NWM v SMK (Matrimonial Cause E016 of 2024)
[2024] KEHC 15955 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15955 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MATRIMONIAL CAUSE E016 OF 2024

HI ONG'UDI, J

DECEMBER 18, 2024

BETWEEN

NWM ..... APPLICANT

AND

SMK ..... RESPONDENT

RULING

1. N.W.M, the Applicant filed an originating summons alongside a notice of motion both dated 12th July, 2024. This ruling is in respect of the notice of motion in which the applicant is seeking for fourteen (14) different orders in respect of their matrimonial property Bahati/Engorusha Block 2/179 and land No. Bahati/Engorusha Block 2/131. Eight (8) of the prayers (1-3, 6, 8, 10, &12) are spent. The orders sought vary from restraining orders, temporary injunctions orders seeking for accountability by the respondent and deposit of money. The application is premised on the grounds on its face plus the applicant's supporting affidavit sworn on 12th July, 2024. S.M.K the respondent opposed the application through his replying affidavit sworn on 26th July, 2024.

2. The application was canvassed by way of written submission.

The applicant's submissions

3. These were filed by Mangera, Langat & company advocates and are dated 10th September, 2024. Counsel has submitted that the applicant and responded got married in 1994 and set up their matrimonial home on Land No. Bahati/Engorusha Block 2/179 which was gifted to them by the respondent's parents. They were also gifted the second parcel No. Bahati/Engorusha Block 2/131 on which they planted coffee trees and avocado trees for commercial gain. The two properties were later transferred to the respondent through Nakuru Succession Cause No. 389 of 2010 - the *Estate of Joseph Mukera Kuria*. Referring to sections 2 & 6 of the *Matrimonial property Act*, *ENK v INK* [2015] eKLR *SN v FM* [2019] eKLR and *AMM v SMN* (Civil Suit No. E019 of 201 and *SWG v FMK* Civil Case

No. 004 of 2022 [2023] KEHC 1101 (KLR) & *SN v FM* 2019 eKLR, counsel submitted that the assets in question were inherited during matrimony and therefore form part of matrimonial property.

4. On the principles guiding the grant of interlocutory injunction counsel relied on the cases of:

   i. *East African Industries v Trufoods* [1972] EA 420

   ii. *Giella v Cassman Brown & Co Ltd* [1973] EA 354 &

   iii. *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] where the court restated the law as follows:

> "In an interlocutory injunction application, the applicant 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, and
>
> c. Ally any doubts as to (b) by showing that the balance of convenience is in his favour"

It is therefore counsel's submission that all the above three conditions and stages must be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.

5. He further relied on the case of *Esso Kenya Limited v Mark Makwata Okiya* Civil Appeal No. 69 of 1991 to stress that where a party can be adequately compensated by an award of damages, an injunction should not issue. He contends that the applicant and respondent are still lawfully married hence the need for the orders sought under the provisions of the law namely; rule 20(2) of the *Matrimonial Properties Act* & Order 40 of the *Civil Procedure rules* 2010. He pegged his submission on the holding in SN v FM (supra) where the court stated thus:

> "It follows that for all intents and purposes all properties directly acquired by the defendant, which are registered in his name and or those that were acquired during subsistence of the marriage but not in his name, but under his possession form part of the matrimonial property. Some of the said property may indeed, be ancestral land bequeathed to him, but at the point, the plaintiff's claim regarding her contribution towards their development cannot be termed as a frivolous one. It is therefore my view that the plaintiff had established a prima facie case as regards the said properties"

Based on the above provisions of the law and the cited authorities counsel submitted that the applicant had established a prima facie case.

6. On whether the applicant stands to suffer irreparable loss counsel referred to the Nguruman case (supra) and submitted that if the suit properties are not secured, the same may be alienated and/or disposed of before the suit is heard. This would render the suit and or the decree issued nugatory. Counsel further submitted that there is evidence of third parties doing construction on the lands complained of as shown in the applicant's supporting and supplementary affidavits.

7. On the balance of convenience counsel relied on the case of *FM v EMM* (Matrimonial Cause 1 of 2018) [2024] KEHC 3984 (KLR) where the court held:

> " The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff's 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 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 (sic) which is likely to arise from granting it".

