



**MCC v WCC (Matrimonial Cause E003 of 2024)  
[2024] KEHC 14876 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 14876 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
MATRIMONIAL CAUSE E003 OF 2024**

**A. ONG'INJO, J  
OCTOBER 31, 2024**

**BETWEEN**

**MCC ..... APPLICANT**

**AND**

**WCC ..... RESPONDENT**

**JUDGMENT**

1. The Applicant brought application dated 8.3.24 concurrently with originating summons dated 8<sup>th</sup> March 2024 pursuant to Section 1A, B, 3, 3A and B of the Civil Procedure Act and Order 1 Rule 15 and Order 37 Rules 7 ad 14 of the Civil Procedure Rules as well as Section 4 (a) and 12(3) of the Matrimonial Property Act No. 49 of 2013;
2. In the application the applicant is seeking orders that a mandatory injunction do issue compelling the Respondent to allow and/or grant access to the Applicant for purposes of occupying and / or living in their matrimonial home in land parcel No, BWERIGI/BUKIHENCHE / 639. She also sought that an order of temporary injunction do issue restraining the Respondent from interfering with her occupation of their matrimonial home located on Land parcel No. 639 by threatening to kill assault and/or uttering and unprintable words directed at the Applicant. The Applicant further sought that the Respondent be restrained from bring a third party in the form of a new wife to live in or occupy their matrimonial home without her consent; that pending the hearing and determination of this suit that a mandatory order of injunction do issue compelling the Respondent to allow and/or grant access to the Applicant for purposes of occupying and/or living in their matrimonial home; that pending the hearing and determination of the suit herein an order of temporary injunction do issues restraining the Respondent from interfering with the occupation of the Applicant of their matrimonial home by threatening to kill assaulting and/or uttering unprintable abusive words directed at the Applicant. She also sought for costs of the application.



3. The Application is premised on the grounds on the face of the application and affidavit of the Applicant sworn on 8<sup>th</sup> March 2024.
4. The Applicant and Respondent were married in 1989 and were blessed with 6 children aged between 33 to 16 years of age. That during the subsistence of their marriage the Applicant juggled between taking care of the children being a housewife where she planted maize, bananas and coffee. She said she also kept dairy cows and ran a hardware which the Respondent who was a teacher by profession had opened.
5. The Applicant stated that she sold her farm produce and handed the proceeds to the Respondent who used the money to acquire the properties in question. She said that the 3 properties in question were acquired during the subsistence of their marriage and that they established their matrimonial home on LR Bwiregi/Bukihenche / 639 in 2012. She said parcel No. 639 was acquired on 6.5.2002 from Menganyi Mwise and Mwita Chacha Maroa. She said that she used to operate a posho mill and paid for part of the plot in instalments whereas the Respondent paid the other part.
6. The Applicant also asserted that she contributed on the purchase of materials to build the matrimonial house as well as provide labour by cooking for the masons and workers generally. She said she was also fetching water and also ensured that the children and Respondent and their home were well taken care of.
7. In regard to parcel No. Bwiregi /Bukehanche/644 the Applicant said she contributed Kshs. 6,000/= towards the purchase price. That although parcel No. 620 was purchased before, they got married she participate in its development and that it had 5 single rooms and 2 shops. She said she contributed in constructions of the shops by giving money from the farm produce and again looked for the masons.
8. The Applicant argued that the Respondent had always threatened her with contempt and repeatedly beat her up while insulting her using unprintable words.
9. That on 15.10.2023 the Respondent tried to kill her and broke the doors to gain access to her. That the Respondent burnt her clothes and sent her away from the matrimonial home without considering where she was to live. The Applicant said she was forced to seek refuge in her sister's homes.
10. The Applicant informed the court that the Respondent was planning to marry a 2<sup>nd</sup> wife on 10.12.2024 and live / cohabit with her in the matrimonial home whereas she remains restitute after being sent out of their matrimonial home.
11. She said the Respondents' properties were acquired through joint efforts and the Respondent intended 2<sup>nd</sup> wife should not have any interest in the property acquired before she was married.
12. The Applicant filed a further affidavit in support of the originating summons in response to the Respondents Replying Affidavit. The further Affidavit is sworn on 6<sup>th</sup> May, 2024 and emphasized and reiterated her argument in the supporting Affidavit. She added further that although the Respondent paid school fees for the children, she personally took care of the other needs of the children like clothes, ensuring they were clean as she never had a house help at any one time to help take care of the children.
13. The Applicant claimed that on 15.10.2023 the Respondent locked her out of the matrimonial house and she sought refuge in her son's house.
14. That on 16.10.2023 the Respondent broke the door while insulting her and threatened to kill her and only left when people came. That she left and took her clothes to her sons house but the Respondent followed her and broke the door to her son's house and to defend herself she pick acid water which



