



**Lesrima v Lesrima & another (Environment & Land Case E314 of 2022)  
[2023] KEELC 16086 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16086 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E314 OF 2022  
AA OMOLLO, J  
FEBRUARY 23, 2023**

**BETWEEN**

**GLADYS LESRIMA ..... PLAINTIFF**

**AND**

**SIMEON SAIMANGA LESRIMA ..... 1<sup>ST</sup> DEFENDANT**

**JAYESH SAINI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff/Applicant filed a notice of motion dated September 28, 2022 brought under the provisions of section 3A and 63 of the [Civil Procedure Act](#) order 40 of the *Rules*. The Applicant is seeking for the following orders;
  1. Spent
  2. That pending the hearing and determination of this application, inter partes, the defendants their agents, servants or employees or otherwise howsoever be be restrained from selling, evicting, transferring or in any way whatsoever interfering with the plaintiffs quiet selling, evicting, transferring or in any way whatsoever interfering with the plaintiff's quiet possession and occupation of all that property comprised in LR No 2951/491.
  3. That pending the hearing and determination of this suit, the defendants their agents, servants or employees or otherwise howsoever be restrained from selling, evicting, transferring or in any way whatsoever interfering with the Plaintiffs quiet possession and occupation of all that property comprised in LR No 2951/491.
  4. That this honourable court be pleased to issue an order of restriction be entered in the register of all that property comprised in LR No 2951/491 prohibiting any dealings in the said property.



5. That costs of this application be provided for.
2. The motion was supported by an affidavit sworn on September 28, 2022 by Gladys Lesrima, deposing that she is a wife to the 1<sup>st</sup> Defendant. In respect to the suit property, the Applicant deposed that they built their matrimonial home on the suit property comprised in LR No 2951/491. That the 1<sup>st</sup> Defendant proposed that they sell their LR No 2951/491 herein referred to as 'the suit property' to offset their financial burden and establish another matrimonial property.
3. The Applicant deposed further that consequent to their discussion, the 1<sup>st</sup> Defendant entered into sale agreement dated May 9, 2022 with the 2<sup>nd</sup> Defendant for Kshs 240,000,000 and a deposit of Kshs 24,000,000 was paid with the balance agreed to be paid in within 90 days. The Applicant stated that upon execution of the agreement, she signed a spousal consent. However, she withdrew the same after the 1<sup>st</sup> Defendant and his advocates stated dodging her inquiries on the progress of the transaction and is apprehensive that the property will be sold and their debts remain unsettled and proceeds of the sale misappropriated.
4. The 1<sup>st</sup> Defendant responded to the motion vide replying affidavit sworn on October 25, 2022. He confirmed that he is married to the Applicant and that the suit property is their matrimonial property. That he entered into an agreement for sale with the 2<sup>nd</sup> Defendant who is yet to pay the balance of the purchase price thus failing to complete the transaction within the agreed time despite issuance of a letter dated September 6, 2022 from his Advocates calling for the payment. The 1<sup>st</sup> Defendant stated that the 2<sup>nd</sup> Defendant's visit to the suit property made the Plaintiff apprehensive who then confronted him about the balance of the purchase price.
5. The 2<sup>nd</sup> Defendant opposed the application vide a lengthy replying affidavit sworn by Jayesh Saini on October 24, 2022. Mr Saini deposed that after considering the application, he finds the same as a comedy akin to William Shakespeare's words of much ado about nothing and urged the court not to be hoodwinked into stopping or cancelling a valid transaction as the overall intention of the Plaintiff and the 1<sup>st</sup> Defendant is to frustrate the transaction.
6. In paragraphs 8 to 12, the 2<sup>nd</sup> Respondent narrated the events that led to his desire to purchase the suit property, the negotiations, and the actual execution of the sale agreement between and the 1<sup>st</sup> Defendant dated May 9, 2022. Mr Saini asked the Court to note that all this time, the Plaintiff had consented to the sale of the suit property. The 2<sup>nd</sup> Defendant avers that after the lapse of the completion period, the 1<sup>st</sup> Defendant's Advocates wrote to his Advocates indicating their willingness to complete the transaction and calling for the balance of the purchase price on the strength of their professional undertaking not to release the monies until the transfer was complete but they received a letter dated September 7, 2022 from the Plaintiff withdrawing spousal consent stating that she had been induced by the 1<sup>st</sup> Defendant to give it.
7. The 2<sup>nd</sup> Defendant stated that the Plaintiff was not induced to give the spousal consent as she was involved in the negotiation of the purchase price and that a rapport had been created among the families explaining their visit to the suit property. The 2<sup>nd</sup> Defendant contended that the Plaintiff had already benefitted from the deposit of the purchase price deposited as Kshs 9,500,000/-- that had been released to her directly to aid her in offloading her liabilities hence undeserving of the equitable reliefs sought as she has not approached the court with clean hands.
8. The 2<sup>nd</sup> Defendant also stated there is no prima facie case against him as the issue is between the Plaintiff and the 1<sup>st</sup> Defendant. That this application has been brought to frustrate the sale of the property to him.



9. The 1<sup>st</sup> Defendant filed a further affidavit sworn by him on November 2, 2022 in response to the 2<sup>nd</sup> Defendant's affidavit stating that the suit property is registered under his name but the 2<sup>nd</sup> Defendant went behind his back and directly communicated to the Plaintiff that he had paid the balance of the purchase price making it difficult to update his wife on the progress of the transaction and so he was no longer interested in it.
10. The Applicant filed her submissions dated November 16, 2022 stating that she has spousal rights in the suit property being her matrimonial property. She placed argument relying in the case of *Mugo Muiro Investments Limited V EWB & 2 others* whose position is that even though the Matrimonial Home was registered in the name of SB alone, he held the Title and legal estate in trust for both himself and Elizabeth jointly as buttressed by the decision in *Gissing V Gissing (1970) All ER 780 (1971) AC 886* see also *Falconer V Falconer (1970) 3 All Er 449 (1970) I WLR 1333* and *Hazell V Hazell (1972) I ALL ER 923 I WLR301* Lord Diplock in *Gissing W Gissing (Supra)* at PG 906 IN (1971) AC 886 as follows':

' In nearly all these cases the inexorable inference is that the husband is to hold the legal estate in the house in trust for them both, for both to live in for the foreseeable future. The couple does not have in mind a Sale nor division of proceeds of Sale except in the far distance.'

11. The 1<sup>st</sup> Defendant filed his submissions dated November 18, 2022 in support of the prayers sought in the Plaintiff's motion stating that having the spousal consent withdrawn, the question for the court to determine is whether a sale transaction can proceed any further when consent by a spouse has been withdrawn and that damages would not be suitable remedy and that further, balance of convenience tilts in the Plaintiff's and 1<sup>st</sup> Defendant's favour.
12. In submitting that the Applicant has established a prima facie case, the 1<sup>st</sup> Defendant referred this court to the decision of *Juja Coffee Exporters Limited & another v NIC Bank Limited & another [2020]*, where the Court stated as follows;

' What the Applicant needs to show at this point is that it has a fair and bona fide Question to raise as to the existence of the right thus:

'What I get from that decision is a reiteration of the law that this court must hesitate from straying into the area demarcated for trial. That is what I get in this sentence by the court; 'We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.'



13. The 2<sup>nd</sup> Defendant filed written submissions dated February 10, 2023. They submitted inter alia that the principles governing the grant of an interlocutory injunction are clear beyond peradventure. As was stated in the celebrated case of *Giella –vs- Cassman Brown (1973) EA 358*:

' 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.'

14. The 2<sup>nd</sup> Defendant submitted that the Applicant has not demonstrated a prima facie case thus not deserving of the orders of temporary injunction. They argue that the spousal consent is binding upon the Plaintiff as she signed the consent on oath after taking independent legal advice. That the Applicant has neither alluded to nor sought to rely on any of the vitiating factors of consent order as held in the case of *Flora N Wasike vs Destimo Wamboko (1982-1988)1KAR 625*.

15. The 2<sup>nd</sup> Defendant submitted further that once a matrimonial property is pledged for sale, it becomes a tool of business and the Plaintiff having consented to the sale, waived her right to plead the protection of the statutory provisions pertaining to spousal consent. They rely on the decision of [Wilstone Mdindi Mwawugunga v Kenya Women Microfinance Bank Plc \[2022\] eKLR](#) where the Learned Judge expressed himself as follows:

' 29. As Concerns sale of matrimonial property, the appellant quoted various authorities hereinabove referred to in his submissions all of which were determined before the enactment of the land Act. The position then was that matrimonial property could not be sold for lack of consent of a spouse. With the Land Act in place consent of a spouse was made mandatory. In this case spousal consent was sought and duly granted with his wife signing the charge document a fact that is not disputed. What was the objective of the applicant in knowingly subjecting his matrimonial property to the risk of sale in case of defaulting? was it a case of trying to obtain funds from the bank through false pretences? I dare add that choices have consequences.

16. I find the remainder of the 2<sup>nd</sup> Defendant's submissions at paragraphs 30-44 to be touching on the merits of the case as it raises issues that should be dealt with at the trial of the main suit.

17. The issue for determination in this application is whether the Applicant should be issued with the injunctive reliefs sought. From the pleadings, it is not in dispute that the suit property is matrimonial property for the Plaintiff and 1<sup>st</sup> Defendant. It is also not in contention that there was a sale agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant with regard to the suit property which sale transaction has not been completed.

18. It is settled law that at the interlocutory stage, the Court does not look at the merits or otherwise of the Applicant's case. The court should only concern itself whether or not the Applicant has met the principles of prima facie case, irreparable loss or in whose favour the balance of convenience tilts. From the argument brought forth by both sides, a question has arisen whether the Applicant could withdraw the spousal consent once it had been given. Secondly, the pleadings bring out another issue in controversy is whether the import and effect of the professional undertaking given by the advocates for the 1<sup>st</sup> Defendant and the Applicant meant that the Applicant had willingly given her Spousal Consent as part of the completion documents. The third issue raised for determination at the trial is whether



or not the 2<sup>nd</sup> Defendant is entitled to access and possession of the suit property before the completion of the sale transaction. All these point to the fact that the Applicant has demonstrated that she has a prima facie case.

19. On the limb of balance of convenience, I am persuaded that the same tilts in favour of the Applicant who is in possession of the suit premises. At paragraph 9.1 of the sale agreement annexed to the 2<sup>nd</sup> Defendant's replying affidavit, it provided that the purchaser (2<sup>nd</sup> Defendant) was to take possession upon payment of the balance of the purchase price as envisaged in clause 4.2 and successful registration of the transfer in favour of the purchaser.
20. The upshot of the foregoing is that I hold the application is merited. The same is allowed in terms of prayer 3 of the motion thus;
  - i. That pending the hearing and determination of this suit, the defendants their agents, servants or employees or otherwise howsoever be restrained from selling, evicting, transferring or in any way whatsoever interfering with the Plaintiffs quiet possession and occupation of all that property comprised in LR No 2951/491.
  - ii. That this honourable court be pleased to issue an order of restriction be entered in the register of all that property comprised in LR No 2951/491 prohibiting any dealings in the said property.
  - iii. Costs abide the winner of the main suit

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023.**

**A. OMOLLO**

**JUDGE**

**In the Presence of**

**Mr Monda for Plaintiff/Applicant**

**Mr Maondo for the 1<sup>st</sup> Defendant/Respondent**

**Mr Mbugua for 2<sup>nd</sup> Defendant Respondent**

