



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**ZAS v MKO (Family Originating Summons E005 of 2023)  
[2023] KEHC 27152 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27152 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
FAMILY ORIGINATING SUMMONS E005 OF 2023  
RE ABURILI, J  
DECEMBER 21, 2023**

**BETWEEN**

**ZAS ..... APPLICANT**

**AND**

**MKO ..... RESPONDENT**

**RULING**

**Introduction**

1. By an application dated 2<sup>nd</sup> October 2023 the applicant seeks the following orders:
  - a. Spent
  - b. That pending hearing and determination of this suit, a conservatory order do issue maintaining the prevailing status quo on Land Parcel Kisumu/Kasule/3655; For clarity and avoidance of doubt, the respondent, his agents, proxies, and or anyone acting on his behalf be prohibited from evicting the plaintiff, harassing her in any way, and or taking any action that may dispose of, encumber, and or tamper with occupation and status of Land Parcel Kisumu/Kasule/3655 until this application is heard and concluded.
  - c. That pending hearing of the suit, the defendant be deterred from accessing Venmar School, transferring teachers, dismissing them, becoming involved in its management in any capacity, operating or accessing the school account number held in all banks in any capacity, taking loans, withdrawing cash, and/or becoming involved in any capacity in matters pertaining to Venmar School.
  - d. That cost of this application be provided for.
2. The Application was supported by the Affidavit dated 2<sup>nd</sup> October 2023, sworn by the applicant, Zuhura Anubii Saleh.



3. It was the applicant's case that she and the respondent had been married and living together since 2010 but the respondent left the matrimonial home, abandoned her and threw her out of her own business and further he was in the process of selling the matrimonial home without her consent.
4. The applicant further averred that the respondent had unlawfully appropriated Venmar School and was negotiating economic loans with banks under the school's name and was also mistreating and expelling teachers without justification thus causing her harm as the rightful proprietor of the aforementioned school.
5. It was the applicant's case that the respondent had dispatched thugs who had threatened to beat her and evict her from the marital residence, which residence was purchased and constructed by both of them.
6. The applicant deposed that she was concerned that the respondent would harass, assault and evict her.
7. Opposing the application, the respondent filed a replying affidavit sworn on the 11<sup>th</sup> October 2023 denying the allegations made by the applicant in which he stated that the instant application was incompetent, frivolous and misconceived hence it did not meet the criteria for grant of the orders sought.
8. The respondent denied ever being in a marriage with the applicant but admitted that they were in a relationship in which they had two children.
9. It was the respondent's case that he was the legal proprietor of land parcel number Kisumu/Kasule/3655 which land he purchased solely and developed using his own finances and resources and that at no time did the applicant make any contribution to the same.
10. The respondent further deposed that during the subsistence of their relationship, he caused the applicant and their children to reside on the suit property land parcel number Kisumu/Kasule/3655 where she remained to date.
11. It was the respondent's case that the applicant had not provided any documents regarding the impending sale and alleged appropriation of the said properties and thus there was no way the court could rely on her allegations.
12. The respondent reiterated that the suit property land parcel number Kisumu/Kasule/3655 was not matrimonial property as they had not been married and neither had they conducted any divorce to enable them distribute the properties and thus the instant application was premature and undeserving of the court's time.
13. The parties filed submissions to canvass the application. `

### **The Applicant's Submissions**

14. On behalf of the applicant, it was submitted that the applicant had established a prima facie case that can only be determined at full trial as she had adduced evidence showing that she was facing eviction from the matrimonial home which the respondent was to sell and further that the respondent had unlawfully taken over Venmar School that is registered in her name without her consent and was mistreating staff and further that the respondent had sold the aforementioned property that was matrimonial property.
15. The applicant further submitted that she is likely to suffer irreparable injury if the orders sought are not granted as she faced eviction from her matrimonial home and thus risked losing the monies she



invested in developing it and further as she was unable to enjoy the profits from the school despite being the registered owner.

