



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: E. M. GITHINJI, HANNAH OKWENGU &**

**J. MOHAMMED, JJA.)**

**CIVIL APPEAL NO. 44 OF 2015**

**BETWEEN**

**PSN.....APPELLANT**

**AND**

**BNO.....FIRST RESPONDENT**

**RATILAL GOSAR DODHIA..... SECOND RESPONDENT**

**VIPUL RATILAL.....THIRD RESPONDENT**

**AVIR KANTI SHAH.....FOURTH RESPONDENT**

*(Appeal from the ruling/order of the High Court of Kenya at Kitale (Obaga, J) dated 26<sup>th</sup> February, 2015*

**in**

**ELC NO. 136 OF 2014)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

[1] This appeal arises from an application in a suit that was filed by the appellant **PSN** in ELC No. 136 of 2014. The subject of the appellant’s suit was a property known as Kitale Municipality[Particulars Withheld] (herein the suit property). The appellant claimed that she was married to one **BNO** (B), and that the suit property was acquired jointly with her spouse during the subsistence of the marriage. The appellant was aggrieved because B had secretly and fraudulently entered into an agreement to sell the suit property to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents without taking into account her interests in the suit property.

[2] The appellant sought declaratory orders that the transfer of the lease in the suit property from B to **Ratilal Gosar Dodhia, Vipul Ratilal and Avil Kanti Shah** (2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents), is unlawful. The appellant also sought cancellation of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents lease in the suit property and an order for the same to be reinstated to the name of B.

[3] B filed a defence in which he contended that he was never married to the appellant and denied that she had any interest whatsoever in the suit property. He claimed that he was the only registered owner of the suit property and had transferred his leasehold interest over the suit property to the three other respondents.

[4] The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents also filed a defence in which they pleaded that B had transferred the suit property to them to enable him pay off a mortgage on the suit property, as the Mortgagor was threatening to exercise its statutory power of sale; that they purchased the suit property from B for value and without notice of any defect or any other interest.

[5] Filed simultaneously with the appellant’s claim was a notice of motion dated 25<sup>th</sup> August, 2014, in which the appellant sought to have the respondents, their agents or servants ordered to maintain the *status quo* prevailing at the time of filing the suit until the determination of the

suit. In the appellant's oral submissions made in support of the motion, the appellant submitted that she was indeed married to B through Kisii Customary law; that there was one issue arising from the union; that the appellant had spousal interest over the suit property since it was matrimonial property; that under sections 27 and 28 of the Land Registration Act her interest was an encumbrance over the title to the suit property; and that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were not innocent purchasers. She urged that her suit would be rendered nugatory unless the orders sought were issued.

[6] In response to the motion B denied the facts stated by the appellant, maintaining that he was not married to the appellant; that the existence of an issue of its own does not prove a marriage; and that he did not require any consent from the appellant to sell the suit property. He therefore urged that the appellant's motion be dismissed.

[7] The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents aligned themselves with B's submissions and added that the appellant never adduced evidence to prove that she contributed to the acquisition of the suit property or that she was indeed married to B when the suit property was acquired by B; and therefore, her application had no basis in law.

[8] In his ruling delivered on 26<sup>th</sup> February, 2015, the learned Judge (Obaga, J) declined to grant the injunctive orders sought by the appellant because in his view the appellant had failed to demonstrate that she was married to B. The learned judge found that although the appellant claimed to be married to B, there were annexures availed in which she had sworn that she was married to one GON (N) from whom she claimed to have separated; and that a Divorce Cause No. 8 of 1990 for dissolution of the marriage between the appellant and N was still pending; that since the appellant was still married to N she could not be married to B. The learned judge concluded that there was no basis upon which the appellant's motion could be sustained.

[9] In the memorandum of appeal, the appellant has challenged the ruling of the trial judge contending, *inter alia*, that he determined the substantive suit prematurely; that he relied on documents that had not been proved in evidence, and misdirected himself on the authenticity of the documents; that he did not properly apply the principles in **Giella vs Cassman Brown Company Limited [1973] EA 358** to the evidence before him; that he failed to appreciate that the customary marriage was a matter of fact to be supported by evidence; that the learned judge failed to take into account the appellant's spousal right which is an overriding interest and which had been recognized by the Chargee, Housing Finance Company of Kenya Limited; and that the learned judge failed to differentiate between civil proceedings and matrimonial proceedings which are not covered by Part 5 of the Evidence Act.

[10] During the hearing of the appeal, the appellant was in person while the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were represented by Mr. Musambai Analo. B was duly served but did not attend court for the hearing of the appeal. The appellant relying on her grounds of appeal submitted that the learned judge was wrong in finding that she was still married to N; that the issue before the learned judge was property and not the validity of her marriage; that the learned judge ignored a letter that she produced from the District Officer confirming that she was married to B; and that the ELC lacked jurisdiction to address a marriage dispute that was not before it.

[11] In addition, the appellant faulted the learned judge for failing to take into account the evidence concerning the joint acquisition of property between her and B including joint ownership of Kitale Block 10/xxx. The appellant maintained that she did not give consent to the transfer of the suit property. She concluded that the learned Judge took into account irrelevant matters and wrongly exercised his discretion in dismissing the interlocutory application that was before him, and urged the Court to uphold the appeal.

