REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

E.L.C CASE NO. 116 OF 2015

FLORA WANGUI KARIUKI...........................PLAINTIFF/ RESPONDENT

-VERSUS-

KARIUKI NJOROGE...........................1ST DEFENDANT/ RESPONDENT

PETER MWANGI KAMAU......................2ND DEFENDANT/APPLICANT

SAMUEL NJOROGE................................3RD DEFENDANT/APPLICANT

RULING

1. Before me for determination are two applications, both dated **6th August, 2015**. They have been filed by both the 2nd and 3rd defendants (hereafter referred to as the applicants), each of them seeking to restrain the respondent, her agents, servants, employees and anyone claiming under her from entering into the two land parcels: Title Number **Loc.2/Mairi/1295** registered in the name of the 2nd defendant, and Title Number **Loc.2/Mairi/1294** registered in the name of the 3rd defendant (hereafter referred to as the suit properties) and/or committing any acts of wastage and damage to the applicants' property pending the hearing and determination of the main suit. The applicants have also prayed that costs of both applications be provided for.

2. Both applications are premised on similar grounds, which are stated on the face of the applications and supported by both applicants' affidavits sworn on 6th August 2015, which are, to wit, that each applicant purchased his parcel of land from the 1st defendant and that the respondent has taken it upon herself to enter and into the applicants' parcels and commit acts of waste thereon.

3. Incidentally, the 3rd defendant in his supporting affidavit states that the 1st defendant and the respondent are married. Further, he depones that she (respondent) and her family have their own separate parcel of land (Title Number **Loc.2/Mairi/1296**) which they utilise, a fact that is reiterated by the 2nd defendant. According to the applicants, the respondent is using the pendency of this suit to intimidate and interfere with their quiet use and possession, despite their (applicants') heavy investment in the suit properties.

4. The applicants also state that they have complained of the respondent's actions on several occasions, which culminated in a report to the Kigumo Police Station and the institution of criminal proceedings in Kigumo Criminal case Number 2785 of 2014; thus there is need for the court's urgent intervention to preserve and protect the status quo.

5. The application is opposed vide a replying affidavit sworn by the respondent on 21st October, 2015. She depones that both applications are defective and bad in law, as both suit parcels (Title Number **Loc.2/ Mairi/1294** and Title Number **Loc.2/ Mairi/1295**) are non-existent in the ground. According to her, she resides and occupies the original parcel, Title Number **Loc.2 /Mairi /203,** which has never been subdivided**.** She describes the process by which the applicants acquired their titles as fraudulent as there was no spousal consent on her part; thus necessitating this present suit for cancellation of the applicant's titles.

6. She further depones that the applicants have not been in occupation nor invested in the land, which she says is non-existent in any case. The acts of waste thus claimed do not arise. She maintains that both applications and the orders sought are an abuse of the process of the court and should in fact be dismissed with costs as the applicants have no legal and factual basis.

7. On 20th June 2016, counsels for the respective parties, with the concurrence of the court, agreed that both applications be disposed of together by the pleadings on record.

8. The 1st defendant did not file any response in support of, or opposing both applications.

9. Both applicants' versions of events have it that the 1st defendant entered into two different Agreements for Sale (both dated 30th September 2014) with the 2nd and 3rd defendants over the suit properties (Title Numbers **Loc.2.Mairi/1294** and **1295**)**,** each parcel measuring 1.66 Ha and title deeds in favour of each applicant were issued as attached herein. The respondent is in possession of Title Number **Loc.2.Mairi/1296,** also measuring 1.66 Ha, which is registered in the name of the 1st defendant, (PM6). It is the applicants contention, that it is in order for them as registered owners of the suit properties, to seek orders against the respondent restraining her from interfering with the quiet possession of their properties.

10. The respondent maintains that whereas she and the 1st defendant own Title Number **No Loc.2.Mairi/203,** the 1st defendant failed to seek her consent before subdividing and selling the parcels to the applicants; therefore the sale to both applicants are a nullity.

11. Both applications seek orders to preserve the suit properties pending the hearing and determination of the main suit.

The conditions for granting an injunction are now well settled in Kenya through the decision in ***Giella v Cassman Brown and Co. Ltd & Another [1973] E.A. 358***, where the court held:

> **"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, 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. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."**

12. These principles are to be applied sequentially; the court need not consider the second and third principles if it finds that the appellant has a prima facie case. However, traditionally, courts have always considered all the three principles.

13. The issue is whether the Applicants have demonstrated a prima facie case. **Bosire JA** of the Court of Appeal in ***Mrao Ltd v First American Bank Kenya Ltd & 2 Others (2003) KLR 125***, defined a prima facie case thus:

> **"So what is a prima facie case? I would say that in civil cases it is a case in 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.”

He later went on to add:

> **“…a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”**

14. It is important to note that at this stage, the court is not required to make any final findings on the facts. That will be for the main hearing. This was as observed by **Lord Diplock** in **American Cyanamid Co. v Ethicon Limited (1975) 1 ALL ER 504** at 509:

> **“It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.''**

15. With the above in mind, I have considered the pleadings of the parties herein and found that the applicants have established a prima facie case as they have produced several documents to show they purchased their parcels from the 1st defendant and have been registered as proprietors of the suit properties.

16. On the other hand, the respondent claims that the suit properties are matrimonial properties but she has not demonstrated that as a family, they are in occupation of **Parcel No Loc.2.Mairi/203** as their matrimonial home, or that parcel No. Loc. 2.Mairi/203 is the land that was subdivided to result in Parcels No Loc.2.Mairi/1294 and 1295.

17. In making this particular determination, I am guided by the decision of the Court of Appeal in **Stella Mokeira Matara v Thaddues Mose Mangenya & another [2016] eKLR,** where the court of appeal upheld the decision of **Okong’o J** and stated:

> **“Matrimonial home” is defined by the Land Act, 2012 to mean “any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.”**
>
> **Taking into account the above definition, the learned judge held that the appellant had failed to show, firstly, that there is a home on the suit properties and, secondly, that together with the 1st Respondent they were occupying the alleged home. Perhaps photographs of the home, if at all, or a valuation report containing appropriate description of the suit properties would have sufficed. In the circumstances, we cannot fault the learned judge for the conclusion that he arrived regarding absence of proof of existence of a matrimonial home on the suit properties.”**

18. Having considered the circumstances in this case, I find the order that best commends itself in the circumstances to be an order of status quo which I hereby grant pending the hearing and determination of the suit.

19. Costs of both applications shall be in the cause.

Dated, signed and delivered at Nyeri this 28th day of July, 2016

L. N. WAITHAKA

JUDGE

In the presence of:

N/A for the plaintiff/respondent

N/A for the defendants/applicants

Court assistant - Lydia