



**EKK v DMN (Matrimonial Cause E005 of 2024)
[2024] KEHC 10424 (KLR) (21 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MATRIMONIAL CAUSE E005 OF 2024
FN MUCHEMI, J
AUGUST 21, 2024**

BETWEEN

EKK APPLICANT

AND

DMN RESPONDENT

RULING

Brief facts

1. This application dated 12th February 2024 seeking for the orders of an injunction to restrain the respondent, by himself or his representatives from selling, entering, leasing, encroaching and/or trespassing, interfering, wasting, constructing or dealing in any manner, with Plot No. xxx Ngei II Kugeria or any developments thereon pending the hearing and determination of the originating summons dated 12th February 2024.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 25th April 2024.

The Applicant’s case

3. The applicant states that she was married to the respondent through cohabitation in 1989 and their marriage is blessed with two issues. The applicant states that she is a business lady and sells cereals at Nyamakima since 2004. The applicant further states that the respondent is an engineer and a contractor who has vast properties and cars.
4. The applicant states that she parted ways with the respondent due to his cruelty and desertion. During their separation, the respondent procured a monogamous marriage and put up a matrimonial home in Ngariama Kirinyaga County where he currently lives.
5. The applicant states that they reconciled in the year 2010 and they continued cohabiting. During their cohabitation, the respondent’s business went under and he could not cater of the family’s needs



- which included providing shelter for the family. Thus, the applicant states that she purchased the suit property so as to deal with the shelter menace. Without any assistance from the respondent, the applicant states that she requested her sister LWK for Kshs. 300,000/- to purchase the property.
6. On 26th March 2013, the applicant entered into an agreement for the sale of Plot No. xxx in Ngei II Kugeria from one Salome Wanjiku Babu who is well known to her. The applicant states that she paid Kshs. 500,000/- as part of the purchase price and paid the balance in instalments thereby transferring ownership to her name. She was then issued with the share certificate no. xxx of Ngei II Kugeria. The applicant states that she paid the entire purchase price in cash as she was close friends with the vendor.
 7. The applicant then requested her son, an architect to prepare and follow up with the building plans of their home. The applicant further sought for referrals of a qualified contractor who began construction of the house and she states that the respondent chased her away when the house was at the roofing stage.
 8. The applicant avers that during construction she paid all the contractors and bought all the building materials and the respondent started coming to see if the site was stalling or continuing having already chased away the contractor and her son who was supervising the project.
 9. The applicant states that upon completion of the house, she invited the respondent to join her and her sons in the new home. After a short period of time, the respondent chased away their sons from her house claiming that they were not his children. The applicant states that she rented a house for the children for they had no alternative shelter. The applicant further states that their sons have never lived in peace or harmony due to the turmoil caused by the respondent in the family.
 10. The applicant states that from the onset of their cohabitation, through the years and most recent in 2022, the respondent vowed to kill her and burned the bedroom door where she had locked herself for her safety. Due to the immense violence and cruelty meted upon her by the respondent, the applicant states that she ran away from the house for her safety. The applicant further states that she filed for divorce and the marriage was annulled.
 11. Due to the fear inflicted by the respondent, the applicant states that she sought police assistance to collect her personal and household items in November 2023 but the respondent had stolen, hid and destroyed the receipts she used to purchase the building materials. The applicant avers that she has been staying with family and friends despite her having a property registered in her name.
 12. The applicant argues that the ordeal has caused her financial loss and mental distress and she will be greatly tormented if the house is sold as she and the children will have no place to call home. The applicant states that the suit property does not form part of matrimonial property and prays that the court declare the suit property to have been solely purchased by herself. The applicant states that the respondent will not suffer irreparable harm or damage as he has his matrimonial home where he causally resides together with his second wife.

The Respondent's Case

13. The respondent states that he met the applicant in 1989 and started living together from February 1990 in Bahati Estate. During their cohabitation, the respondent states that they were blessed with two issues born on 1st January 1990 and 4th July 1993.
14. The respondent states that he was employed at Kenya Threads Industry as a sales manager while the applicant was unemployed when they met. The respondent states that he left employment at Kenya Threads Industry in 1991 and the applicant left their rented home without any reasonable cause. The respondent avers that the applicant has been in and out of their matrimonial home and he has never harassed or been cruel to her.