He argued that the applicant had demonstrated that the balance of convenience tilts in her favour as she stands to suffer the most should the applicant alienate the suit properties. He placed further reliance on the cases of *ZNG V PWG* (Matrimonial Cause No E002 of 2023) [2023] KEHC 22578 (KLR) and *Robert Mugo wa Karanja v Ecobank (Kenya) Limited and another* [2019] eKLR. He urged the court to allow the application.

The respondent's submissions

8. The same were filed by Naomi Muriithi & co advocates and are dated 28th October, 2024. Counsel submitted that the applicant and respondent were indeed married for several years as per the replying affidavit dated 26th July, 2024. He argues that the parcels of land the applicant calls matrimonial property were an inheritance through a succession process in Succession Cause No. 389/2010 in which the applicant is not a beneficiary. Further that the applicant has not demonstrated her input in the said properties and the evidence that the respondent wanted to dispose of the properties.

9. Counsel while referring to sections 6(1), 6 (3) and 7 of the *Matrimonial property Act* submitted that subject to section 6(3) of the said *Act* matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. In the instant case the parties are still married he said.

10. Counsel further submitted that during the division of matrimonial property between and among spouses, the customary law of the communities in question shall be taken into account, subject to the values and principles of the construction. He added that the applicant has not been evicted from the matrimonial home. While referring to the Supreme court case of *JOO V MBO; Federation of Women Lawyers (FIDA) (Kenya) & another (Amicus curiae)* [2023] KESC4 (KLR), counsel submitted that the said court dealt with two issues namely:

    i. The applicable law in the division of matrimonial property to causes filed prior to the current matrimonial property regime namely *the Constitution* and the *Matrimonial Property Act* 2013; and

    ii. Whether Article 45(3) of the *Constitution* provides for proprietary rights and whether the said Article can be a basis for apportionment and division of matrimonial property on a 50/50 basis without parties fulfilling their obligation of proving what they are entitled to by way of contribution.

11. He contented that as held by the Supreme Court, the *Matrimonial Property Act* does not apply retrospectively and so the applicable law to claims filed before its commencement is the Married Women's Property Act 1882. He called on the court to consider the circumstances of each arising case independently in assessing contribution by the parties:

> Counsel heavily relied on the element of propriety rights under Article 45(3) of the *Constitution* as espoused in the case of *Echaria v Echaria* [2007] eKLR. His argument is that Article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage. He argued that equality can only mean that each party is entitled to their fair share of the matrimonial property.

12. On the injunctive orders sought counsel referred to the principles set out in the cases of: *Giella v Cassman Brown* (supra) and *Airland Tours & Travel limited V National Industrial Credit Bank* Nairobi (Milimani) HCCC No. 1234 of 2002. He further referred to the cases of *Dr. Simon Waihoro Chege v Paramount Bank of Kenya Ltd* Nairobi (Milimani) HCCC No. 360 of 2001 where 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 right 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 the interlocutory state, 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 conveniencEAnd because if its origin and foundation in the equity stream of the jurisdiction of the court's 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".

He thus submitted that the injunction sought should not be granted. He urged the court to dismiss the application with costs.

Analysis and Determination

13. Having carefully considered the application, affidavits, annexures, both submissions and the law I find the main issue for determination to be whether the applicant has made out a case for issuance of the orders sought. At the center of this matter is what the applicant refers to as matrimonial property, which the defendant/respondent says is not matrimonial property. He however admits that the original owner of the two parcels of land Bahati/Engorusha Block 2/179 (Mukera) and Bahati/Engorusha Block 2/131 (Mukera) was the respondent's father. The respondent inherited the two parcels of land vide a Succession Cause No. HCC 389 of 2010 (NWM 5b). This was done during the subsistence of the marriage between the applicant and respondent. The applicant stated that she contributed to the development of these properties and even their matrimonial home which lies on it.

14. The applicant also wants the court to direct the respondent to account for money received from the sale of trees, coffee, avocadoes, cows, goats, rental houses. She also prays that the respondent in the alternative deposits money/ proceeds from the suit properties and businesses based on the accounts rendered.

15. The respondent in his replying affidavit denied any support from the applicant in running his businesses, and development of the properties. He claims to have sold the land inherited from his father though he does not state which one between Bahati 2/179 Mukera and Block 2/131, was sold.

16. From the material on record there is no dispute that the applicant and respondent got married sometime in 1994. They have been blessed with four (4) children. There is no evidence seen nor presented before this court showing any divorce or dissolution of this marriage.

17. Both parties have informed the court that the two parcels of land were inherited from the respondent's late father. They have identified the parcels of land by their numbers. Annexed to the Applicant's supporting affidavit is the further rectified certificate of confirmation of grant dated 23rd November, 2023. The list of properties which have devolved to the respondent are: Bahati Engorusha Block 2/27 (Mukera); Bahati Engorusha Block 2/29 (Mukera), Bahati Engorusha Block 2/34 (Mukera) – a share of 0.72 hectares. None of these parcels relates to the ones in issue and no clarification has been given by either the applicant nor the respondent. It is therefore not clear if the parties are talking about the same parcels of land. Be it as it may both parties are clear on the parcels of land being referred to.

18. The issue then is whether the applicant has satisfied the threshold for issuance of a temporary injunction.

19. Circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the *Civil Procedure Rules* require proof that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree. The only purpose of an interlocutory injunction is to preserve the subject in controversy in its condition at the time of granting the order, and it does not in any way determine a right; it is simply a provisional remedy to prevent the commission of any other wrong.

20. Before issuing an interlocutory injunction under Order 40 Rule 1 of the Civil Procedure Rules the court must be satisfied that the following have been satisfied:

    i. A prima facie case – *Mrao Lts V First American Bank of Kenya Ltd* [2003] eKLR. From the evidence given in this case the property in question should in the face of the strained relationship between the applicant and respondent be preserved pending the hearing of this suit.

    ii. Will irreparable injury be occasioned if an order of temporary injunction is not issued? Irreparable injury is one which cannot be adequately compensated for in damages. A case in point is *Nguruman Limited v Jan Bonde Neilsen & 2 others* [2014] eKLR. In this case if the parcels of land herein are sold out before the case is determined the applicant and the children may not have a place to settle and call home.

    iii. Thirdly the applicant must show that the balance of convenience tilts in her favour. I refer to the case of *Pius Kipchirchir Kogu v Frank Kimeli Tenai* 2018 eKLR where it was held as follows:

> "The meaning of balance of convenience in favour 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 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".

Also see *Giella v Cassman* 1973 EA 358.

21. In the instant case its clear that if the subject parcels of land are sold the parties' children will suffer a big blow. Grant of the temporary injunction will not cause such a serious inconvenience to the respondent if he in the long run wins the case. I am guided by the case of *Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 others* [2016] eKLR on this

22. In light of my findings above I am satisfied that the Applicant has satisfied the conditions necessary for the grant of the injunctory orders sought.

23. As regards the other prayers seeking accounts to be availed and or payments made I have found the said prayers to be too open and wide. They do not refer to any specific period yet the respondent availed documents showing how he had borrowed money from Financial Institutions to operate his businesses, and how the same had been utilized.

24. Secondly the court in matters of this nature would require real evidence to show the contributions the applicant has made to the properties. That will be for the stage at which the matter comes for hearing.

25. The upshot is that the Notice of Motion dated 12th July, 2024 partially succeeds and the following orders are granted:

    a. A temporary injunction hereby issues restraining the respondent, his agents, servants or any other person acting on his behalf from subdividing, selling, and/or transferring the parcels of land known as Bahati/Engorusha Block 2/131 (Mukera) and Bahati Block 2/179 (Mukera) pending the hearing and determination of this suit.

    b. A temporary injunction to issue restraining the respondents agents, servants from undertaking any developments on the above mentioned plots pending the hearing and determination of this suit.

    c. A temporary injunction to issue restraining the respondent by himself, his employees, agents or otherwise from cutting down and selling the trees planted on Bahati/Engorusha Block 2/131 without the written consent of the applicant pending the hearing and determination of this suit.

    d. All the other prayers are for now declined. The same shall be dealt with during the full hearing. The applicant and respondent are encouraged to sit down and work towards re-conciliation, or have the matter heard expeditiously. There shall be no order as to costs.

26. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 18TH DAY OF DECEMBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE