



**BAO v MSJ (Matrimonial Cause E018 of 2024)
[2024] KEHC 10376 (KLR) (Family) (23 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10376 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

MATRIMONIAL CAUSE E018 OF 2024

SN RIECHI, J

AUGUST 23, 2024

**IN THE MATTER OF: SECTIONS 7, 12 & 17 OF THE
MATRIMONIAL PROPERTY ACT NO. 49 OF 2013**

IN THE MATTER OF: AN APPLICATION FOR DIVISION OF MATRIMONIAL PROPERTY

BETWEEN

BAO APPLICANT

AND

MSJ RESPONDENT

RULING

1. The applicant BAO and the Respondent, MSJ married on 29th December, 2014 and were issued with marriage certificate attached to the application. The applicant filed for divorce in Milimani Commercial Division E156 of 2021 where the said marriage was dissolved and decree absolute issued on 26th June, 2023.
2. On 4th March, 2024 the applicant filed this application seeking the following orders: -
 - a) Spent
 - b) Pending the Hearing and determination of this application, the Honourable Court be pleased to issue an order of temporary injunction restraining the Respondent whether by himself or through his associates or agents or servants or assigns from collecting rent generated from the following properties i.e. LR /12768 /Unit No.3 in Parkside Villas along Mombasa road, LR No. 209 /17242 house No. 129 and LR NO.17269 House No. 115 all located in Eagle Plains Estate and generating each of Kshs. 100,000 /- and order and direct that the rest be deposited in interest earning account in the names of the Advocates of the parties.



- c) Pending the Hearing and determination of this application, the Honourable Court be pleased to issue an order of temporary injunction restraining the Respondent whether by himself or through his associates or agents or assigns from evicting the Applicant from her matrimonial home known as Apartment B6 on LR NO.330 /360 in Kings Sherwood Apartment along Riara Road.
- d) The Honourable Court be pleased to grant a temporary injunction restraining the Respondent by himself, his agents, servants, employees, personal representatives or otherwise howsoever from entering, occupying, destroying, erecting structures, selling, offering for sale, charging, transferring, leasing, letting, charging, alienating, or completing any conveyance and /or dealing in any manner whatsoever with all that parcel of land known as:

Kisumu /Kogony /3021, Kajiado /Kaputiei-North /37766, Kajiado /Mailua /6400, Kajiado Mailua /6401, Kajiado Meto /5777, Kajiado /Mailua /5835, Kajiado /Dalalekutuk /4308 /4309, Kajiado /Dalalekutuk /1460B, Kajiado /Dalalekutuk /10574, Kajiado /Dalalekutuk /6420, Kajiado /Kitengela /4226, Kajiado /Meto /5527. Kajiado /Mailua /5835, KJD /Kitengela /59640, Uholo /Ugunja /1970, Kajiado /Mailua /2426, Kajiado /Meto /5076. LR /209 /17269 Sandrige. LR /209 /12768(HSE.3) Parkside Villas LR /209 /17242 (Hse 129) Eagle Plains. LR 330 /360I.R 30877 Kings Sherwood, pending hearing and determination of this Application.

- e) That this Honourable Court grant conservatory orders ensuring The Honourable Court be pleased to grant restraining the Respondents by themselves, agents, servants, employees, personal representatives or otherwise howsoever from entering, occupying, destroying, erecting structures, selling, offering for sale, charging, transferring, leasing, letting, charging, alienating, or completing any conveyance and /or dealing in any manner whatsoever with all that parcel of land known as Kisumu /Kogony /3021.Kajiado /Kaputiei-North /37766. Kajiado /Mailua /6400.Kajiado Mailua /6401. Kajiado /Meto /5777. Kajiado /Mailua /5835, Kajiado /Dalalekutuk /1460B. Kajiado /Dalalekutuk /6420. Kajiado /Dalalekutuk /4308 /4309. Kajiado /Dalalekutuk /10574. Kajiado /Kitengela /4226.

Kajiado /Meto /5527. Kajiado /Mailua /5835. KJD /Kitengela /59640. Uholo /Ugunja /1970. Kajiado /Mailua /2426. Kajiado /Meto /5076.

LR /209 /17269 Sandrige. LR /209 /12768(HSE.3) Parkside Villas LR /209 /17242 (HSE 129) Eagle Plains. LR 330 /360I.R 30877 Kings Sherwood, pending hearing and determination of the Originating summons.

- f) That this Honourable Court grants costs of the application.

3. The grounds for the application are that the properties were jointly acquired by the applicant and respondent; that some of the properties generate rental income; that applicant has been managing them and finally that the court should grant the injunctive and conservatory orders as prayed.
4. The application is supported by the affidavit of the applicant sworn on 4th March, 2024. In the affidavit she reiterates the grounds of the application. She further depones that the named properties above are subject to the proceedings of division of matrimonial property and should, therefore, be preserved, pending the determination of the dispute.
5. The Respondent MSJ opposed the application and filed a replying affidavit sworn on 13th May, 2024. He depones that he single handedly purchased all the properties listed. He depones that even after the



divorce he continues maintaining the children of the marriage and pays Kshs.50,000 /- monthly for family upkeep. He also maintains a health Insurance for the Children, avails a Mercedes Benz for family use and has given Applicant land along Mombasa Road and registered it in her name. He depones that he has now an abdominal ailment and he uses rent collected for medical care.