- was the only item within her reach and threw it towards him and that is how she managed to escape. She said she is scared for her life and is not able to go back to the matrimonial home.
15. She said she had never threatened or assaulted the Respondent in any way and the reports listed at paragraph 24 of the Replying Affidavit are false.
  16. She said the Respondent broke his leg in an incident in 2010 and it is not true that he has a broken spine, she said the Respondent did not attach any medical documents to prove he has a broken fracture and that he is able to do everything that a normal human being and has even been able to remarry.
  17. She said that parcel No. 620 is still in the name of the Respondent although a church is constructed in it. She said she participated in its purchase.
  18. The Applicant said the Respondent made one of the children to defer their college studies to March 2025 claiming he could not pay her fees if supports the Applicant.
  19. That the Respondent sends threatening messages to the children and sends them away whenever they go home and as such the children had nowhere to seek refuge.
  20. The respondent opposed the application by replying affidavit sworn on 18.3.24. He confirmed that he was married to the applicant in 1989 and at the time of marriage he had already purchased LR NO. BWIREGI /BUKIHENCHE / 644. He annexed a sale agreement dated 6.5.1987 to support his averment that the applicant did not assist him to purchase the piece of Land. He further deposed that the applicant was a house wife and her contribution towards the matrimonial property was in kind.
  21. The respondent further stated that he put up his home on LR NO. BWERIGI / BUKIHECHE / 639 in 2012 after taking a loan of 1,2 million from Barclays Bank. The respondent said that when he purchase parcel No. 639 the applicant was merely a witness but did not contribute the purchase price neither did she participate building the house thereon. That the hardware he opened for the applicant was run down and closed. He said that he had to employ an assistant to run the posho mill he had purchased and its not true that the applicant was running it. The applicant further averred that he single handedly took his children to school and as well as the upkeep.
  22. The respondent added that on 15.10.23 the applicant returned home at 9:30p.m and when the Respondent asked where she had been she reiterated by violent abuses against him picked her stuff and locked them in her sons house. The respondent denied threatening or burning the applicant's clothes. In the contrary he averred that on 16.10.23 the applicant picked the battery acid and hurled it at him and he was skulled on the head and left eye and was treated at Ntimaru Medicare Hospital from where he was refereed to Migori Hospital for reviews. The respondent gave account of the many times the applicant had physically assaulted him and reported the matters to police station.
  23. The respondent also stated that he was a disabled person with a broken spinal code and unable to fight or put up resistance to the applicant who had always threatened to harm him or kill him. He said that he apprehensive if the applicant is allowed in the matrimonial home she may injure or kill him.
  24. Concerning LR NO. BWERIGI / BUKIHENCHE / 620 he said he bought it in 1988 before he got married to the applicant and donated it to the SDA Church. He denied that there any shops on this piece of land.
  25. The respondent admitted having married a second wife and said that this was necessitated by the applicant threats and willful refusal to take care of him. He said there has no break of coverture to warrant subdivision of matrimonial property in the absence of divorce.



