



AAL v GWM; Kinoti Kimathi & Company Advocates & 2 others (Interested Parties) (Family Originating Summons E090 of 2023) [2024] KEHC 8007 (KLR) (Family) (28 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY ORIGINATING SUMMONS E090 OF 2023
PM NYAUNDI, J
JUNE 28, 2024**

BETWEEN

AAL APPLICANT

AND

GWM RESPONDENT

AND

KINOTI KIMATHI & COMPANY ADVOCATES INTERESTED PARTY

KURIA MUKUNDI INTERESTED PARTY

MATIBA STANLEY INTERESTED PARTY

RULING

1. By a Notice of Motion dated 5th December 2023, the Applicant seeks the following orders;
 1. Spent.
 2. That a temporary injunction do issue restraining the Respondent together with the interested parties, their servants and/or agents from transferring, or alienating and/or otherwise interfering, with the matrimonial properties herein below tabulated by transferring the same into the name of the Respondent pending the hearing and determination of this application and suit.
 - a. Dagoretti/Mutuini.xxx approximately 0.1400.
 - b. ½ of Dagoretti/Mutuini/xxx.



3. That a temporary injunction do issue restraining the Respondent together with the interested parties, their servants and/or agents from transferring, or alienating and/or otherwise interfering, with the matrimonial properties herein below tabulated by transferring the same into the name of the Respondent pending the hearing and determination of this application and suit.
 - a. Dagoretti/Mutuini.xxx approximately 0.1400.
 - b. $\frac{1}{2}$ of Dagoretti/Mutuini/xxx.
 4. That the court do issue an order directing that the interested parties and the Respondent do deposit original titles of the properties herein together with the signed sale agreement and the transfer forms into court pending the hearing of this application and suit.
 5. That in the alternative, the court do issue an order to the Registrar of Lands, restraining him/her from making any transfers in relation to the properties Dagoretti/Mutuini.xxx approximately 0.1400 and $\frac{1}{2}$ of Dagoretti/Mutuini/xxx.
 6. That the costs of this application be provided for.
2. The Applicant's case is that he and the Respondent got married on 16th April 2016. Their marriage was blessed with four children. Their marriage is in the process of dissolution at Milimani Law Courts under Divorce Cause No. E1103 of 2023. During the subsistence of their marriage, they acquired the following properties in 2019;
 - a. Dagoretti/Mutuini.xxx approximately 0.1400 owned by Joan Wanjiku Nyaga.
 - b. $\frac{1}{2}$ of Dagoretti/Mutuini/xxx.
 3. It was his contention that he paid Kshs. 5.2 million towards the purchase of these properties. He then proceeded to build 16 rental houses on the properties. The rental properties collect Kshs. 160,000 which is deposited in a joint account owned by him and the Respondent. The money was to be used to pay school fees and school related expenses. During the purchase of these properties, the Respondent introduced him to the interested parties who would help with the transfer of the properties. He forwarded cheques relating to the purchase price and paid legal fees to the interested parties to forward the same to the seller.
 4. He was surprised to see part of a sale agreement in regards to Dagoretti/Mutuini.xxx approximately 0.1400 in the name of the Respondent and the sellers. Efforts to have the whole sale agreement sent to him have been futile. That the Respondent and the interested parties colluded to have the properties registered solely in her name despite the fact that he paid for the purchase price. The Respondent also colluded with the estate management to have the money be deposited into her account. The Respondent has been receiving rental income for the last one year to the exclusion of the applicant. She then ran off to the Democratic Republic of Congo and left him with the children. During the 2022 campaigns, he financed her as she was running for a parliamentary seat in Dagoretti South. He urged the court to allow his application.
 5. The Respondent via a Replying Affidavit dated 20th December 2023 opposed all the averments in the notice of motion. It was her case that the applicant allowed her to be the registered owner of the properties. She contended that she contributed towards the purchase of these properties which money was obtained from their joint account. That the bank statements attached by the applicant have not been certified while others have been manipulated to favour him. she denied receiving rent from the rental houses and averred that the Applicant had ordered the tenants to deposit rent in his account.



She averred the applicant denied her access to their matrimonial home where the original documents and titles pertaining the property are. She argued that the applicant has no cause against her and the application should be dismissed with costs.

