



**JWK v CKK (Matrimonial Cause E066 of 2022)
[2023] KEHC 3967 (KLR) (Family) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3967 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E066 OF 2022
MA ODERO, J
MARCH 24, 2023**

BETWEEN

JWK APPLICANT

AND

CKK RESPONDENT

JUDGMENT

1. Before this court for determination is the Notice of Motion dated 30th September 2022 by which the Applicant JWK seeks the following orders:-

- “1. Spent.
- 2. Spent.
- 3. That this Honourable Court be pleased to issue a temporary order of injunction restraining the Respondent whether by himself, his servants, agents, employees or any person whomsoever from taking any action including alienating, charging, disposing of, transferring, making adjustments creating new spaces or interfering with the Applicant’s user and peaceful enjoyment of their matrimonial property pending the hearing and determination of the Applicant’s divorce petition under case number MCDC Cause No. XXX of 2022.
- 4. Spent.
- 5. That pending the hearing and determination of the Originating Summons Application filed by the Applicant, an order of stay do issue temporarily staying any orders that might be issued by the lower court in respect of



the Notice of Motion Application on matrimonial property filed by the Respondent in the Chief Magistrates' Court at Nairobi under case number MCDC Cause No. XXX of 2022.

6. Spent.
 7. That this Honourable Court be pleased to issue such further orders as it may deem to be in the interests of justice.
 8. That Costs of this application be provided for.
2. The Application which was premised upon Section 1A, 1B and 3A, of the Civil Procedure Rules 2010, Rule 3 of the High Court (Practice and Procedure) Rules, and all other enabling provisions of Law was supported by the Affidavit of even date sworn by the Applicant.
 3. The Respondent CKK opposed the application through his Replying Affidavit dated 7th November 2022. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated 16th December 2022 whilst the Respondent relied upon his written submissions dated 30th December 2022.

Background

4. The Applicant avers that she and the Respondent got married to each other on 6th April 2002. That their union was blessed with a son born on 16th December 2003. That their marriage has now broken down and there is pending Divorce Cause No. XXX of 2002 before the Milimani Chief Magistrates Court.
5. The Applicant avers that during the subsistence of the marriage the couple jointly acquired the following properties:-
 - a) Athiriver/Athiriver Block XXXX
 - b) Donyo Sabuk/Komarock Block XXXX
 - c) Donyo Sabuk/Komarock Block XXXX
 - d) Plot No. A1-XXXX Kayole Site & Scheme
 - e) Kiambaa/Kihara/XXXX (wholly owned by and registered in the name of the Applicant.
 - f) Mavoko Town Block XXXX
 - g) Mavoko Town Block XXXX
 - h) Mavoko Town Block XXXX
 - i) Mavoko Town Block XXXX
 - j) Mavoko Town Block XXXX
 - k) Mavoko Town Block XXXX
 - l) Mavoko Town Block XXXX
 - m) Mavoko Town Block XXXX
 - n) Mavoko Town Block XXXX



- o) Mavoko Town Block XXXX
- p) Mavoko Town Block XXXX
- q) Mavoko Town Block XXXX
- r) Mavoko Town Block XXXX
- s) Mavoko Town Block XXXX
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- u) Mavoko Town Block XXXX
- v) Mavoko Town Block XXXX
- w) Mavoko Town Block XXXX
- x) Mavoko Town Block XXXX
- y) Mavoko Town Block XXXX
- z) Mavoko Town Block XXXX
- aa) Mavoko Town Block XXXX
- bb) Mavoko Town Block 3/77387
- cc) Mavoko Town Block XXXX
- dd) Mavoko Town Block XXXX
- ee) Mugunda/Karemeno Block XXXX
- ff) Motor Vehicle KCH XXXX

6. The Applicant further avers that Title Number Kiambaa/Kihara/XXXXX which is registered in her name belongs wholly to her. She states that the Respondent has been collecting rental income from that property since 2015 and continues to collect and utilize rent amounting to between Kshs.47,000 to Kshs.80,000 from this Kiambaa Property to the exclusion of the Applicant.
7. The Applicant therefore seeks Preservatory Orders to protect her beneficial interest in the said properties.
8. The Respondent vehemently opposed the application for Preservatory Orders. The Respondent conceded that he was married to the Applicant and confirms that there is a pending in the Magistrates Court Divorce Cause No. XXXX of 2002 filed by the Applicant.
9. The Respondent avers that he is a realtor and makes a living from the purchase and sale of real estates. He denies that the named properties were acquired by the couple jointly and denies that the Applicant made any contribution towards the purchase of the said properties.
10. The Respondent concedes that the property known as Kiambaa/Kihara/XXXXX is registered in the sole name of the Applicant. However he denies that the Applicant contributed fully towards the acquisition of this asset. The Respondent admits that he is collecting income of Kshs.50,000 from the rental units constructed on the Kiambaa Property but states that the rental income is being utilized to cater for household expenses and to pay University fees for the couples son.



11. The Respondent denies that he has any intention to deal with the listed properties to the detriment of the Applicant. He prays that the application be dismissed in its entirety.

Analysis and Determination

12. I have carefully considered the application before this court, the Reply filed thereto as well as the written submission filed by both parties. The issue is whether the Interlocutory Injunction being sought by the Applicant ought to be granted.
13. The law regarding grant of interlocutory injunctions is found in order 40 Rule 1 of the Civil Procedure Rules which provide as follows:

“Where in any suit it is proved by affidavit or otherwise:

- a. That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree;
- b. That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further order.”

14. The principles upon which a temporary injunction may be granted were set out in the celebrated case *Giella v Cassman Brown & Co* [1973] EA as follows:-
 - i. The Applicant must establish a prima facie case with a probability of success.
 - ii. The Applicant must show that he is likely to suffer irreparable loss or damage if the relief being sought is not granted.
 - iii. In case of any doubt the balance of convenience should tilt in favour of the applicant.
15. Similarly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2012] eKLR the court stated as follows:-

“The conditions for the grant of an interlocutory injunction are 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 normally be 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 on the balance of convenience.”

16. The Applicant has alleged that the listed properties were jointly acquired during the subsistence of her marriage to the Respondent. It is not in dispute that the property known as Kiambaa/Kihara/XXXX is registered in the sole name of the Applicant.
17. The Respondent has not denied ownership of the remaining properties. However he argues that the same do not constitute Matrimonial property because he acquired them jointly with third parties. The



Respondent further submits that the Applicant made no contribution towards the acquisition of the said properties.

18. It is important at the outset to emphasize that all the court is being required to do is to determine whether an interim injunction ought to be granted. The aim of such an injunction is to preserve the suit properties from disposal and/or wastage pending the hearing and final determination of the suit. The court is not required at this stage to determine the merits or otherwise of the Applicant's claims to the suit properties.

19. In the case of *Silvester Momanyi Marumbe v Guizar Ahmed Motari & Another* [2012] eKLR, Odunga J. held that as follows:-

“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an applicant for injunction although the court cannot find conclusively who is to be believed or not the court is to be excluded from expressing a prima facie view of the matter and the court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.” [own emphasis]

20. As per the principles in *Giella v Cassman Brown*, the Applicant is required to show a prima facie case.

21. It is common ground that the parties herein were in a statutory legal marriage. Although the disputed properties are registered in the name of the Respondent, the Applicant contends that as a wife she contributed substantially to the acquisition of the said properties. That if the Interlocutory Injunction is not issued the Applicant stands to suffer irreparable harm in the event the properties are sold or otherwise disposed of before her suit is heard and determined.

22. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR the court in discussing irreparable harm stated as follows:-

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

23. The same court went on to define ‘balance of convenience’ as follows:-

“The meaning of balance of convenience tilts favour of the plaintiff is that if an injunction is not granted and 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 plaintiff's to show that the inconvenience cause to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.”

24. Section 6 of the *Matrimonial Property Act* defines matrimonial property as:-

- “(a) the matrimonial home or homes
- (b) household goods and effects in the matrimonial home or homes or



(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage”

25. The properties in question were acquired during the subsistence of the couples marriage. This is not denied by the Respondent. The Applicant claims to have contributed towards the acquisition of said assets. Her claim is yet to be tested in the main hearing. Suffice to say I am satisfied that the Applicant has established a prima facie case.
26. Further, I find that the balance of convenience tilts in her favour. Accordingly I am inclined to grant Preservatory Orders pending the hearing and determination of the main suit.
27. Regarding prayers (5) of the application I find that the prayer ought to have been made before the Magistrates Court. In any event this court cannot issue orders in ‘anticipation’ of what orders the Magistrate Court may make in the Divorce Cause. Accordingly I dismiss prayer 5
28. Regarding prayer (6) given that it has been conceded that the property in question being Kiambaa/Kihara/5073 is registered in the sole name of the Applicant, I find that the rental income derived there from ought to be preserved, until the suit herein is finalized.
29. Finally and in conclusion I allow this application and make the following orders:-
 1. A temporary order of injunction be and is hereby issued restraining the Respondent whether by himself, his servants, agents, employees or any person whomsoever from alienating, charging, disposing of, transferring, or in any other way interfering with the following properties:-
 - a) Athiriver/Athiriver Block XXXX
 - b) Donyo Sabuk/Komarock Block XXXX
 - c) Donyo Sabuk/Komarock Block XXXX
 - d) Plot No. A1-XXXX Kayole Site & Scheme
 - e) Kiambaa/Kihara/XXXX (wholly owned by and registered in the name of the Applicant.
 - f) Mavoko Town Block XXXX
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- w) Mavoko Town Block XXX
- x) Mavoko Town Block XXXX
- y) Mavoko Town Block XXXX
- z) Mavoko Town Block XXXX
- aa) Mavoko Town Block XXXX
- bb) Mavoko Town Block XXXX
- cc) Mavoko Town Block XXXX
- dd) Mavoko Town Block XXXX
- ee) Mugunda/Karemeno Block XXXX
- ff) Motor Vehicle KCH XXX pending the hearing and determination of the originating summons dated 30th September 2022.

2. From the date of this Ruling all rental income derived from the property known as Kiambaa/Kihara/5073 to be deposited in a joint interest earning account opened in the joint name of the Advocates to both parties. The said funds to be utilized for the payment of education costs for the son of the parties.

3. This being a family matter each side will meet its own costs.

DATED IN NAIROBI THIS 24TH DAY OF MARCH 2023.

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MAUREEN A. ODERO

JUDGE

