 2016.

Mr. Mwangi for Ms Muthoni for Respondent present

Ms Muthike for Mr. Njuguna for the Applicant present.

B.N. OLAO

JUDGE

13TH MAY, 2016