15. The respondent states that he met another lady MN in August 2004 whom he married. This was after the continued desertion of more than 10 years by the applicant and further because his efforts if reconciliation with the applicant had failed.
16. The respondent states that his only known matrimonial home is situated on Plot No. xxx Ngei II Kugeria and the applicant had failed to provide any substantial proof of her baseless assumptions and averments.
17. In 2009, the respondent states that after extensive consultations between his family and that of the applicant's they settled their differences and moved back in with the applicant in Kerugoya then to Kahawa Wendani then to Safari Park Gardens where he rented the said houses. The respondent states that the applicant caused separation with his other wife when she assaulted his second wife causing her to flee for her own safety. The respondent states that the applicant is naturally prone to anger and violence is her inherent attribute.
18. The respondent states that his friend Njagi Njiru was facing financial issues and wished to sell his property at Kshs. 450,000/-. The respondent avers since he had Kshs. 420,000/-, he borrowed the balance of Kshs. 30,000/- from the applicant and bought it and returned back her money together with an additional Kshs. 20,000/- as a token of appreciation.
19. The respondent avers that the applicant approached him and told him that she had spotted some land in Ruiru, Membley Estate which she was interested in buying to build their matrimonial home. He further states that the purchase price was Kshs. 950,000/- and the applicant had managed to borrow Kshs. 600,000/- and thus he topped up the balance of Kshs. 350,000/-. The share certificate was printed in her name since it was their family home.
20. The respondent avers that he began constructing their permanent house in June 2014 and his company vehicles would transport the construction materials which he purchased. Further, the respondent states that since he was a contractor, he would have his professional staff on the ground to supervise the ongoing construction.
21. The respondent avers that the applicant only contributed a sum of Kshs. 575,000/- for the entire construction of the matrimonial house which costed Kshs. 4,800,000/- without considering the cost of the land. Further, the remainder sum of Kshs. 4,250,000/- was his contribution towards the construction of the matrimonial home which amount is well accounted for. the respondent states that he moved into the house in September 2016 with the applicant by which time their children had all moved out. The respondent further avers that he completed construction of the suit home in August 2017. He further states that he built the water storage tanks, paid for water infrastructure fee for pie works that had been done and contributed towards the connection of water supply to the matrimonial home.
22. The respondent avers that he provided for all his needs for his children at all times and never belittled them. The respondent states that the applicant is the one who has been meting violence upon him and abusing him verbally which he reported at BTL Police Post in September 2019 under OB x/19/09/2019.
23. The respondent states that the applicant left on her own volition after assaulting him and he noticed that none of her essential documents and personal valuables were in the house meaning that she had partly moved. Further, the respondent states that the applicant is attempting to evict him from their matrimonial home. The respondent states that he will be greatly prejudiced and at the risk of being left homeless and destitute if the orders sought are granted as he cannot afford rent because he is



- economically unstable currently. He further states that he uses the suit property as his office and his business and employees stand to suffer.
24. The applicant filed a Supplementary affidavit dated 20th June 2024 and states that when she met the respondent he was unemployed. Further the applicant states that from the year 1994 – 2004, she did different jobs to sustain her children and eventually ventured into the cereal business. The applicant states that she has left the respondent on numerous occasions because of his cruelty, harassment, abusive language, belittling and his male chauvinist attitude.
 25. The applicant avers that the respondent did not provide basic needs for his children who stayed with her mother back in Othaya for over 15 years. Further, the respondent remarried in 1998 and in 2004 they solemnized their marriage through a church wedding at PCEA Church. The applicant further avers that the respondent established a matrimonial home on LR No. Ngariama/kabare/xxx (Kiambatha Farm) where he forced her to stay together with his wife but there arose a conflict which forced her to embark on purchasing the suit property to avoid any further grievances with the respondent's wife.
 26. The applicant states that the respondent denied paternity of her last born son and only wanted to cater for one child. During their stay in Kerugoya, the applicant states that they used to live in between the rental house and the respondent's matrimonial home where her first born son was given a gazebo while the 2nd family occupied the matrimonial house. The applicant avers that she was the one who used to pay the house rent as the respondent used to threaten that he could leave her any time.
 27. The applicant avers that after the commotion with the respondent's wife, the respondent approached her and told her that they should buy land in Baragwe/Kianguku which is near his ancestral home. The applicant further avers that the respondent is used to selling family assets with no consent and does not like to be questioned on the same. Further, the applicant states that the respondent is the registered owner of land in South Ngariama, Baragwi/Kariru, Nrariama/Baragwi, land in Lamu, Juja Farm and Kamiti/Animar and the only reason he is not the registered owner of the suit property is because it does not belong to him.
 28. The applicant avers she and her sons have no place to call home and further that she has been informed that the respondent sold the land he bequeathed them at Ngariama/Baragwi. The applicant further avers that the respondent continues to live at both houses in Ruiru and at Kiambathi Farm while she continues to incur losses, anguish and pay rent.
 29. The respondent filed a Further Affidavit on 17th July 2024 and reiterated the contents of his Replying Affidavit and states that he always contributed to the upkeep of the children and would occasionally send money to the applicant's mother through friends for the upkeep of the children. Further the applicant used to collect money for upkeep in his office.
 30. The respondent avers that the applicant has always been in the habit of running away from the matrimonial home without any cause as she deserted her matrimonial home in 1994 and returned in 2009, in 2015 and returned after three months and on 2019 and returned in February 2020.
 31. The respondent states that he never denied the paternity of his youngest child but he was concerned about how the pregnancy came about considering that the applicant had deserted their home.
 32. The respondent denies ownership of the properties listed by the applicant in her supplementary affidavit save for the Ngariama/Barigwi (Kiambatha farm) which has recently been disposed of by way of public auction.



