



REPUBLIC OF KENYA



**JWK v JKG & another (Matrimonial Cause E027 of 2022)
[2023] KEHC 24489 (KLR) (Family) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E027 OF 2022
MA ODERO, J
OCTOBER 27, 2023**

BETWEEN

JWK PLAINTIFF

AND

JKG 1ST DEFENDANT

TGN 2ND DEFENDANT

RULING

1. Before this Court for determination are the following:-
 - (i) Notice of Preliminary Objection dated 23rd May 2022.
 - (ii) Notice of Motion dated 13th April 2022.
2. The matter was canvassed by way of written submissions. The Applicant Jane Wariga Kimotho filed the written submissions dated 27th July 2023, whilst the Respondents Joseph Kiama Gitau and Thomas Gitau Ngiru filed the written submissions dated 11th August 2022.

Background

3. The Applicant and the 1st Respondent got married to each other on 3rd October 2018 at PCEA Ngemwa church in Kiambu County. Their union was blessed with two (2) sons.
4. The 1st Respondent filed a petition for Divorce being Divorce Cause No. 1104 of 2021 at the Milimani Chief Magistrates Court.



5. The Applicant avers that during the subsistence of the marriage the couple resided on Title Number Githunguri/Ikinu/1203 – the Matrimonial home. That during the subsistence of the marriage the couple also acquired the following assets:-
- (a) Livestock at the Matrimonial home.
 - (b) Household goods.
6. The Applicant filed the summons dated 13th April 2023 seeking division of matrimonial property. Contemporaneously with the originating summons the Applicant filed a Notice of Motion seeking the following orders:-
- “ 1. Spent.
 - 2. Spent.
 - 3. That pending the hearing and determination of the main suit herein, the Honourable court be pleased to issue [an] order restraining the Respondents, their agents, servants or anyone acting on their behalf from selling, transferring alienating or disposing of the suit properties.
 - 4. That this Honourable court be pleased to grant such other or further orders as it may deem fit to grant.
 - 5. That costs of this Application and suits be met by the Respondents.”
7. In opposition to the said Notice of Motion the 1st Respondent filed a Replying Affidavit dated 23rd May 2022. The Respondents also filed the Notice of Preliminary Objection dated 23rd May 2023 which was premised upon the following grounds:-
- “ 1. That the subject matter of the application is a property known as Githunguri/Ikinu/1203 which is a trust property, registered in the names of both the Defendants as trustees on behalf of the beneficiaries of the estate of the late William Ngiro. The suit property is a trust property, which does not form part of the matrimonial property according to the provisions of Section 6 (2) of the [Matrimonial Property Act](#) of 2014 and as such, the Application filed is fatally defective and must be struck off.
 - 2. That the 2nd Defendant/Respondent is wrongly enjoined herein in this matrimonial cause as he is not part of the marriage between the Plaintiff/Applicant and the 1st Defendant/Respondent.
 - 3. That the application is incompetent, misconceived, fatally defective and bad in law.
 - 4. That the application is an abuse of the court process which ought to be dismissed with costs.”
8. I will proceed to deal with each application separately.

(i) Notice of Preliminary Objection dated 23rd May 2022

9. I have carefully considered the Preliminary Objection filed by the Respondent as well as the written submissions filed by both parties.



10. The definition of a Preliminary Objection was given in the case of Mukisa Biscuits Manufacturing Company Ltd – vs West End Distributors Ltd [1969] EA where the court stated as follows:-

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. “.....A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.”
11. In Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others [2015] eKLR, the Supreme Court of Kenya stated as follows:-

“a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”
12. Therefore in order for a preliminary objection to succeed the following tests must be satisfied.
 - (i) The Preliminary Objection should raise a pure point of law.
 - (ii) The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
 - (iii) The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
 - (iv) A valid Preliminary Objection ought if successful dispose of the entire suit.
13. Therefore, a genuine and proper Preliminary Objection can only raise points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.
14. By this Preliminary Objection the Respondents contend that this court has no jurisdiction to make the orders being sought in respect of LR No. Githunguri/Ikinu/1203 as the said property in question does not belong to solely to the to the 1st Respondent but rather is trust property held on behalf of the beneficiaries of William Ngiru Gitau (Deceased).
15. The Respondents also argue that the beneficiaries of the late William Ngiru Gitau reside on the property in question. That said property does not constitute matrimonial property.
16. The question of whether the suit property is held in trust, the question of whether the other beneficiaries occupy the said property and the determination of whether the suit property constitutes matrimonial property are all issues of fact that can only be determined after a full hearing at which parties will be called upon to adduce evidence in support of their respective positions.
17. The Preliminary Objection also raises the issue that the 2nd Respondent was wrongfully enjoined in this suit. Once again this is not a point of law but it is a question of fact which will require a hearing by the court to determine.



18. I find that the Preliminary Objection does not raise pure points of law. It does not meet the threshold set out in the Mukisa Biscuit case. Accordingly, I find no merit in the Notice of Preliminary Objection dated 23rd May 2022.

(ii) Notice of Motion dated 13th April 2022

19. By the application the Applicant seeks that the court issue temporary interlocutory orders pending the hearing and determination of her suit seeking division of matrimonial property
20. The grounds upon which an injunction may be granted were set out in the case of GIELLA VS 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.”

21. The definition of a prima facie case was given in MRAO LTD VS 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.”

22. It is important to note that 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 – VS 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.”

23. The fact that the Applicant and the 1st Respondent were a married couple is not in any doubt. A copy of their marriage certificate serial No. 35075 has been annexed by both parties to their respective Affidavits.
24. It is common ground that the 1st Respondent filed a Petition in the Chief Magistrates Court seeking dissolution of his marriage to the Applicant. The Applicant claims that the properties listed in



paragraph 2 of the Notice of Motion constitutes matrimonial Properties. That the couple set up their matrimonial home on the Property known as Githunguri/Ikinu/1203.

25. The Respondent counters that the Githunguri property does not belong exclusively to him but is held in trust for others parties.
26. Firstly, in her Notice of Motion the Applicant has prayed that interim order issue in respect of the Entire Githunguri property. By her submissions the Applicant now appears to be seeking orders only in respect of half (50%) of the Githunguri property. If this is the case then she ought to have amended her application accordingly. The Application on file seeks orders in respect the entire Githunguri Property. The Applicant cannot purport to amend her application through her written submissions.
27. The Applicant while conceding that the Respondent initially held the Githunguri property in trust for their sisters, now contends that this is no longer the position. The Applicant seeks to rely on what she calls a 'Dissolution of Trust Deed dated 26th March 1998'. That in the basis of this Agreement the property reverted exclusively to the Respondents who agreed to subdivide the same into half.
28. There is no evidence of sub-division of the property and subsequent registration of a half share into the name of the 1st Respondent. Indeed there is no evidence that any rectification to the Title Deed of the property was ever effected to reflect the alleged Agreement of 26th March 1998.
29. Annexed to the 1st Respondent Replying Affidavit is a copy of the Title Deed for the said Property which indicates that the said property is registered in the joint names of the 1st and 2nd Respondents "as Trustees" for other beneficiaries. This court cannot issue interlocutory order in respect of the said property as the Interested Parties have not been called to address the court on the matter. Any orders given are likely to affect persons who were not parties to the marriage in question. Accordingly, I decline to grant interim orders in respect of this Githunguri property.
30. The Applicant in her Notice of Motion also prayed that interim orders be issued in respect of:
 - Livestock at the Matrimonial Home.
 - Household goods bought during the subsistence of the marriage.
31. Orders sought by a party to a suit must be set out in clear terms giving specifics. The term 'livestock' is very vague. No description have been given as to the type or number of Livestock which the Applicant claims to be matrimonial Properties.
32. Likewise to merely seek orders in respect of 'Household good' bought during the Marriage will not suffice, specifics must be given of the number and type of the household goods over which the Applicant is seeking interlocutory orders.
33. Given the vague nature of these prayers the same cannot be granted by this court. Therefore, I find no merit in the application dated 13th April 2023.

Conclusion

34. Finally based upon the foregoing I find that the Applicant has failed to establish a prima facie case to warrant grant of the orders being sought. This court now makes the following orders:-
 - (i) The Notice of Preliminary Objection dated 23rd May 2022 is dismissed in its entirety.
 - (ii) The Notice of Motion dated 13th April 2023 is dismissed in its entirety.
 - (iii) This being a family matter I make no orders on costs.



DATED IN NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

.....

MAUREEN A. ODERO

JUDGE

