



**Chemutai v Cheruiyot & 2 others (Land Case E044 of 2024)  
[2024] KEELC 13413 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13413 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
LAND CASE E044 OF 2024  
EO OBAGA, J  
NOVEMBER 21, 2024**

**BETWEEN**

**PHILOMENA MARION CHEMUTAI ..... APPLICANT**

**AND**

**ALFRED CHERUIYOT ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR UASIN GISHU ..... 2<sup>ND</sup> RESPONDENT**

**ANNE JELAGAT KENOR ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is with respect to the Plaintiff's Notice of Motion dated 17<sup>th</sup> July, 2024 which seeks the following orders:-
  - a. Spent
  - b. Spent
  - c. A temporary order of injunction be issued to restrain the 3<sup>rd</sup> Respondent either by herself, her agents and/or servants from selling, disposing off, constructing on, alienating, trespassing on, wasting or in any other manner dealing with all that parcel of land known as PIONEER/ NGERIA BLOCK 1(EATEC)16956 in a manner that will change, altar, qualify and or extinguish the interests of the Plaintiff/Applicant pending the hearing and determination of this suit.
  - d. A prohibitory and or inhibitory order do issue in respect of the suit land and that the same be registered as an encumbrance in the Land Registry records pending the hearing and determination of this suit.
  - e. Costs and interests



2. The Application was based on the grounds adduced in the Plaintiff's Supporting Affidavit sworn on 9<sup>th</sup> July, 2024. The Plaintiff's case is that as the spouse of the 1<sup>st</sup> Defendant, she contributed towards the acquisition of PIONEER/NGERIA BLOCK 1(221) which is in her possession and registered in her husband's name. Without her consent, her husband undertook an initial subdivision resulting into 2 plots. One of the two plots was subsequently subdivided into a further two parcels being PIONEER/NGERIA BLOCK 1(EATEC)/16955 & 16956, the latter being the suit property herein. Despite the Plaintiff having registered a caution on Plot No. 16955 and 16956 dated 24<sup>th</sup> September, 2021 the suit property was sold to the unsuspecting 3<sup>rd</sup> Defendant.
3. The Plaintiff deponed that a search on Plot No. 16955 shows that the caution registered thereon is still pending whereas the one for the suit property was lifted. The Plaintiff expressed belief that the Land Board Consent was obtained fraudulently and the transfer to the 3<sup>rd</sup> Defendant was done illegally, un-procedurally and through the faulted consent. The Plaintiff deponed that the 3<sup>rd</sup> Defendant has started fencing the suit property and this will change the substratum of the subject matter which is their matrimonial property. She thus sought for interim relief pending determination of the suit and to prevent them from defeating the course of justice. That if the orders sought do not issue, the Plaintiff is likely to suffer irreparable loss and any court orders issued will be in vain.
4. The Application was opposed vide the 1<sup>st</sup> Defendant's Replying Affidavit dated 24<sup>th</sup> July, 2024. The 1<sup>st</sup> Defendant admitted to being married to the Plaintiff, but averred that he purchased PIONEER/NGERIA BLOCK 1(EATEC)/221 through his salary and proceeds from the sale of another property. The 1<sup>st</sup> Defendant averred that any loans the Plaintiff took were utilised for her other personal purposes and not to purchase the land. It is alleged that before the property could be developed, the Plaintiff left for the United States of America where she has stayed to date, only sending minimal contributions which he used to complete the building. That she has never visited or lived on the suit property since December, 2006.
5. The 1<sup>st</sup> Defendant deponed that he informed the Plaintiff of his intention to subdivide Plot No. 221 and sell part thereof so as to raise funds to develop the farm, and to afford a decent retirement life. The Plaintiff did not object only to later lodge the cautions. He explained that his actions were not meant to disenfranchise the Plaintiff, and that he has no intention of selling the remaining part of the land, having used the proceeds to make improvements to generate a sustainable income during his retirement. He accepted blame for the decision to sell the property, absolving the 3<sup>rd</sup> Defendant of any wrong doing. The 1<sup>st</sup> Defendant deponed that allowing the Application will subject him to consequences of breach that he may not be able to live with. The 1<sup>st</sup> Defendant asked that the court find the Plaintiff's decision to withhold her consent was unreasonable given the pressing financial needs and his contribution to the suit property. He urged that the instant application be dismissed with costs.
6. The 3<sup>rd</sup> Defendant also opposed the Application by filing a Replying Affidavit sworn on 7<sup>th</sup> October, 2024. She confirmed purchasing the suit property for a total consideration of KShs. 4,800,000/- and confirmed paying KShs. 3,000,000/- on execution of the agreement. She explained that she had conducted a search which showed that there were no encumbrances. She even visited the Area Chief, Kapsoya, as well as the 1<sup>st</sup> Defendant's home and confirmed that he had no wife at his home, thus she lacked actual or constructive knowledge that he was married. The 3<sup>rd</sup> Defendant deponed that the Plaintiff had provided no proof that the Consent was forged.
7. The 3<sup>rd</sup> Defendant deponed that the suit property was acquired procedurally and in compliance with the relevant laws and has been paying rates on the suit property since acquisition. On acquiring title, she then commenced construction after complying with the relevant laws thereto. She also deponed that



there is no proof that the loans taken by the Plaintiff were to purchase the land, and one of the forms annexed was for payment of school fees. Further, that the cautions the Plaintiff applied for were not registered at the time of transfer. It is the 3<sup>rd</sup> Defendant's case that the suit property does not form part of the Plaintiff's matrimonial property, and it was undeveloped since any developments she contributed to were on the adjoining property.

8. It is the 3<sup>rd</sup> Defendant's case that the application does not meet the threshold for grant of the orders sought as she had not demonstrated a prima facie case, and that she was unlikely to suffer irreparable harm if the orders are not granted. According to the 3<sup>rd</sup> Defendant, she is the one who would suffer the greatest convenience having purchased the property and being in the process of making developments which will waste away if the orders are granted, and in addition, she is now burdened with legal costs. The 3<sup>rd</sup> Defendant averred that the application is an abuse of the process of court and is frivolous as well as vexatious. She urged that the Applicant does not deserve nor is she entitled to the orders sought and prayed that the Application be dismissed with costs.

### **Submissions:**

#### **Plaintiff's Submissions;**

9. The Application was heard orally on 9<sup>th</sup> October, 2024 where the Parties' Advocates made their oral submissions. The Plaintiff's Advocate took the lead and gave a summary of the facts as appears in the Motion and supporting affidavit. Counsel then submitted that the Registrar failed to register the caution which resulted in the sale of the suit property to the 3<sup>rd</sup> Defendant, who at the time of the sale had not constructed on the land. Counsel submitted that despite knowing of this suit, the 3<sup>rd</sup> Defendant went ahead and constructed a house on the suit land. Counsel placed reliance on Article 45(3) and Section 9 of the *Matrimonial Property Act* and prayed that the Application be allowed and the interim orders extended.

#### **1<sup>st</sup> Defendant's Submissions;**

10. On his part Mr. Terer for the 1<sup>st</sup> Defendant submitted that the Application does not meet the threshold for injunction. Relying on *Giella vs Cassman Brown & Co. Ltd*, Counsel submitted that the three conditions laid out therein must be met. He also relied on the case of *Mrao Ltd vs First American Bank Limited*. Counsel submitted that the 1<sup>st</sup> Defendant was the sole registered owner of the land and had annexed the sale agreement and evidence of payment. Counsel cited Section 9 of the *Matrimonial Property Act*, submitting that the Plaintiff had not annexed any evidence of contribution as the loan applications she presented were raising school fees. Counsel submitted that the 1<sup>st</sup> Defendant attempted to obtain consent of the Plaintiff through the Children, after she relocated to the USA and blocked contact with him but she did not agree.
11. Counsel also submitted that the 1<sup>st</sup> Defendant is a 65-year old retired Citizen who sold the land to meet his needs. He argued that the Plaintiff had not demonstrated that her rights had been infringed, thus there is no prima facie case or irreparable harm shown. Counsel referred to the case of *Pius Kipchirchir Kogo vs Frank Kimeli (2018) eKLR* which defined irreparable harm that could not be compensated. Counsel explained that a divorce case has been filed where division of the property is the subject, the land can therefore be valued and the Plaintiff compensated in monetary terms. Counsel relied on *Paul Gitonga Wanjau vs Gathuti Tea C. Ltd (2016) eKLR* on the principle of convenience, submitting that the balance of convenience tilts in favour of the 1<sup>st</sup> Defendant. Counsel prayed for dismissal of the Application.



### **3<sup>rd</sup> Defendant's Submissions;**

12. On behalf of the 3<sup>rd</sup> Defendant, it was submitted that the Plaintiff had not met the threshold in *Giella vs Cassman Brown & Co. Ltd.* She argued that there is no prima facie case with a probability of success established (*Mrao vs First American Bank Ltd*). She pointed out that the 1<sup>st</sup> Defendant is the registered owner per Section 26 of the *Land Registration Act* (LRA) which guarantees title. Counsel submitted that the 3<sup>rd</sup> Defendant was not party to any wrongdoing and was unaware even after inquiries that the 1<sup>st</sup> Defendant was married. Counsel urged that she is therefore an innocent purchaser without notice, and cited the case of *Lawrence Muriki vs AG & 4 Others* (2013) eKLR.
13. Counsel also submitted that the Plaintiff has not demonstrated that she will suffer irreparable harm which will not be compensated and relied on the *Pius Kogo Case* (*Supra*). Counsel argued that the balance of convenience tilts in favour of the 3<sup>rd</sup> Defendant who has spent millions in constructing the house, and that the 3<sup>rd</sup> Defendant's property will waste away as judgment will take time to be delivered. Counsel accused the Plaintiff of approaching the court with unclean hands. Further that the Plaintiff had not made claims on the resultant subdivisions. Counsel prayed that the application be dismissed.

### **Analysis and Determination:**

14. I have carefully considered the Notice of Motion herein, the affidavit in support, the replying affidavits and submissions made by the Parties' Advocates. The issues arising for consideration are:-
  - i. Whether the plaintiff has satisfied the conditions upon which a temporary injunction can be granted?
  - ii. Whether the Plaintiff has made a case for the grant of a prohibitory order
  - iii. What orders should the court issue?

#### **i. Whether the plaintiff has satisfied the conditions upon which a temporary injunction can be granted?**

15. The law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides:-

“Where in any suit it is proved by affidavit or otherwise—

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”



16. The conditions to be considered in granting an injunction were settled in the case of *Giella vs Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself as follows:-
- “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.”
17. The first element to be satisfied is whether the Plaintiff has established that she has a prima facie case with a probability of success. In *Mrao Ltd vs Ltd vs First American Bank of Kenya and 2 others*, (2003) KLR 125, the Court of Appeal defined a prima facie case as:
- “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...”
18. The Plaintiff’s position is that she contributed to the purchase of the property alongside her husband and that the same is part of their matrimonial property. This allegation has been denied by the 1<sup>st</sup> Defendant who alleged that he bought the land on his own. The Plaintiff annexed loan application forms as proof that she contributed to the purchase of the mother title. There is no evidence that the loans were utilised in purchasing the property. Indeed, on one of the annexed loan application forms, it is indicated that the loan was for school fees, the rest however indicate that the loan is to purchase a plot/shamba. The forms do not however indicate which shamba was being purchased, whether it was the mother title Plot No. 221 or another parcel of land. It is evidently clear from the copy of the title deed annexed to the Supporting Affidavit that Plot No. 221 was registered in the name of the 1<sup>st</sup> Defendant. From the attached Mutation Form, he is also the one who applied for the subdivision that resulted into the suit property herein.
19. The Plaintiff has also annexed a copy of the caution over the suit property, which although the Plaintiff claims was not registered, appears to have been noted on the Certificate of Official Search dated 14<sup>th</sup> October, 2021. However, from the search dated 11<sup>th</sup> March, 2024 also annexed to the Plaintiff’s Affidavit the caution appears to have been removed. Nonetheless, the removal of the caution, in the absence of any evidence of wrongdoing, does not imply that there was fraud involved in the registration of the suit property in the name of the 3<sup>rd</sup> Defendant. In addition, I have seen the Pleadings in ELC JR No. 2 of 2024 annexed to the 1<sup>st</sup> Defendant’s Affidavit and note that in that suit, she had averred that she contributed 100% to the purchase of the property as opposed to her allegations of contributions made in this application. It is trite that an injunction is an equitable remedy and it will not be granted where a party has come to court with unclean hands. This variation in relation to the facts as narrated in these two cases does not auger well for the Plaintiff in this regard.
20. Moreover, I have also had time to consider the 3<sup>rd</sup> Defendant’s case. The 3<sup>rd</sup> Defendant informed this court that she conducted due diligence before she purchased the property. She alleges that when she conducted the pre-transaction search, there were no encumbrances registered on the suit property. Since the sale was done on 7<sup>th</sup> October, 2024 it is indeed plausible that the 3<sup>rd</sup> Defendant obtained a clean Search from the land office, as it appears from the Plaintiff’s searches that by 11<sup>th</sup> March, 2024 the caution had been lifted from the suit property.



21. That aside from conducting an Official Search, she visited the Area Chief who confirmed to her that the 1<sup>st</sup> Defendant was not married. She also visited the 1<sup>st</sup> Defendant's home and there was no wife in the compound. I presume all this was done to confirm that the transaction would not require spousal consent, and once she cleared her suspicions, she went ahead to purchase the suit property. On the date of execution of the sale agreement, she paid KShs. 3,000,000/- as part of the purchase price. The 1<sup>st</sup> Defendant absolved the 3<sup>rd</sup> Defendant of any wrong doing. The suit land is now registered in the name of the 3<sup>rd</sup> Defendant as evidenced by the copy of a title Deed dated 15<sup>th</sup> December, 2024 annexed to her Replying Affidavit. This supports the 3<sup>rd</sup> Defendant's claim of being an innocent purchaser without notice. From the above analysis, I do not see how in the circumstances it can be said that the Plaintiff has established that she has a prima facie case.
22. The next requirement is for the Plaintiff to demonstrate that she will suffer irreparable harm if the orders are not granted. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (2014) eKLR, the Court of Appeal held that:

“If the applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”
23. On irreparable harm, the Plaintiff deposed that if the orders sought are not granted, the Defendants will alter the character of the suit property. With all due respect that has already happened courtesy of the sub-division and sale of the land to the 3<sup>rd</sup> Defendant. The only thing that could happen at this point is if the Defendants choose to dispose of the land to third parties or otherwise alienate it. However, in the instant case, there is no proof that the suit property is in a danger of being wasted, damaged or alienated by any party to the suit. There is also no proof that the Defendants have threatened or intend to remove or dispose the suit, which would convince the court to grant a temporary injunction to restrain such acts. The 1<sup>st</sup> Defendant has admitted to selling the suit property to the 3<sup>rd</sup> Defendant but has clarified that he has no intention of disenfranchising the Plaintiff or their children. He also swore in his Affidavit that he has no intention of selling the remainder of the suit property and that he has granted the sons of their union the liberty to undertake such projects as they will thereon.
24. The photographs annexed to the application show what appears to be a completed house which I assume is the house constructed by the Plaintiff and the 1<sup>st</sup> Defendant, a semi-permanent shed and an open lot surrounded by a barbed wire fence. Notably, the semi-permanent shed is what appears in one of the photographs annexed by the 1<sup>st</sup> Defendant as part of the investments he undertook on the suit property from the proceeds of the sale. It cannot therefore be part of the construction being undertaken by the 3<sup>rd</sup> Defendant.
25. The 3<sup>rd</sup> Defendant has not denied that she purchased property and is in the process of putting up a house. From the 3<sup>rd</sup> Defendant's annexures, there is indeed a bungalow being constructed on the land she purchased alongside a water tank and a temporary mabati structure. She has also not expressed any desire, nor has any allegation been made, that she intends to dispose of the suit property. The 3<sup>rd</sup>



Defendant having bought the property seemingly unaware of the alleged defects in title, also stands to suffer irreparably if the orders herein are granted as her developments will go to waste.

26. Lastly, where the court is in doubt, it is to decide the Application on a balance of convenience. Having failed to fulfil the two previous conditions, I am not convinced that in the circumstances of this case, the balance of convenience tilts in the Plaintiff's favour. For that reason, the prayer for an interim injunction must fail.

**ii. Whether the Plaintiff has made a case for the grant of a prohibitory order;**

27. It is not disputed that the suit land is registered in the name of the 3<sup>rd</sup> Defendant. The Plaintiff has sought a prohibitory order to be registered as an encumbrance in the Land Registry records over the suit property pending the hearing and determination of this suit. The essence of the prohibitory order is to ensure that the property is not transferred, charged or dealt with in any manner. Prohibitory orders are in the form of inhibitions granted under Section 68 of the *Land Registration Act*, which provides that:-

“ 68. Power of the court to inhibit registered dealings

- (1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.
- (2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.
- (3) An inhibition shall not bind or affect the land, lease or charge until it has been registered.”

28. In the case of *Dorcas Muthoni & 2 Others vs Michael Ireri Ngari* (2016) e KLR, the Court explained that:-

“ An order of inhibition issued under Section 68 of the *Land Registration Act* is similar to an order of Prohibitory Injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed of. The Court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.”

29. The effect of an inhibition is explained at Section 69 thereof as:-

“ So long as an inhibition remains registered, any instrument that is inconsistent with the inhibition shall not be registered.”

30. As to the conditions required for the grant of a prohibitory orders pending hearing and determination of a suit, in *Samuel Njeru Daniel vs James Njeru Nthiga & 2 others* (2017) eKLR, the court had this to say:-

“ 17. The second issue is whether or not the Plaintiff has made out a case for the grant of such an order. When the application is considered from the view point of a



prohibitory injunction under Order 40 Civil Procedure Rules, the Plaintiff is required to satisfy the principles set out in the case of *Giella vs Cassman Brown & Co* [1973] EA 358.”

31. From the above case, it is clear that the conditions are the same as those in the *Giella vs Cassman Brown Case* (Supra). Since the same have been analysed earlier in this decision and found to fall short, it follows that the Plaintiff has equally not demonstrated entitlement to the order of prohibition.

**iii. What orders should the court issue?**

32. From the averments in both the Plaintiff and 1<sup>st</sup> Defendant’s Affidavits, this is more than a property ownership dispute. There have been allegations of contribution towards purchase of a matrimonial home and that the Plaintiff leaving the matrimonial home for the USA. The 1<sup>st</sup> Defendant has alleged that the marriage between him and the Plaintiff has broken down, and during the submissions, Counsel for the 1<sup>st</sup> Defendant informed this court that there is a divorce cause filed which seeks the division of matrimonial property. I presume the suit land herein is one of the properties for which the parties seek a determination for division as matrimonial property in the family court.
33. It is to be noted that both the Plaintiff’s and the 1<sup>st</sup> Defendant’s Counsel both cited sections of the *Matrimonial Property Act* in their submissions before court. The Plaintiff’s Advocate cited Section 9 and 45(3) of the *Matrimonial Property Act*, while the 1<sup>st</sup> Defendant’s Advocate relied only on Section 9. On the one hand, Article 45(3) of *the Constitution* provides that:-

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

Whereas Section 9 of the *Matrimonial Property Act* on the other hand provides that:-

“9. Acquisition of interest in property by contribution

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

34. The jurisdiction of the Environment and Land Court as provided under Article 162(2)(b) and Section 13 of the Environment & Land Court Act is to determine disputes relating to the environment and the use and occupation of, and title to, land. For claims relating to matrimonial property, Section 6 of the *Matrimonial Property Act* provides that:-

“6. Court to which application may be made

(1) An application to enforce a claim relating to matrimonial property may be made in any proceedings under the Act—

(a) to the High Court in any case where the value of the matrimonial property which is the subject matter of the claim exceeds the pecuniary jurisdiction of a magistrate’s court; or



- (b) to a magistrate's court having civil jurisdiction to adjudicate matters within the court's pecuniary jurisdiction.
- (2) Where the spouses profess the Muslim faith, the court to which an application is made may, on the request of the parties, be guided by Muslim law.”

35. In the premises, the court hereby finds that the Plaintiff's Notice of Motion dated 24<sup>th</sup> July, 2024 lacks merit and is hereby dismissed with costs to the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;

M/s Sang for 3<sup>rd</sup> Defendant.

M/s Terer for MR. Langat for 1<sup>st</sup> Defendant.

M/s Keter for the Plaintiff.

Court Assistant –Laban

**E. O. OBAGA**

**JUDGE**

**21<sup>ST</sup> NOVEMBER, 2024**