33. The respondent states that in 2022, the applicant was arrested and arraigned in court to answer charges of assault in Ruiru MCCR/E1235/2022, reported and recorded under OB No. xx/27/05/2022 which he withdrew in November 2023 after the dissolution of marriage was allowed in June 2023. The respondent states that all the allegations of cruelty, assault and violence claimed by the applicant are untrue and without any substantial proof.
34. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

35. The applicant submits that the suit property is not matrimonial property pursuant to Section 2, 6 and 7 of the *Matrimonial Property Act*. The applicant submits that she filed the instant application owing to an indication from the respondent that he wants to sell the suit property to third parties. The respondent further denied her access to the property despite her being the legal and registered owner of the suit property. The applicant sought injunctive orders so that the status of the property remains the same.
36. The applicant relies on Section 68(1) of the Lands Registration Act and the case of Mwambeja Ranching Co. Limited & Another vs Kenya National Capital Corporation Limited & 6 Others (2015) eKLR and submits that she has met the threshold for the grant of injunctive orders. she further submits that she has shown that she has a prima facie case by showing that she was not married to the respondent as he married his wife in 2004 under Christian marriage. The applicant further states that the balance of convenience tilts towards preserving the suit property as failing to do the same will render the matter nugatory.
37. The applicant submits that she is the legal and registered owner of the suit property, a fact not denied by the respondent as he does not hold any title document to show proof of ownership. The applicant further submits that the respondent continues to enjoy possession of the property solely to her exclusion and that of the children who are renting houses. Thus, the applicant states that pending the determination of the suit, she should be granted vacant possession of the property as the legal and registered owner.

The Respondent's Submissions

38. The respondent reiterates what he deposed in his affidavits and submits that he contributed a sizeable amount towards the establishment of the matrimonial home. According to the respondent, he commenced construction of the matrimonial home in 2014 and through his resources, machinery and expertise, he ensured that their home was complete and they moved in together with the applicant in the year 2016. The respondent further submits that the estimated cost of construction was Kshs. 4,800,000/- and the applicant only contributed Kshs. 575,000/-.
39. The respondent relies on Section 2 of the *Matrimonial Property Act* and the cases of T.K.M vs S.M.W [2020] eKLR and N.W.M vs K.N.M (2014) eKLR and submits that he has made both monetary and non-monetary contributions which fact is corroborated by the evidence filed and annexed to his replying affidavit and further from the supervisory role he played all through the construction and establishment of the matrimonial home.
40. The respondent relies on Section 7 of the *Matrimonial Property Act* and submits that even though his name does not appear on the register in terms of ownership of the suit property, he argues that he still has a beneficial interest over the property owing to the substantial contribution he has made towards



its establishment. The respondent further submits that he contributed towards the purchase of Plot No. xxx Ngei II Kugeria even though his name is not in the register.

41. The respondent cites Article 45 of *the Constitution* and the case of P.N.N. vs Z.W.N [2017] eKLR and submits that although the provision grants equal rights to parties to a marriage it does not mean that a party to a marriage is entitled to equal share of the property acquired during marriage unless his or her contribution is ascertained to have been equal to that of the other spouse.
42. The respondent submits that the reliefs sought by the applicant cannot suffice as he has a beneficial interest over the subject matrimonial property.

The Law

Whether the applicant has met the requisite conditions to warrant the granting of a temporary injunction.