6. The interested parties on the other hand filed grounds of opposition dated 20th December 2023 to the effect that ;
 1. The prayers sought by the applicant in his notice of motion and originating summons dated 5th December 2023 do not affect the interested parties nor place any legal obligations on the interested parties herein.
 2. The interested parties do not have the legal capacity to interfere with the right of ownership and quiet enjoyment of the properties subject matter of this application since they do not own or purport to own the said properties, do not have possession of the properties neither do they have the legal; capacity to transfer the said properties hence the orders sought do not in any way apply to the interested parties.
 3. The respondent herein retained the 1st interested party to represent her in the purchase of L.R NO. Dagoretti/Mutuini/xxx through drafting the conveyance documents including the sale agreement and the relevant transfer instruments only, a mandate that does not place any legal obligation drawing the interested parties into the issues before this Honourable court and therefore the interested parties are completely un- interested in the application.
 4. The interested parties are erroneously enjoined in this suit on the following further grounds;
 - a. The interested parties were enjoined in the suit suo moto because they did not make a formal application to be enjoined.
 - b. The applicant has not vividly demonstrated to this court any law contravened by the interested parties that led him to enjoining them to this suit.
 - c. The applicant has not demonstrated to this Honourable court the prejudice he will suffer if the prayers ought in the application herein and the originating summons are granted in the absence of the interested parties in this application.
 - d. That the applicant has not demonstrated the role of the interested parties in this suit, as advocates the interested parties do not have legal capacity to register or transfer and/ or interests on the said properties, this is the role of the Registrar of lands.
 - e. The applicant herein included the interested party in a cursory manner and has totally failed to show this Honourable court why it is a necessity for the interested parties to be involved.
 - f. The applicant has totally failed to establish to this Honourable court whether the presence or absence of the interested parties will affect the outcome of the applicant's application and originating summons.
 5. Reasons wherefore, the interested parties pray to be expunged / removed from any proceedings in relation to this matter henceforth with costs for wrongful enjoinment.
7. The applicant filed a further affidavit sworn on 12th January 2024 in which he stated that the interested parties are properly enjoined since they received money from him and have an interest by colluding with the Respondent to defeat his interest in the properties. That the interested parties are properly enjoined by virtue of Section 4 and 5 of the Matrimonial Property Rules.



Applicant's Submissions.

8. The Applicant's Submissions are dated 13th February 2023. In his submissions he has identified two issues for determination:
 - a. Whether the interested parties have been properly joined in this application.
 - b. Whether the applicant is entitled to the orders sought.
9. On the 1st issue, the Applicant submitted that the interested parties are necessary parties in these proceedings. Reliance was placed on the decision in *Meme v Republic* [2004] 1EA 124 where the court held that; "a party should be enjoined in a matter for reasons that; (i) joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings; (ii) joinder to provide protection of the rights of a party who would otherwise be adversely affected in law; (iii) joinder to prevent a likely course of proliferated litigation."
10. On the second issue, he relied on the decision of the Court of Appeal in *Mrao Limited- vs- First American Bank of Kenya Limited & 2 others* (2003) e KLR, where the Court stated that:

"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case". It is a case which, on the material presented to 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."
11. On this, he submits that the evidence he has produced demonstrates *prima facie* with a high possibility of success.
12. He further submitted that he stands to suffer damage which cannot be compensated by costs if the transfer is enforced and the Respondent and the interested parties dispose the properties. That the balance of convenience lies with preservation of the properties through an injunction.

Respondent's Submissions.

13. The Respondent's submissions are dated 20th February 2024. She submitted that the applicant has not demonstrated any legal rights infringed by her and the Respondents. That the applicant presented documents which cannot be adduced as evidence before this court and therefore, he has not established a prima facie case. She relied on the decision of *Mrao Limited- vs- First American Bank of Kenya Limited & 2 others* (2003) e KLR, which states 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal of the latter."
14. She submitted that the applicant has failed to demonstrate that he will suffer irreparable damage if the application is not allowed. She sought to rely on the decisions in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR and *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No. 77 of 2012 [2014] eKLR which illustrate the threshold of irreparable damage.



15. On a balance of convenience, she sought to rely on the decision in *Pius Kipchirchir Kogo versus Frank Kimeli Tenai* [2018] eKLR where the court stated the following;

“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff's to show that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer. In other words, the plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”

16. On the above, she submitted that the applicant having failed to fulfil the first two thresholds in an injunction, the balance of convenience shifts to her and the notice of motion should be dismissed with costs.

1st and 2nd Interested Parties Submissions.

17. The 1st and 2nd interested parties submissions are dated 20th February 2024. They majorly submitted on their joinder in these proceedings. They submitted that they did not have a stake in these proceedings and will not be affected by the outcome of the decision in this suit. Reliance was placed in the decision of *Trusted Society of Human Rights Alliance v Mumo Matemo & others* [2014] eKLR. It was their submission that the applicant did not meet the requirements to enjoin them in these proceedings as held in *John Harun Mwau v Simone Haysom & 2 others (interested parties)* [2021] eKLR .

Analysis and Determination

18. The issues for determination are;
- i. Whether the 1st and 2nd interested parties are necessary parties in this suit.
 - ii. Whether injunctive orders sought can issue.

Whether the 1st and 2nd interested parties are necessary parties in this suit.

19. In Rule 1 of the *Mutungu Rules*, an interested party is defined thus:

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

20. The 1st and 2nd interested parties have argued that they have no interest in the properties mentioned. That their names have been joined without any cause or consent. It is not in dispute that the reason they have been brought into the matter is that they acted as Counsel for the Respondent when she purchased the suit properties. The subject matter of the Originating Summons is declaration of interest in matrimonial property. If the Applicant has a complaint to tender against the role or conduct of the Advocate in the transaction that is a separate issue and cannot be the subject of these proceedings. Accordingly, the opposition of both the 1st and 2nd interested Party is upheld and they are both expunged from these proceedings.



Whether injunctive orders sought can issue

21. There is no dispute that the Applicant and Respondent were married. The parties got married at the Registrar of Marriages office in Nairobi on 16th April 2016. It is also not in dispute that the properties were acquired in the pendency of the marriage. Whereas the Applicant submits that he was the sole contributor towards the purchase, the Respondent contends that the properties were acquired jointly and the documents relating to the purchase solely executed by her with the consent of the Applicant.
22. Section 6 (1) of the *matrimonial property Act* gives the meaning of matrimonial property as the matrimonial home or homes; household goods and effects in the matrimonial home or homes or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
23. With these facts and having regard to the relevant law it is evident that the issue as to the respective interests of the parties to the property acquired must be determined and the Court is duty bound to protect those rights. The question is whether the Court should issue an injunction as sought.
24. The law under order 40 (1) of the *Civil Procedure Rules* provides as follows on the issue of when temporary injunctions can 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; 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 orders.
25. The Applicant is apprehensive that unless stopped, once the applicant has the properties transferred into her name, she is likely to dispose of them, to his detriment. The Applicant alleges that the Respondent has diverted the rental income to her private account and the respondent counters this by stating that it is the Applicant who has diverted the rental income to his personal account.
 26. The principles that guide a Court in exercising its discretion on whether or not to issue an injunction are those laid out in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR
 27. Applying the facts of this case to that test, I find that the Applicant has demonstrated that he does have a recognizable interest in the assets as enumerated. Apart from the disposal she seeks injunctive orders that would prevent the Respondent from dealing with the properties in a manner that would prejudice his interest. The loss that he is likely to suffer is likely to be irreparable as apart from the monetary investment is the emotional and sentimental value he has to these assets which cannot be compensated in monetary terms.



28. An interlocutory injunction is key in maintaining the substratum of the matter. I am of the view that the balance of convenience tilts towards maintaining the status quo so as to prevent dealings in the properties pending the determination of the suit.
29. It is my finding that the Applicant has established a prima facie case with a probability of success. I am persuaded by the court in *SJM v MK* [2020] eKLR where the court stated that:
- “The Court’s first task is to determine if the Plaintiff has established a prima facie case with a probability of success once the full case is ventilated. I must be careful to reiterate that this first Giella factor does not suggest that the Applicant must establish with certainty that she will succeed on the merits; only that she raises an arguable case with a probability of success (see, for example, *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125).”
30. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] eKLR the court in discussing irreparable harm stated as follows:-
- “Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”
31. Finally, the court is required to consider the balance of convenience. I am guided by the case of *Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, where the court discussed the issue on balance of convenience. The court in that case expressed itself as follows:
- “Where any doubt exists as to the applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies. ”
32. In my view the balance of convenience tilts in favour of the Applicant.
33. In conclusion I am satisfied that this application has merit and I therefore, make the following orders: -
- i. The Interested parties are struck off from these proceedings with no order as to costs.
 - ii. A temporary injunction is issued restraining the Respondent, her servants and/or agents from transferring, or alienating and/or otherwise interfering with properties known as Dagoretti/Mutuini.xxx approximately 0.1400 and ½ of Dagoretti/Mutuini/xxx by transferring the same into the name of the Respondent pending the hearing and determination of this suit.



- iii. The Chief Registrar of Lands, Nairobi is restrained from making any transfers in favour of the respondent in relation to the properties Dagoretti/Mutuini.xxx approximately 0.1400 and ½ of Dagoretti/Mutuini/xxx pending the hearing and determination of the main suit.
- iv. Each party shall bear own costs.

It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 28TH DAY OF JUNE, 2024.

P. NYAUNDI

JUDGE

In presence of: -

Fardosa Court Assistant

Ms. Muhanda for Applicant

Kuria h/b for Irungu for Respondent and Mr. Kinoti for Interested Parties

