



REPUBLIC OF KENYA



KENYA LAW
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**LK v PKK & another (Matrimonial Cause E021 of 2021)
[2023] KEHC 3006 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3006 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MATRIMONIAL CAUSE E021 OF 2021
RB NGETICH, J
MARCH 30, 2023**

BETWEEN

LK APPLICANT

AND

PKK 1ST RESPONDENT

CARLOG LOGISTICS LTD 2ND RESPONDENT

RULING

1. Before the court for determination is the notice of motion application dated January 25, 2022 seeking the following orders: -
 - a. Spent
 - b. That pending hearing and determination of this application, and the hearing of the suit honourable court be and is hereby pleased to issue an order restraining the Defendants whether by themselves, agents, servants and/or their employees or otherwise howsoever from alienating, disposing, selling, encumbering, assigning, transferring or in any other like manner dealing with the properties:
 - i. Juja/Kiura Block XX (Waroma/Njemuwa) XXX
 - ii. Motor Vehicle Registration Number KBT XXX
 - iii. Motor Cycle Registration No. KMCT XXX.
 - c. That Thika Honourable court do issue an order staying proceedings in Thika CMELC no 92 of 2021 pending the hearing of the application and the hearing of the suit.
 - d. That the Respondent be ordered to pay the costs of this application.



2. The application is premised on the grounds that the applicant and the 1st Respondent were husband and wife but the marriage was dissolved by court in Thika CMCC Divorce No 9 of 2021. The Applicant's argument is properties acquired during the subsistence of the marriage by joint effort and contribution of both parties are matrimonial property but the 1st Respondent defrauded the Applicant in respect to the matrimonial house by transferring to the 2nd Respondent. Further that the property known as Juja/ Kiarua Block 47 Waroma/Njemwa 163 is subject to the proceedings in Thika CMELC 92 of 2021 and it is in the interest of justice that stay order is issued as the applicant is apprehensive if the orders are not granted she will be greatly prejudiced.
3. The application is supported by the annexed affidavit sworn by Cyline Kaimuri Kanyua the applicant herein on January 25, 2022. She deposes that she has cohabited with the Respondent for 14 years since 1996 and they were blessed with two (2) children. She stated that the 1st Respondent worked in the United States and was largely out of the country; that the 1st Respondent sent money to the Applicant who in turn improved and developed the matrimonial property Juja/ Kiarua Block XX Waroma/ Njemwa XXX and she lived in the matrimonial property with the children. She further deposes that the 1st Respondent fraudulently transferred the property to the 2nd Respondent who is seeking to evict the applicant.
4. In response, the 1st Respondent filed replying affidavit sworn by Paul Kanyua Kibe on June 22, 2022. He disposes that he is the proprietor of Juja/ Kiarua Block XX Waroma/Njemwa XXX and the same was acquired through sole contribution, finances and savings. He stated that he developed and erected a three (3) storey building on the suit property and the transfer of the property to the 2nd Respondent was after the divorce case was completed. He stated that the applicant had failed to adduce evidence that the transfer to the 2nd Respondent was unlawful and unprocedural. He further stated that the motor vehicle and motorcycle do not form part of the matrimonial property.
5. The 1st Respondent further disposes that the applicant has been benefiting from collecting rent from the developed 3-storey building and the applicant has stated she did not contribute financially to the purchase of the property. He further stated that a company has a separate legal entity with the directors. He urged the court to dismiss the application with costs.

Applicant's Submissions

6. On behalf of the applicant, counsel submitted that the applicant is deserving of the injunction orders sought having satisfied the threshold set out in the case of Giella vs Cassman Brown.
7. On whether prima facie case has been established, counsel contends the property known as Juja/Kiarua Block XX Waroma/Njemwa XXX was acquired during the subsistence of the marriage and developed during the subsistence of the marriage and it therefore forms part of matrimonial property.
8. Counsel further submitted that the applicant will suffer irreparable harm as the 2nd Respondent seeks to evict the applicant from the matrimonial home and if the orders sought are not granted, the applicant and her children will be rendered homeless.
9. On the issue of balance of convenience, the applicant's counsel submitted that it tilts in her favour as she has established she will be evicted from her matrimonial home and it is in the interest of justice to stay Thika CMELC No 92 of 2021 as the issue in dispute involves the same parties and revolves around the ownership of the parcel of land known as Juja/ Kiarua Block 47 Waroma/Njemwa 163 which is best addressed by this court; that there is no prejudice to be suffered by the Respondents if the orders are granted.



Respondent's Submissions

10. Counsel for the Respondent submitted that the applicant has failed to demonstrate that she is deserving of the orders sought; that she has failed to demonstrate that damages will not adequately compensate her if orders are not granted neither has she demonstrated the existence of a prima facie case.
11. Counsel further submitted that the applicant failed to demonstrate that the properties are matrimonial properties and submitted that the transfer of the property to the 2nd Respondent was after the divorce and Section 24 of the [Land Registration Act](#) confers indefeasible title to the 1st Respondent.
12. Counsel submitted that the applicant has failed to disclose material facts before this court as the property in dispute also consists of rental units and has failed to demonstrate to the court that the matrimonial property is held in trust by the 1st respondent.
13. Counsel further submitted that the balance of convenience will tilt in favour of the Respondents in that, if the orders are granted, the 1st Respondent will be denied the use of his motor vehicle while the 2nd Respondent will be denied the right to enjoy its proprietary interest over the property. That the existence of status quo continues to cause great hardship to the 1st Respondent who has been deprived the enjoyment of rent by the applicant.
14. Counsel submitted that the applicant has not met the threshold of granting the orders of injunction and urged the court to dismiss the application.

Analysis And Determination.

15. I have considered grounds of the application, averments by the parties and submissions filed. I wish to consider whether the threshold for grant of relief of injunction and stay of lower court proceedings have been met.
16. The principles governing the grant of prohibitive injunctions are well settled in the case of *Giella v Cassman Brown and Company Limited* [1973] E A 358 which sets out the principles as set out hereunder: -
 - a. That the applicant must show a *prima facie* case with a probability of success;
 - b. The applicant stands to suffer irreparable harm not compensable in damages;
 - c. The balance of convenience.
17. On the issue of a *prima facie* case. The applicant contends she has a *prima facie* case with a probability of success. In [Mrao Limited v First American Bank of Kenya Ltd and others](#) [2003] KLR 125, the Court of Appeal stated that a prima facie case is one –

“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 as to call for an explanation or rebuttal from the latter”.
18. The originating summons is pending determination and I will not delve into the merit of this matter at this stage as it would be appropriate to allow parties be heard on issues raised. The orders sought by the Applicant are a discretionary remedy by this court. The applicant contends she was married to the Respondent but the marriage has since been dissolved. The 1st Respondent's argument is that after the marriage, the 1st Applicant transferred the matrimonial property Juja/Kiarua Block 47 Waroma/



- Njemwa 163 to the 2nd Respondent a company formed by the 1st Respondent. It's the 2nd Respondent seeking to evict the applicant and her children.
19. According to the Applicant, the property forms matrimonial property as it was acquired and developed during the subsistence of the marriage. The applicant has told the court the money to purchase and develop the property was obtained from the 1st Respondent but her main task was to supervise the construction as well as take care of the children as the 1st Respondent was away on official duties.
 20. The 1st Respondent has not disputed that the property Juja/ Kiarua Block 47 Waroma/Njemwa 163 was acquired during the subsistence of the marriage; his contention is that he solely contributed the finances. The 1st Respondent's main contention is that the property was not held in trust for the applicant and the same having been transferred to the 2nd Respondent it has a legal capacity to own property independent from the director.
 21. In my view, the actions of the 1st Respondent to transfer the matrimonial property to the 2nd Respondent is aimed at defeating the interest of the Applicant in the share of the matrimonial property.
 22. Secondly, the applicant is apprehensive that if the orders sought are not granted, the 2nd Respondent will proceed to evict her and her children and she will be rendered homeless which will occasion great prejudice to her and her children. The Applicant is apprehensive that with the existence of Thika CMELC No 92 of 2021, she will be rendered homeless.
 23. I find that if the applicant is evicted from the matrimonial home she will suffer prejudice which may not be compensated by way of damages.
 24. Section 2 of the *Matrimonial Property Act* defines a matrimonial home as:
" any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property..."
 25. The applicant has established that the balance of convenience tilts in her favour as there is a likelihood of being evicted by the 2nd Respondent from her matrimonial home.
 26. This court is vested with the jurisdiction to determine issues on the distribution of matrimonial property. The applicant has urged the court to stay the proceeding in Thika CMELC no 92 of 2021. Having established that the issue in contention is the ownership of Juja/ Kiarua Block 47 Waroma/ Njemwa 163, which is subject of this matter, I find it prudent and it will be in the interest of justice that the order of stay of proceedings in Thika CMELC No. 92 of 2021 is issued.
 27. In the circumstances, therefore, I find the application dated January 25, 2022 is merited and I allow the same in terms set out hereunder.
 28. Final Orders:
 1. The application dated January 25, 2022 is allowed.
 2. An injunction do issue restraining the Respondents whether by themselves, agents, servants and/or their employees or otherwise howsoever from alienating, disposing, selling, encumbering, assigning, transferring or in any other like manner dealing with the properties known as Juja/Kiura Block 47 (Waroma/Njemuwa) 163, Motor Vehicle Registration Number KBT 161F, and Motor Cycle Registration No. KMCT 758K.
 3. There be a stay of proceedings in Thika CMELC No 92 of 2021 pending the hearing and determination of the suit.



4. Costs be in the cause.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET

THIS 30TH DAY OF MARCH, 2023

.....

RACHEL NGETICH

JUDGE

In the presence of:

Martin – Court Assistant

Ms Kanyoni holding brief for Mr Muchiri for the Respondents

Mr Shimenga holding brief for Mr Karunga for the Applicant