[12] Mr. Analo relied on his written submissions that he duly highlighted. He maintained that the appellant had pleaded at paragraph 4 of her claim that she was married to B and this brought that marriage into issue and therefore the learned judge was correct in addressing the issue. Mr Analo dismissed the letter from the Deputy County Commissioner that was produced by the appellant, maintaining that the Deputy County Commissioner had no jurisdiction to determine the marriage issue.

[13] In the written submissions, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents compressed the issues raised in the appeal into two main issues. That is whether the appellant had satisfied the threshold for granting of injunctive reliefs; and whether the learned judge purported to make a decision in Eldoret Divorce Case No. 8 of 1990. It was submitted that the decision whether or not to grant an interlocutory injunction was an exercise of judicial discretion that must be done on sound reason in order to do justice. Referring to the conditions for the granting of a temporary injunction as set out in **Giella -vs- Cassman Brown** (supra), it was submitted that the learned judge correctly exercised his discretion in refusing to grant the interlocutory orders of injunction, as the appellant's motion was anchored on her alleged marriage to B; that in the light of the evidence that was before the learned judge showing that the appellant was still married to GON, the appellant had failed to demonstrate that she had a *prima facie* case, with regard to her spousal interest as she could not be married to B, when she was still married to N.

[14] It was asserted that the three principles for grant of a temporary injunction must be addressed and applied sequentially; that once an applicant failed to prove that he or she has a *prima facie* case with probability of success, the Court need not consider the remaining two principles regarding adequacy of damages and balance of convenience; that without proving her marriage to B the appellant had not demonstrated *prima facie* that spousal consent was required in the transfer of the suit property.

The three respondents reiterated that they were *bona fide* purchasers for value of the suit property, and had no notice of any defect in the title, and had since transferred the suit property to the County Government of Trans Nzoia.

[15] Upon careful perusal of this appeal, the record of appeal, the submissions and the authorities cited, we find three main issues that arise for our consideration. These are first, whether the learned judge erred in finding that the appellant was unable to prove her marriage to the 1<sup>st</sup> respondent; secondly, whether the learned judge misdirected himself in law and fact and erred in refusing to grant the temporary orders of injunction; and thirdly whether the learned judge exercised his discretion judicially

[16] As was submitted before us, the principles for granting an interlocutory injunction are well settled since the celebrated case of **Giella vs Cassman Brown Co. Ltd (supra)**: to wit the applicant has to established a *prima facie* case with probability of success; secondly that the

applicant stands to suffer irreparable loss which cannot be adequately compensated by an award of damages; and, thirdly if the court is in doubt, the application would be determined on a balance of convenience.

[17] Thus, in order for the court to grant the injunctive relief that the appellant sought, she had to first establish that she had a *prima facie* case with a high probability of success. In **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR Bosire JA** defined a *prima facie* case as follows:

***“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.”***

[18] The appellant’s case as pleaded before the superior Court was that the suit property was matrimonial property jointly acquired by her and her spouse B; and that B had proceeded to transfer the suit property to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, without her consent, or regard to her spousal interest. The learned Judge considered the annexures presented by B in his replying affidavit, which was in the form of a further affidavit sworn in proceedings brought under the Married Women’s Property Act (1882) (repealed) and a petition filed in divorce proceedings, which documents alluded to the existence of a marriage between the appellant and someone else, that is, N.

[19] The learned Judge analyzed the documents then went on to conclusively find that the appellant had failed to demonstrate the dissolution of her marriage to N; and therefore, there could not have existed a marriage between the appellant and B upon which the appellant’s spousal interest could be anchored. With this finding, the learned Judge did not think that the material placed before him by the appellant showed that she had any spousal interest over the suit property, hence she did not prove that she has a *prima facie* case.

[20] The question is whether the learned Judge had jurisdiction to consider the issue of the alleged existence of a marriage between B and the appellant, and whether the issue was dealt with conclusively at an interlocutory stage. As we have already stated the appellant’s interest that she was alleging had been infringed was her spousal interest in the suit property. In order to establish a *prima facie* case, the appellant had to establish that she was married to B the registered owner of the suit property; and that the suit property was acquired during the subsistence of the marriage. This brought the issue of the existence of the marriage between the appellant and B into sharp focus. In this regard the appellant’s marriage to N and the non-dissolution of the appellant’s marriage to N was a relevant consideration, and therefore the learned judge acted within his jurisdiction in addressing the issue.

[21] As was stated by **O’kubasu JA** in **Mrao Ltd v First American Bank of Kenya Ltd** (Supra):

***“... 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.”***

[22] The appellant raised the issue that B proceeded to transfer the suit property to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents without her consent. It is not disputed that the three respondents have already been issued with a Certificate of lease dated 21<sup>st</sup> January, 2014 in their names. The appellant sought injunctive reliefs to maintain the *status quo* of the suit property pending the determination of her suit. The property was registered in the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, and may even have been transferred to yet another party. In the absence of *prima facie* evidence of a marriage between the appellant and B, the appellant failed to demonstrate her alleged spousal interest which she sought to have protected.

[23] In the circumstances, the appellant failed to meet the threshold required for granting an interlocutory injunction as she did not demonstrate that she had a *prima facie* case with a probability of success, and her application was properly dismissed.

We find no merit in this appeal and do therefore dismiss it. We award costs to the respondents.

**DATED and delivered at Eldoret this 17<sup>th</sup> day of January, 2019**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**