16. As to whether the balance of convenience is in her favour, the applicant submitted that she is likely to lose her home and school which would likely cause financial constraints on her side and further that she is likely to be auctioned in case the respondent defaults on payment of the loans secured by Venmar School as she is the registered owner of the school.
17. The applicant submitted that she ought to be granted costs of the application.

### **The Respondent's Oral Submissions**

18. On behalf of the respondent, it was submitted that the applicant had failed to disclose a *prima facie* case with chances of success as the allegations she had laid regarding being married to him and having acquired the suit properties in the course of the marriage thus making them matrimonial property were untrue as no evidence had been placed before the court in support of the said allegations.
19. The respondent relied on the cases of *Rev. Madara Evans Dondo v Housing Finance Company of Kenya Nakuru High Court Civil Case No. 262 of 2005* and that of *Uburu Highway Development Limited v Central Bank of Kenya & 2 Others*, Court of Appeal Application No. 140 of 1995 (UR.62/95) where the courts dismissed an application for temporary injunction where the plaintiff had obtained *ex parte* interim orders of temporary injunction by basing it on fraudulent misrepresentation to court as was allegedly done in this case.

### **Analysis & Determination**

20. I have carefully considered the pleadings, affidavits and annexures as well as the submissions by both parties' counsel. From the aforementioned pleadings, it is clear that what the applicant is seeking are conservatory orders in the nature of a temporary injunction.
21. The question to be determined is whether the applicant has met the threshold for the grant of temporary orders of injunction. I will therefore proceed to determine the Applicant's Notice of Motion on the basis of the requirements stated in *Giella v Cassman Brown & Co Ltd*, (1973) EA 358 as to the grant of a temporary injunction.
22. The principles in *Giella v Cassman Brown & Co Ltd*, (1973) EA 358 as to the grant of a temporary injunction are that the applicant must establish a *prima facie* case with probability of success and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.
23. The first question I must answer is whether the applicant has established a *prima facie* case.
24. A *prima facie* case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR as follows:

“a *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”
25. In the instant case, the applicant has argued that she and the respondent are married, that she is the registered owner and proprietor of Venmar Schools and that the respondent now threatens her with



eviction from the matrimonial home and further has taken up loans using the school as security which security the applicant is likely to lose if and when the respondent fails to settle the loans.

26. In response, the respondent has denied being married to the respondent and urged the court to dismiss the instant claim on account of the numerous misrepresentations made by the applicant.
27. From the foregoing, it is evident there is a dispute as to whether the parties herein are married and subsequently if determined in the affirmative, whether the properties subject of this suit constitute matrimonial property. Annexure ZS 2 is also evidence of threats touching on access to Venmar School. It is thus evident that the applicant has shown a prima facie arguable case.
28. The other question to determine is whether damages would be an adequate remedy for the applicant, and this court in this regard takes judicial notice of the fact that land is a scarce commodity, particularly where land that is alleged to constitute matrimonial property on where an individual has set up a matrimonial home and resides on it hence it is unlikely that the applicant can be adequately compensated in damages. In the circumstance, I find that the balance of convenience tilts in granting the orders sought by the applicant.
29. The upshot of the above is that the application dated 2<sup>nd</sup> October 2023 is meritorious and is granted as prayed as follows:
  - a. That pending hearing and determination of this suit, a conservatory order do issue maintaining the prevailing status quo on Land Parcel Kisumu/Kasule/3655; For clarity and avoidance of doubt, the respondent, his agents, proxies, and or anyone acting on his behalf be prohibited from evicting the plaintiff, harassing her in any way, and or taking any action that may dispose of, encumber, and or tamper with occupation and status of Land Parcel Kisumu/Kasule/3655 until this application is heard and concluded.
  - b. That pending hearing of the suit, the defendant be deterred from accessing Venmar School, transferring teachers, dismissing them, becoming involved in its management in any capacity, operating or accessing the school account number held in all banks in any capacity, taking loans, withdrawing cash, and/or becoming involved in any capacity in matters pertaining to Venmar School.
  - c. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF DECEMBER, 2023**

**R.E. ABURILI**

**JUDGE**