6. By consent, the application was canvassed by way of written submissions. Both counsel filed their respective submissions.
7. Prof. Mumma for the applicant submitted that the applicant seeks a temporary injunction to restrain the respondent from selling or disposing of the listed properties. The applicant also seeks that he be restrained from collecting rental income of that property and instead same be deposited in an account for the benefit of the children.
8. Mr. Ogotu for the Respondent submitted that in an application for temporary injunction the applicant has not established that the properties are matrimonial property, that the respondents intends to transfer or that she will suffer irreparable loss which cannot be adequately compensated by award of damages.
9. From the application, replying affidavit and submissions, there is no doubt that the issue for determination is whether applicant has established grounds for granting of injunctive orders:
10. This is an application for temporary injunctive relief pending suit, and is governed by the principles in *Giella v. Cassman Brown* and reiterated in the case of *Nguruman Limited Versus Jan Bonde Nielsen & 2 Others* Ca No. 77 of 2012 (2014) eKLR where the Court held thus:

“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 damages; and if the court is in doubt then it can decide the application on a balance of convenience.

11. Therefore, according to the principles set out in *Giella*, an applicant is required to establish:
 1. the existence of a *prima facie* case based on the Originating Summons and Affidavit Evidence,
 - 2) the likelihood of irreparable injury to the applicant if the injunction is not granted; and
 - 3) on where the balance of convenience tilts in case the court cannot decide based on the first two requirements.

On whether the applicant has established a *prima facie* case

12. In the case of *Naftali Rutbi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR the Court of Appeal stated that:

“With reference to the establishment of a *prima facie* case, Lord Diplock in the case of *American Cyanamid vs Ethicon Limited* [1975] AC 396 stated thus, “If there is no *prima facie* case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief.”



On whether the Applicant stands to suffer an irreparable injury that cannot be adequately compensated by an award of damages:

13. The Applicant has to establish that she would suffer an irreparable injury that cannot be adequately compensated or remedied by any monetary award or damages that may be awarded later.
14. In *Family Bank Limited vs. Tassels Enterprises Limited & 2 Others* [2021] eKLR which cited the ruling of the Court of Appeal in *Nguruman Limited vs. Jane Bonde Nielsen & 2 Others* [2014] eKLR,

It was submitted that speculative injury or unfounded fear cannot be termed as irreparable damage as the injury must be grave and irreparable. It must be actual, substantial and demonstrable. In this case it was submitted that the Plaintiff /Applicant has not demonstrated any grave and irreparable injury she stands to suffer if the orders sought are not granted since she has not demonstrated any contribution made to the acquisition of the suit properties and stands to suffer no loss as she did not contribute to the acquisition of the same and secondly the said properties do belong to the Defendant /Respondent.

In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course... The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed based on the balance of convenience while being aware that formal evidence will be adduced at the hearing...

15. From the application replying affidavit, it is not in dispute that the application and Respondent were married. There is also evidence that they are now divorced. The applicant has filed an originating summons seeking division of the properties acquired during the said marriage. She has to establish that the property listed is matrimonial property and that she contributed to its acquisition. That can only be determined in the Originating Summons hearings. Her apprehension is that the respondent may dispose of the property before the conclusion of the dispute. The respondent disputes the allegation that he may dispose of the property and, therefore, he will not suffer if order not to dispose is granted.
16. Where an application is not clear cut on whether the application was made a prima facie case or will suffer irreparable loss, the court can determine the applications on the balance of convenience.
17. In *Paul Gitonga Wanjau Vs Gatbuti Tea Factory Company Ltd & 2 Others* (2016) eKLR , where the court expressed itself thus:

Where any doubt exists as to the applicants' right, 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... 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.

18. Upon considering the application I issue the following orders:

1. That a temporary injunction do issue against the respondent restraining him from selling, transferring or in any way disposing of the following properties:

Kisumu /Kogony /3021, Kajiado /Kaputiei-North / 37766, Kajiado / Mailua / 6400, Kajiado Mailua /6401, Kajiado Meto /5777, Kajiado /Mailua /5835, Kajiado / Dalalekutuk /4308 /4309, Kajiado /Dalalekutuk /1460B, Kajiado /Dalalekutuk /10574, Kajiado /Dalalekutuk /6420, Kajiado /Kitengela /4226, Kajiado /Meto /5527.

Kajiado /Mailua /5835, KJD /Kitengela /59640, Uholo /Ugunja /1970, Kajiado / Mailua /2426, Kajiado /Meto /5076.

LR /209 /17269 Sandrige.

LR /209 /12768(HSE.3) Parkside Villas LR /209 /17242 (HSE 129) Eagle Plains.

LR 330 /360I.R 30877 Kings Sherwood,
2. The above order to be valid for 6 months within which period the applicant would have prosecuted the originating summons for hearing, same be heard and finalized.
3. The interim orders be deemed vacated after expiry of 6 months from date of the ruling.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF AUGUST, 2024.

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S N RIECHI
JUDGE

