



**GMN v JNN (Matrimonial Cause E074 of 2022)
[2023] KEHC 19194 (KLR) (Family) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 19194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

MATRIMONIAL CAUSE E074 OF 2022

MA ODERO, J

MAY 26, 2023

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY ACT 2013

BETWEEN

GMN APPLICANT

AND

JNN RESPONDENT

RULING

1. Before this court is the notice of motion dated October 21, 2022 by which the applicant GMN seeks the following orders:-

- “ 1. Spent
- 2. Spent
- 3. That this honourable court be pleased to issue a temporary order of injunction against the respondent, his agents, employees, servants and/or any person(s) acting through him from evicting and/or interfering with the applicant’s peaceful stay on parcel of land No Block 105/4479 Utawala (previously known as V7107/P5047 Embakasi Ranching) and/or selling, transferring, auctioning alienating, mortgaging and/or in any way interfering with land parcels whomsoever from taking any action including alienating, mortgaging and/or in any way interfering with land parcels No West Mugirango/ Bonyamatuta/2154, Block 105/4479 Utawala (previously known as V7107/ P5047 Embakasi Ranching) and Block 105/4501 Utawala (previously known as V7095/R161) until full hearing of this suit.



4. That costs of this application be provided for.
2. The application was supported by the affidavit of even date sworn by the applicant.
3. The respondent JNN filed a replying affidavit dated November 15, 2022 opposing the application. The matter was canvassed by way of written submissions. The applicant filed the written submissions dated December 31, 2022 whilst the respondent relied upon the written submissions dated January 25, 2023.

Background

4. The parties herein were a couple who got married to each other on December 16, 2001 at the Seventh Day Adventist Church Nairobi Central. Their union is blessed with one issue a daughter who was born on September 12, 2010.
5. The applicant later filed at the Milimani Commercial Courts divorce petition No 286 of 2019. Following the hearing of that petition the union between the parties was dissolved. A decree nisi was issued on January 24, 2020 and the decree absolute was made on February 24, 2020
6. The applicant states that during the subsistence of their marriage, they acquired the following properties;
 - a) West Mugirango/Bonyamatuta/2154.
 - b) Block 105/4479 Utawala (previously known as V7107/P5047 Embakasi ranching).
 - c) Block 105/4501 Utawala (previously known as V7095/R161).
 - d) Mwangori Settlement Scheme measuring approximately 1 acre.
 - e) Motor vehicle registration No KBL xxxx.
7. The applicant contends that she made financial contribution towards the acquisition of the above properties by taking several loans to support construction of the same.
8. The applicant states that she is apprehensive that the respondent may proceed to sell or otherwise dispose of the said properties to her prejudice before this suit which she has filed for division of matrimonial properties is heard and determined.
9. The applicant further alleges that the respondent has already sold the motor vehicle registration No KBL xxxx without obtaining her consent and/or authority to do so. That the respondent has also transferred title No West Mugirango Bonyamatuta/2154 to himself and a minor named F. N. N That such sale and transfer is designed to defeat the applicant's claim to the matrimonial properties. She prays that the court issue orders to preserve the suit property pending the hearing and determination of this suit.
10. The respondent opposed the application. He denies that the properties listed by the applicant constitute matrimonial property. The respondent states that the motor vehicle registration No KBL xxxx was not a family car but was a vehicle he purchased alone.
11. The respondent further asserts that the property known as West Mugirango/Bonyamatuta/2154 is ancestral land he developed without any input from the applicant. That he purchased Mwangori Settlement Scheme property jointly with his brother.
12. The respondent further avers that he purchased block 105, 4501 Utawala during the pendency of the divorce and that he solely purchased block 105/4479 Utawala without any input from the applicant.



13. The respondent states that the applicant was a housewife during the marriage and had no income that would have enabled her to make financial contribution towards any asset. He states that he in fact paid the applicant's college fees at the Kenya Medical Training College and met all her needs. The respondent urges the court to dismiss this application with entirety.

Analysis and Determination

14. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by the parties. The law regarding the issuance of interlocutory injunction is found in order 40 rule 1 of the *Civil Procedure Rules* which provides as follows:-

“Where in any suit it is proved by affidavit 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”.

15. The applicant herein is seeking temporary orders to prevent the sale and/or disposal of the suit properties pending the hearing and determination of the main suit.

16. The grounds upon which an injunction may be granted were set out in the case of *Giella v Casman Brown* (1973) EA 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”.

17. The definition of a *prima facies* case was given in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR as follows:-

“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. This is clearly a standard, which is higher than an arguable case”.

18. At this stage the court is not required to make conclusive findings on the matters in issue. All that the court is required to do is to determine whether there exists a 'prima facie' case warranting issuance



of the interlocutory orders. In *Silvester Momanyi Maribe v Guizar Ahmed Motari & another* (2012) eKLR Hon Justice Odunga (as he then was) stated 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 application for injunction although the court cannot find conclusively who is to be believed or not, the court is not excluded from expressing a *prima facie* view of the matter and the court is entitled to consider what else the deponent to the supporting affidavits has stated on oath which is not true”.

19. It is common ground that the parties herein were a married couple whose union has since been dissolved by a court of law. The applicant’s case is hinged on her claim that the properties in question constitute ‘matrimonial property’ and that she contributed towards the acquisition and/or development of the said properties.
20. On his part the respondent denies that the said properties constitute matrimonial property and further denies that the applicant made any contribution towards the acquisition and/or development of the same.
21. Section 6 of the *Matrimonial Property Act* 2013 defined matrimonial property as follows:-
 - “6(1) For 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”.
22. The court cannot at this interlocutory stage make a determination as to whether the properties in question constitute matrimonial property. Such determination will have to await the hearing of the main suit at which the parties will be entitled to adduce evidence in support of their respective positions.
23. All that the court needs to determine at this interlocutory stage is whether the applicant has established a *prima facie* case to warrant the orders being sought.
24. Although the properties in question are registered in the name of the respondent, they were acquired during the subsistence of the marriage between the parties. It is therefore, not outside the realm of possibility that the applicant may have contributed directly or indirectly toward the acquisition of said properties. The extent if any of the applicant’s contribution is a matter which is yet to be determined. I find that a *prima facie* case has been established.
25. The applicant pleads that she is likely to suffer irreparable harm if the orders sought are not given as the respondent is likely to dispose the suit properties unless he is restrained by the court. The applicant cites the fact that the respondent has already disposed of two of the properties as proof that her apprehension is real.



26. 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.”

27. Certainly the disposal of the cited properties means that the substratum of the applicants suit would no longer exist, rendering her suit no longer tenable. Moreover the sentimental value of a matrimonial home cannot be quantified in monetary terms.

28. I am satisfied that the applicant is likely to suffer irreparable harm if the properties in question are disposed before this suit is determined.

29. Finally, the court is required to consider the balance of convenience.

In the case of *Pius Kipchirchir Kogo* [supra] the court went on to define balance of convenience in the following terms:-

“The meaning of balance of convenience tilts 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 defendant’s 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”.

30. In my view the balance of convenience tilts in favour of the applicant.

31. In conclusion I am satisfied that this application has merit and I therefore, make the following orders.

(i) Pending the hearing and determination of this suit, a temporary order of injunction is hereby issued restraining the respondent, his agents, employees, servants and/or any person(s) acting through him from evicting and/or interfering with the applicant’s peaceful stay on parcel of land No Block 105/4479 Utawala (previously known as V7107/P5047 Embakasi Ranching) and/or selling, transferring, auctioning, alienating, mortgaging and/or in any way interfering with land parcels whomsoever from taking any action including alienating, mortgaging and/or in any way interfering with land parcel No West Mugirango/Bonyamatuta/2154, Block 105/4479 Utawala (previously known as V7107/P5047 Embakasi Ranching) and Block 105/4501 Utawala (previously known as V7095/R161)

(ii) This being a family matter each side will bear its own costs.

DATED IN NAIROBI THIS 26TH DAY OF MAY, 2023.

.....
MAUREEN A. ODERO

JUDGE