43. The principles of interlocutory injunction are now well settled. Those principles were set out in *East African Industries vs Trufoods* [1972]EA 420 and *Giella vs Cassman Brown & Co. Ltd* [1973]EA 358. Restating the said principles, Ringera J, (as he then was) in *Airland Tours & Travel Limited vs National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002* set them out as follows:-
 - a. A prima facie case with a probability of success at trial;
 - b. The applicant is likely to suffer an injury, which cannot be adequately compensated in damages;
 - c. If the court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;
 - d. The conduct of the applicant meets the approval of the court of equity.
44. Similarly, in *Dr. Simon Waiharo Chege vs Paramount Bank of Kenya Ltd Nairobi (Milimani) HCCC No. 360 of 2001*, Ringera J, (as he then was) held:-

“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation, which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show that he has a prima facie case with a probability of success at the trial. If the court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as pertains to the subject matter of the suit does not meet the approval of the eye of equity.”

A prima facie case with a probability of success at trial

45. What then constitutes a prima facie case? In the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125,

“The principles which guide the court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success.



Secondly, an interlocutory injunction will not normally be granted unless an 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....A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “prima facie case” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a suitable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of prima facie case, the former being the lesser standard of the two...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 being 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 applicant’s case upon trial. That is clearly, a standard, which is higher than an arguable case.”

46. It is not in dispute that the applicant and the respondent were married in 1989 through cohabitation. The applicant filed for a divorce vide Ruiru SPMC Divorce Cause No. E063 of 2023 where a decree nisi was issued on 6th June 2023 and certificate of making a decree nisi absolute was issued on 6th December 2023. Both parties agree that during their marriage they acquired the suit property Plot No. xxx Ngei II Kugeria however the applicant argues that she solely acquired the said property through a loan from her sister whereas the respondent argues that both he and the applicant acquired the suit property but he made the bigger contribution. The applicant has annexed a sale agreement between her and the vendor one Salome Wanjiku Babu and a share certificate showing that she is the registered proprietor of the suit property. The respondent on the other hand claims that they agreed that the applicant’s name appear solely on the share certificate but he contributed to the purchase of the land and the building of their matrimonial home.
47. Section 6 of the *Matrimonial Property Act* 2013, defines matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage.
48. At this juncture it is evident that as the parties were married and lived as a couple they both contributed to their marriage in their own respective ways. During the pendency of the marriage both parties acquired certain rights which this court must protect pending the hearing and determination of their divorce and the distribution of the property they may have acquired upon proof of individual contribution towards its acquisition. The applicant has sought for injunctive orders based on the fact that she acquired the suit property solely and the suit land is registered in her name but the respondent has threatened to sell the matrimonial home thus leaving her and the children destitute and homeless.
49. From the record it is evident that the issue of contribution cannot be determined at this interlocutory stage and would need to be ventilated at trial. Although the applicant has argued that the suit property



belongs to her solely and that the respondent did not contribute to it, it is evident that the said property was acquired during the subsistence of the marriage and both parties would need to ventilate their respective cases. It is therefore my considered opinion that the applicant has established a prima facie case.

Irreparable Injury

Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others [2016]eKLR the court considered Halsbury's Laws of England on what irreparable loss is and stated that:-

“First, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

50. The question is whether the applicant demonstrated that she will suffer irreparable loss unless the injunction is granted, which loss would not adequately be compensated by an award of damages? The applicant submits that she is apprehensive as she was evicted from the suit property and the respondent has already done a valuation and is in the process of selling it to her exclusion as she is the registered owner.
51. The respondent is silent on the issue of selling the house but he maintains that the applicant left their matrimonial home on her own volition and if the court grants the orders sought by the applicant he risks being homeless and destitute.
52. Notably, the suit property is registered in the name of the applicant. However she states that she left the matrimonial home without any documents and as such the title document is not in her possession. As such, there is a great probability that the respondent may dispose of the property without the consent or knowledge of the applicant. It cannot be ruled out that the respondent may render the applicant and her children homeless if injunctive orders are not granted. I am therefore satisfied that the applicant may suffer irreparable injury which would not be adequately compensated by way of damages.

Balance of Convenience Test

53. In the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR, the court in dealing with the issue on balance of convenience held as follows:-

The meaning of balance of convenience in favour of the plaintiff is that if the injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience 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 plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.



54. In light of the above, it is my considered opinion that the balance of convenience tilts in favour of the applicant because the inconvenience caused to her will be much greater than that caused to the respondent if the injunction is not granted.

Conclusion

55. I am of the considered view that the applicant has met the threshold as set out in the case of Giella vs Cassman Brown and therefore an injunction ought to issue in her favour. I find that the application dated 12th February 2024 has merit and is hereby allowed. In the following terms:-

- a. That the respondent is hereby restrained from selling, leasing, encroaching, occupying, interfering, dealing in any other way with Plot No. xxx Ngei III Kugeria pending determination of this cause.
- b. The costs of this application shall be in the cause.

56. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21ST DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE

