



REPUBLIC OF KENYA



KENYA LAW
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**DC v JKM (Matrimonial Cause E015 of 2022)
[2023] KEHC 1226 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MATRIMONIAL CAUSE E015 OF 2022
JN ONYIEGO, J
FEBRUARY 17, 2023**

BETWEEN

DC APPLICANT

AND

JKM RESPONDENT

RULING

1. The applicant herein filed an originating summons dated November 20, 2022 and filed on November 28, 2022 seeking distribution of properties alleged to have been solely acquired during the subsistence of her marriage with the respondent.
2. Contemporaneously filed with the summons under under certificate of urgency is a notice of motion application dated the November 15, 2022, brought under sections 3 (1), (b), (d), (e), (f), (j), (k) and (n), 3(2), 4(1) (a), 5(1) (a), 8 (1), 13(1) and 19(1) (b) of the *Protection Against Domestic Violence Act* No 2 of 2015 and rules 4(a), 5(b) and 6(1) (a) of the *Matrimonial Property Rules, 2022* seeking orders that: -
 1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. Spent
 6. Spent
 7. Spent
 8. Spent



9. Pending the hearing and determination of the main suit, as a consequence of prayer 2 above, the respondent be compelled to file with this court a comprehensive record of income obtained from the properties listed at paragraph 2 above.
 10. Pending the hearing of the originating summons herein and the conclusion of the divorce matter being Mombasa Divorce cause number 132 of 2022 DC v JKM, restraining orders be issued to the respondent stopping him from leasing, selling, and/or disposing the properties acquired by the applicant as listed hereunder;
 11. Pending the hearing of the originating summons herein and the conclusion of the divorce matter being Mombasa Divorce cause number 132 of 2022 DC v JKM, this court be pleased to order the respondent to deposit with this court the original title documents for the properties listed at paragraph 2 above;
 12. The costs of this application be provided for.
3. The notice of motion is premised on the grounds set out on the face of it and further supported by an affidavit sworn on the November 15, 2022 by the applicant in which she deposed that she married the respondent on the July 21, 2019 under the provisions of the Marriage Act, 2014. She averred that during the pendency of their marriage, she obtained her retirement benefits and savings which she singlehandedly used to meet all the family expenses which included running the home and investing.
 4. It was the applicant's case that to ensure that her relationship and that of the respondent thrived, she heavily invested financially in the ideas that the respondent presented and as a result she purchased the following properties: -
 - i. Plot No Kilifi/Mtwapa/7XX8
 - ii. Permanent house situated within Kikambala in Kilifi county
 - iii. Motor bike
 - iv. Tuktuk registration No KTWC XXXH
 - v. Plot registration number Kilifi/Mtwapa/6XX4 measuring approximately 0.20 Ha
 - vi. Motor vehicle registration No KCJ XXXE Toyota Vitz
 - vii. Parcel of land registered as Kwale/Diani s.s/4XX3
 - viii. Livestock and farm animals.
 5. According to the applicant, the union has faced several challenges *inter alia*; the respondent has been grossly unfaithful; the respondent has been physically assaulting her thus forcing her to flee back to her home country, the United States of America; that she was misled into the marriage by the respondent who thereafter has mistreated, abused her and even threatened to sell her property.
 6. She deposed that she lives with the respondent's children, whom she has enrolled in school and provides for and it is from one of the respondent's daughters that she has learnt that the respondent had indicated that if he does not have access to money, he would sell any one of the properties that she had purchased.
 7. It is the applicants further averment that she was tricked by the respondent into building 11 rental houses on his mother's land at the cost of 25,000 USD; buying a motor bike at the cost of 1000 USD; Toyota vits at the cost of 4900 USD; Tuktuk at the cost of 4500 USD and renovating a house situate



- a Mtwapa, as well buying livestock whose maintenance cost Kshs 33,000 per month. She averred that despite being the financier, she has never received a single cent, regardless of the fact that she's aware that the respondent earns Kshs 33,000 per month from the rental property; Kshs 1,000 per day from the motor bike and Tuktuk as well as Kshs 15,000 rent for the house in Mtwapa.
8. It is the applicant's further case that she stands to suffer irreparable harm if an order of injunction is not granted pending the determination of the originating summons and Mombasa Divorce Cause No 132 of 2022.
 9. The respondent opted not to file any response to the application despite being duly served. The applicant's application, therefore, remains unopposed. However, due to the nature of the case and the prayers sought being injunctive in nature, it is necessary to scrutinize the applicant's assertion and establish whether or not the prayers sought in the interim are merited.
 10. It is now settled law that even in circumstances where an application has not been opposed, it is not automatic that such an application must succeed. This court is enjoined to look into the merits and demerits of the application and analyse whether the prayers sought can prima facie be granted in absence of an objection. See the Supreme Court case of civil application No 26 of 2018 [Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others](#) [2018] eKLR, where it was held: -

“ [10] Be that as it may, as a court of law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the court will as a matter of course grant the sought orders. It behooves the court to be satisfied that *prima facie*, with no objection, the application is meritorious and the prayers may be granted. The court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this court...”
 11. I have considered the application together with the submissions. The copy of the certificate of marriage leaves no doubt that the applicant and respondent lawfully conducted a church wedding on the July 21, 2019 under the [Marriage Act](#), No 4 of 2014 Laws of Kenya. The applicant's case is hinged on the claim that she contributed wholly to acquiring the various properties mentioned herein during her marriage which properties includes the matrimonial home which she believes the respondent intends to dispose without her involvement to her detriment.
 12. The issues for determination therefore are: -
 - i. Whether or not the applicant has presented sufficient reasons to warrant a grant of conservatory order of injunction pending the determination of the originating summons.
 - ii. Whether the applicant has presented before this court special circumstances to warrant grant of prayer 9 and 11

Whether or not the Applicant has presented sufficient reasons to warrant a grant of conservatory order of injunction pending the determination of the originating summons.

13. The applicant herein has already presented her originating summons under the [Matrimonial Property Rules, 2022](#) seeking for the division of the aforementioned properties. She has availed evidence showing that she duly contributed towards the acquisition of some of the properties and indeed there is proof that they have been registered in her name. She has also averred that the respondent who is her estranged



husband has threatened to sell some of the properties and is intent on disposing of any property to her detriment. She has further averred that her matrimonial home is situate within the suit property, and finally she has indicated that she is entitled to about 100% of the suit properties since she was the sole contributor towards their acquisition and thus, the reason why she is before the court seeking interim orders to prevent their sale.

14. Conditions for the grant of an interlocutory injunction were settled in the celebrated case of *Giella v Cassman Brown* [1973] EA 358 where the court held as follows: -

“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 be normally granted unless the 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 of the balance of convenience.”

15. As regards the first condition, it is noted that the applicant has duly listed all the properties acquired during the subsistence of the marriage as well shown that some of the properties are jointly registered in the names of the applicant and respondent as evidenced by annexure “DC 3”. Further, it is not in doubt that the parties herein were married and this court has no reason to doubt that the applicant has made a full and frank disclosure of the relevant facts.

16. This court has assessed the documents and evidence relied on and it is satisfied that the applicant has shown she has some right whether legal or equitable meriting protection by this court by way of an order of injunction. I am therefore convinced that the applicant has proved that she has a *prima facie* case and complied with the test set by the Court of Appeal in the case of *Mrao Ltd First American Bank of Kenya Ltd & 2 others* (2003) KLR 125, where it was held: -

“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 been 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.

17. On the second condition, the applicant has indicated to this court that she purchased the properties mentioned herein through her retirement benefits and despite being the sole financier, she is apprehensive that the properties might be sold by the respondent to her detriment, a loss which cannot be compensated by way of monetary award. This court has looked at the evidence before it and is convinced the applicant has satisfied this condition.

18. Moving on to the third condition, the court is required to balance the rival interests of the parties herein. Looking at this case, I find that the balance of convenience tilts in favour of granting an interlocutory injunction so as to preserve the properties mentioned herein as it is evident that they are the subject matter of the suit and therefore it is only appropriate that they are preserved pending the hearing and determination of the originating summons filed herein. There is evidence that the respondent has threatened to sell the said properties, hence in order to prevent any alienation a conservatory order in the nature of a temporary injunction is merited in the circumstances. I find, therefore, that the applicant has satisfied the requisite conditions for an order of temporary injunction.



Whether the applicant has presented before this court special circumstances to warrant grant of prayer 9 and 11

19. The applicant has sought for orders that this court be pleased to compel the respondent to file before the court a comprehensive record of income obtained from the properties listed herein as well as an order that he deposits with the court the original title documents of the properties listed herein.
20. I have looked at the import of the orders sought to compel for the production of income obtained as well as title documents of the properties listed herein. I am convinced that the orders are mandatory in nature and it is now trite law that a mandatory injunction can only issue where there is proof of special circumstances and in the clearest of cases.
21. The Court of Appeal in the case of *Kenya Breweries Limited & another v Washington O. Okeyo* [2002] eKLR, set out the following principles for a mandatory injunction to issue;

“...A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application”.

Also in *Locabail International Finance Ltd v Agroexport and others* [1986] 1 ALL ER 901 at pg. 901 it was stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction...”

22. I have looked at the application as well as the evidence attached before court and, I am not convinced that the applicant has presented any special circumstances with regards to the properties mentioned herein for this court to compel the respondent to produce a comprehensive record of income obtained as well as original titles thereto. If anything, that is a substantive issue which shall require adduction of evidence during the main hearing.
23. In view of the above, the application dated November 15, 2022 succeeds partially, and is allowed in terms of prayer No 10, that the respondent is restrained from leasing, selling, and/or disposing of the properties mentioned herein pending the hearing and determination of the originating summons.
24. As the application was not opposed, costs are awarded to the applicant.

It is so ordered.

DATED, SIGNED DELIVERED VIRTUALLY THIS 17TH DAY OF FEBRUARY 2023.

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J.N. ONYIEGO

JUDGE

