



**EJKN v PMN (Matrimonial Cause E001 of 2021)
[2023] KEHC 20446 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 20446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MATRIMONIAL CAUSE E001 OF 2021**

**MS SHARIFF, J
APRIL 25, 2023**

BETWEEN

EJKN APPLICANT

AND

PMN RESPONDENT

RULING

A. Application

1. The applicant moved this court by an application dated December 17, 2021, seeking;
 - a. The court does issue an order granting the applicant full access, user, occupation and or any other dealings in regard to proprietary interest and rights pertaining thereto over all her matrimonial properties known as Karingani/Gatirene/3083, Karingani/Gatirene/4079 and Karingani/Gatirene/1152 and any other property acquired and owned as joint proprietors during the subsistence of their marriage, in the interim basis pending inter party hearing and determination of the instant application.
 - b. The court does issue an order of temporary injunction restraining the respondent by himself, his agents and or anybody acting at his behest or instructions from disposing, transferring, alienating, giving out, evicting, denying access, entry, user and occupation, or in any other way whatsoever from interfering with the applicant’s peaceful user and occupation of their jointly acquired matrimonial known as Karingani/Gatirene/3083, Karingani/Gatirene/4079 and Karingani/Gatirene/1152 and any other matrimonial properties jointly acquired during the subsistence of their marriage without



the applicant's consent in the interim basis pending inter party hearing and determination of the instant application.

- c. The above orders do issue as prayed for in the interim basis pending the hearing and determination of the originating summons/main suit.
 - d. Costs be in the cause.
2. The applicant swore an affidavit and a supplementary affidavit deposing that they married in the year 2007 under the Ameru customary laws and established their matrimonial home in land parcel Karingani/Gitarene/3083 Chera in Chuka where they used to reside. During the subsistence of the marriage, they acquired land parcels Karingani/Gitarene/3083, 4079 and 1152.
 3. She further deposed that her husband has married a second wife and established a matrimonial home in Mombasa where he resides with the second wife and had become cruel to the applicant while she resided in Chera, Chuka.
 4. She states that on May 31, 2021, the respondent sent a villager to her home informing her he had been sent to kill her which matter she reported to the police and again sent goons who demolished the fence surrounding the home threatening her of dire consequences if she doesn't leave.
 5. She depones that she has since filed a divorce petition in Chuka Magistrate's court divorce number E17 of 2021 which is pending determination. That in response to the petition, the respondent admits marrying the applicant through Ameru customary practices.
 6. Frankline Mutuma Nkonge, the applicant's brother and Silas Bundi M'arithi, the applicant's niece also filed affidavits in support of the applicant's assertion that the applicant and respondent are married.
 7. The respondent filed a replying affidavit in opposition to the denying the existence of marriage. He also denies the existence of a matrimonial home in land parcel Karingani/Gitarene/3083 or having resided in that parcel.
 8. He depones that he solely negotiated and bought the properties cited by the applicant way before the year 2005 without the applicant's contribution. He depones that he has never been involved with the applicant intimately and accuses the applicant of taking advantage of him to swindle him of his properties.
 9. He distanced himself from the alleged activities and further accused the applicant of being intimate with another individual and have been conniving to grab his properties.

B. Submissions

10. The application was disposed of by way of written submissions. Both parties filed.
11. The applicant contends that she has met the threshold for the grant of orders of temporary injunction since the property in question is matrimonial and she is being evicted from a home that she has rights to stay in by virtue of Sections 2,6 and 7 of the *Matrimonial Property Act*. In support of her assertion, she relies on the authorities in *Giella vs Cassman Brown & Co Ltd (1973) EA 358*, *Silvester Momanyi Marube Vs Guizar Ahmed Motari & another (2012) eKLR* and *Mrao Ltd Vs first American Bank of Kenya Ltd & 2 others (2003) eKLR*.
12. On his part, the respondent submits that the applicant has come to court with unclean hands by deliberately concealing material facts which are well within her knowledge. That he has no plans whatsoever of disposing his properties in which he has made vast developments thereon.



13. He asserts that the applicant has not met the threshold for grant of the orders sought as stated in Giella case (supra). In support of his contention, he seeks refuge in *East Africa Industries Ltd Vs Trufoods Ltd (1972) EA 420*.
14. He also contends that the orders sought herein are a preserve of the environment and land court by virtue of the fact that the orders sought herein relate to use and occupation of and title to land.

C. Analysis and determination.

15. The court has considered the application and the main prayer sought is an injunctive one. The applicant alleges that she is facing eviction from their matrimonial home while the respondent distances himself from the allegation.
16. The principles upon which a court can decide whether to grant temporary relief of injunction have been enumerated in numerous decisions and in Giella case (supra), the principles were stated thus; whether the applicant has shown prima facie case with a probability of success; whether the applicant shall suffer irreparable injury which cannot be compensated by damages; and if the court is in doubt, it can decide the application on a balance of convenience.
17. From the material on record, the applicant deposed that there is already a pending divorce cause and the orders sought herein are temporary in nature to safeguard her interest in what she calls properties jointly acquired during the subsistence of the marriage.
18. I have considered the divorce petition as annexed to the applicant's supplementary affidavit and I note that therein, she has annexed an affidavit sworn by both the applicant and the respondent confirming their marriage. The respondent in this application however distanced himself from the existence of marriage and disputed the affidavit.
19. The respondent deposes that there is no matrimonial home in the property she alleges to be occupying and using.
20. In the circumstances, I find that by virtue of the existence of divorce proceedings in the subordinate court, there is a genuine dispute between the applicant and the respondent on the issue of marriage. Pending the determination of that matter, there is need to protect the applicant's proprietary interests in the matrimonial property.
21. In determining whether to grant the orders sought, I am guided by the decision in [Nguruman Limited V Jan Bonde Nielsen & 2 Others \[2014\] eKLR](#) the Court of Appeal held that:

' In considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.'
22. In the instant application, the applicant asserts proprietary rights by virtue of marriage and having contributed in the acquisition thereof. Upon marriage, they established their matrimonial home in



- one of the parcels under consideration where she has lived to date and now faces imminent threat of eviction after the respondent contracted another marriage.
23. The protection extended to spouses in relation to the matrimonial property is provided for in Section 2 of the *Matrimonial Property Act* and at Section 6 thereof, the properties include;
- (1) For the purposes of this Act, matrimonial property means—
 - (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.
24. The protection accorded to spouses is provided for by Section 12(3) of the Act which states;
- A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.
25. According to the respondent, he has no intention whatsoever of disposing the property which in any event he says has massive developments thereon.
26. Having considered the evidence tabled before me in the instant application, I find no prejudice that the respondent will stand to suffer if the orders sought are granted.
27. I therefore find that this application is merited and the temporary orders issued by this court given on December 20, 2021 restraining the respondent from evicting the applicant from the matrimonial home in land parcel Karingani/Gitareni/3083 in Chera Tharaka Nithi County is hereby confirmed pending the hearing and determination of the Originating summons filed herewith and dated December 17, 2021.
28. The order above shall extend to the other properties stated in the application to wit; Karingani/Gitareni/4079 and Karingani/Gitareni/1152.
29. Costs of the application shall be in the cause.

DELIVERED, DATED AND SIGNED AT CHUKA THIS 25TH DAY OF APRIL 2023.

MWANAISHA. S. SHARIFF

JUDGE

