



CWW v MKK (Matrimonial Cause 9 of 2023) [2024] KEHC 5399 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEHC 5399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE 9 OF 2023
SM MOHOCHI, J
APRIL 30, 2024**

BETWEEN

CWW PLAINTIFF

AND

MKK DEFENDANT

RULING

1. Before me is a Notice of Motion dated 26th October, 2023 supported by the Sworn Affidavit of CWW, filed pursuant to, Article 50 of *the Constitution*, Section 1A and 1B and 3A of the *Civil Procedure Act* and Order 40 Rule 1(a) and 1(b) of the Civil Procedure Rules 2010 and Section 93 of the *Land Act* 2012 seeking the following relief(s):
 - i. Spent.
 - ii. Spent.
 - iii. That, pending the hearing and determination of this suit, the Court be pleased to issue a temporary injunction restraining the Respondent either by himself, servants and or agents and employees from trespassing, entering, remaining in, selling, advertising for sale, charging, alienating, constructing on and or interfering in any other way whatsoever with all that parcel of land known as Nakuru/ Plave/xxxx and x/x portion of all that parcel of land known as Kieseges/subukia West Block x/xxx.
 - iv. That, the Court do issue a prohibition order directing the Land Registrar Nakuru to register a restriction over all that parcel of land known as Kieseges / Subukia West Block x/xxx pending the hearing and determination of the suit.
 - v. That, costs of the application be borne by the Respondent.
2. The Application is Premised on the following grounds;



- i. That, parties in this matter who were married under the Kikuyu African Customary Laws of Kenya separated and eventually divorced through the same customary rights.
 - ii. That, the Applicant herein is the beneficial and bona fide owner of all that parcel of land known as Nakuru/ Piave/xxxx and x/x portion of all that parcel of land known as Kieseges/ Subukia West Block x/xxx.
 - iii. That, the Applicant and the Respondent were husband and wife until the marriage was dissolved under the Kikuyu Customary Laws.
 - iv. That, the Respondent has since re-married and established a different matrimonial home with another woman.
 - v. That, the Parties herein jointly established a matrimonial home on the suit parcel of land by developing permanent homesteads thereon.
 - vi. That since the separation and dissolution of the marriage the Respondent has been a nuisance to the Applicant, has been emotionally and physically abusing the Applicant culminating in That the Respondent's illegal acts have interfered with the Applicant's use and quiet occupation of the suit land and the Respondent's continued illegal acts are likely to degenerate into a breach of peace.
 - vii. That the Applicant stands to suffer irreparable loss and damage which cannot be compensated by way of damages.
 - viii. That this matter is unassailable, and is one with extremely high chances of successes.
3. The Court had directed on the 21st November 2023 that the Application was to be heard and disposed off by way of written submissions, the Respondent was to file and serve response within seven (7) days, the Applicant was to file written submissions within fourteen (14) days and the Respondent was to file his written submissions within twenty-one (21) days. Two further mentions were held to determine compliance and fixing of the ruling date of 23rd April 2024 that has been differed once.
 4. The Respondent did not enter appearance, file response to the Application or file written submissions despite explicit evidence of service.

Applicant's Case

5. The Applicant in submissions refined three issues for consideration by this Court:
 - a. Whether pending the hearing and determination of this suit, this Court should issue a temporary injunction restraining the Respondent either by himself, servants and or agents and employees from trespassing, entering, remaining in, selling, advertising for sale, charging, alienating, constructing on, and/or interfering in any other way whatsoever portion of all that parcel of land known as Kieseges/subukia West with all that parcel of land known as Nakuru/piave/ xxxx and x/x Block x/xxx.
 - b. Whether this Court should issue a prohibition order directing the Land Registrar Nakuru to register a restriction over all that parcel o land known as Kieseges/subukia West Block x/xxx pending the hearing and determination of the suit. Or...
 - c. Whether costs of the application should be borne by the Respondent.



6. As to whether pending the hearing and determination of this suit, this Court should issue a temporary injunction restraining the Respondent either by himself servants and or agents and employees from trespassing, entering, remaining in, selling, advertising for sale, charging, alienating, constructing on and or interfering in any other way whatsoever with all that parcel of land known as Nakuru Piave/xxxx and x/x portion of all that parcel of land known as Kiesege/subukila West Block x/xxx.
7. Order 40 Rule 1 of the Civil Procedure (Amendment) Rules provides for cases in which temporary injunction may be granted:

“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;

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 orders.”
8. The parties herein jointly established a matrimonial home on the suit parcel of land by developing permanent homesteads thereon.
9. Since the separation and dissolution of the marriage the Respondent has been a nuisance to the Applicant and has evicted the Applicant together with the children from the suit land.
10. The Applicant is apprehensive that, the Respondent is in the process of disposing off the suit land to third parties. It will be proper if the Court do grant the interim orders sought before the disposal of the suit.
11. In re Estate of Harish Hindocha [2021] Civ Application No.69 of 2020, the Court of Appeal affirmed the interim order of injunction which had been issued restraining the Respondent from entering, using transferring, Wasting, selling, charging or in other way interfering with occupation of the Applicant over land parcel number Moi’s Bridge/Ziwa Block xx Chebarus/xxx.
12. As to whether this Court should issue an order directing the Land registrar Nakuru to register a restriction over all that parcel of land known as Kiesege/subukia West Block x/xxx pending the hearing and determination of the suit.
13. Reliance is placed on the case of Joyce Waithira Mwangi v Thika Land Registrar [2018] eKLR, it was stated that

“The purpose of a restriction is aimed essentially at stemming fraud or improper dealings over land. The Land Registrar may also place a restriction where there is other Sufficient cause. Restrictions are to endure for a particular time or until the occurrence of an event, or the making of a further order.”

14. It is therefore the Applicant’s submission that, it is prudent for this Court to direct the Land Registrar Nakuru to register a restriction over the suit land pending the hearing and determination of the suit.
15. As to whether the costs of the application should be borne by the Respondent, the Applicant submits that, it is trite that costs follow the event. In this regard, the Applicant submits the costs of this application should be borne by the Respondent.



Respondents Case

16. The Application is unopposed by the Respondent though a return of service affidavit sworn by Henry Osoro Onduso dated and evenly filed on the 16th November 2023 evidenced the fact that the Respondent was duly served and elected not to respond to or defend the cause.

Analysis and Determination

17. Having considered the present application, the affidavit in support of the said Application, as well as the Applicant's submissions, it is my view that the main issue for determination by this Court is;

“If the Applicant has satisfied the condition for issue of the orders sought?

18. The motion is premised on the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules. The relevant part of Order Rule 6 of the Civil Procedure Rules provides that:

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.....
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.”

19. Visram J (as he then was), distilled the applicable principles guiding the grant of injunction pending appeal in Patricia Njeri & 3 Others -Vs- National Museum of Kenya [2004] eKLR. The Judge stated:

“The Appellants did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the Court can, in a proper case grant an injunction pending appeal. What are the principles that guide the Court in dealing with such an application”?

In the Venture Capital case (Venture Capital and Credit Ltd –Vs- Consolidated Bank of Kenya Ltd Civil Application No. Nairobi 349 of 2003 (UR)) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in a whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:

- a) The discretion will be exercised against an Applicant whose appeal is frivolous (See Madhupaper International Limited –Vs- Kerr [1985] KLR 840 which cited Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries –Vs-KCB 1982 – 88) KLR 1088 (also cited in Venture Capital).
- b) The discretion should be refused where it would inflict greater hardship that it would avoid (See Madhupaper supra).



- c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt –Vs- Rent Restriction Tribunal* [1982] KLR 417 (cited also in *Venture Capital*).
- d) The Court should also be guided by the principles in *Giella –Vs- Cassman Brown & Company Ltd* [1973] EA 358 as set out in the case of *Shitukha Mwamodo & Others* (1986) KLR 445 (also cited in *Venture Capital*).” See also *Mukoma –Vs Abuoga* [1988] KLR 645.”

20. I propose to start with the well settled principles in *Giella -Vs- Cassman Brown & Co. Limited* [1973] EA 358 as reiterated in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (2014) eKLR, the latter which is particularly illuminating as to the principles applicable to applications for interlocutory injunctions. The Court described the role of the judge in such application to be merely to consider whether the principles for the grant of the interlocutory injunction were met. The Court further observed that:

“...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since *Giella’s* case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the Appellants has to satisfy the triple requirements to:

- a) establish his case only at a prima facie level
- b) demonstrate irreparable injury if a temporary injunction is not granted.
- c) allay any doubts as to (b) by showing that the balance of convenience is in his favor.”

21. The Court further stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by an applicant. Such that, it is not enough that the Appellants establish a prima facie case, they must further successfully establish irreparable injury, that is, injury for which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the adequacy of damages, the Court will consider the balance of convenience. Conversely, where no prima facie case is established, the Court need not consider irreparable injury or balance of convenience. The Court of Appeal emphasized that the standard of proof is to prima facie standard.

22. Regarding the definition of a “prima facie case” the Court stated:

“Recently, this Court in *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for “prima facie case” in civil cases in the following words:

“In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the appellant’s case upon trial. That is clearly a standard, which is higher than an arguable case.

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be



restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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 Appellants 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 appellant's case is more likely than not to ultimately succeed."

23. Concerning the condition for the successful applicant to demonstrate a "prima facie case" which condition also ties in with the requirement on the such applicant to demonstrate that he has an arguable suit, it is not denied that the Applicant herein is an estranged wife of the Respondent seeking to ring fence her share of properties acquired during their union.
24. The substratum of the matter herein is divorce proceedings, hence the injunction sought. I am persuaded that a "prima facie case" that is arguable has been demonstrated and furthermore the injunction sought is to prevent any attempts at disposal of the matrimonial properties during pendency of the suit. A substantial loss may occur if this Court would decline granting the orders sought.
25. All in all, the Motion dated 26th October, 2023, is undefended despite service upon the Respondent and is found to be of merit and the same is allowed on the following terms;
 - I. An Order of Temporary Injunction restraining the Respondent either by himself, servants and or agents and employees from trespassing, entering, remaining in, selling, advertising for sale, charging, alienating, constructing on and or interfering in any other way whatsoever with all that parcel of land known as Nakuru/ Plave/xxxx and x/x portion of all that parcel of land known as Kiesege/subukia West Block x/xxxx is hereby issued pending hearing and determination of this suit.
 - II. An Order directing the Land Registrar Nakuru, to register a restriction over all that parcel of land known as Kiesege / Subukia West Block x/xxx pending the hearing and determination of the suit is hereby issued.
 - III. This being a family matter, parties shall bear their own costs.

It is so ordered

SIGNED, DELIVERED ON THIS 30TH DAY OF APRIL 2024

JUSTICE MOHOCHI S.M