26. The Application was heard by way of written submissions. The Applicants submissions are dated 6<sup>th</sup> May 2024. The Applicants counsel submitted that the Respondent contravened provisions of Sections 12(3) and (4) of the Matrimonial Property Act by evicting the Applicant from the matrimonial home during the subsistence of the marriage between them.
27. It was argued that the Applicant had proved a prima facie case to warrant the grant of orders prayed for. It was also submitted that having been evicted from the matrimonial home she had been put through a lot of anguish and as such has suffered irreparable damage that cannot be remedied by way of damages.
28. It was further argued that balance of convenience tilts in favour of the Applicant be granted orders sought as she will incur costs to get accommodation and that at her age, she has grandchildren and she cannot be comfortable in any other place apart from her matrimonial home. The court was therefore urged to issue the prayers sought.
29. the Respondent submissions dated 5.6.2024 are to the effect that the Applicant has failed to establish a prima facie case to warrant grant of orders of an injunction as settled in the case of Giella vs Cassman Brown. It is argued that the application does not show any material on the face of records that persisted a prima facie case. It was contended that the Applicant did not come to court with clean hands as she has been abusive to the Respondent emotionally and physically.
30. The Respondent also submitted that the Applicant had not shown that she is going to suffer any injury if an order of temporary injunction is not granted. It was urged that the Applicant left home on her own after threatening the life of the Respondent by hurling battery accede and sculling his head and left eye. That she further damaged the Respondents motor vehicle and she cannot seek injunctive orders when she already left the Respondent home. That issuing an order sought by the Applicant will be vain and unenforceable.
31. The Respondent claims that the Applicant had taken advantage of his disability and has constantly threatened to evict from his home with the help of the eldest son. He said that he bought and developed parcel 639 on his own without the Applicants contribution and that it does not amount to a matrimonial property.
32. The Respondent also said that the balance on convince does not till in favour of Applicant and the orders prayed for should not be granted. It was urged that the Applicant will not suffer any great injustice if the relief sought are not granted.
33. On whether mandatory injunction should be granted the Respondent submitted that there was no special circumstance existing warranting the grant of mandatory injunction at an interlocutory stage. The court was urged to resolve this matter when the suit is fully heard and determined.
34. On the issue of costs it was submitted Section 27 of the Civil Act that cause follow events and that the successful party shall ordinary have costs. The Respondent urged the court to dismiss the application dated 8.3.24.
35. This court has considered application dated 8.3.2024 together with supporting affidavit as well as the Respondent replying affidavit and submissions by both parties and it is not in dispute that the Applicant and the Respondent are husband and wife and that prior to 16.10.23 they were cohabiting in their matrimonial home in LR NO. BWERIGI / BUKIHECHE / 639. It is also not in dispute that currently the Applicant is not occupying the said matrimonial home following a disagreement with the Respondent does not want the Applicant to be allowed back to the matrimonial home fearing that she might harm him as she had allegedly threatened to do before. On the other hand the Applicant also claims that the Respondent had threatened to harm and kill her and that is why she left the matrimonial



home. Pursuant to Section 17 of the matrimonial Property Act there is prima facie evidence that the Applicant and the Respondent jointly own the matrimonial home situated on LR No. 639 and therefore both are entitled to enjoy the use and/or occupation of the same.

36. In consideration of the above findings this court finds that the Applicant has established a prima facie case and an order of injunction is hereby issued restraining the Respondent from threatening the Applicant. This court also makes an order that the Applicant is given unconditional access to the matrimonial home pending the hearing and determination of the originating summons. Directions on the originating summons 8.3.2024 to be taken on 28.1.2025. In the meantime, the parties herein are hereby referred to Court Annexed Mediation to try and reach an amicable settlement of their dispute.

37. Each party to bear their own costs of the Application.

**DELIVERED DATED AND SIGNED AT MIGORI THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024.**

**A. ONG'INJO**

**JUDGE**

Judgment delivered in the presence of

..... Advocate for Appellants

..... Advocate for Respondents

Victor/ Lola – Court Assistants

Applicants Contact .....

Respondent Contact .....

