



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. E069 OF 2021 (OS)

BJL.....APPLICANT

VERSUS

JKL.....RESPONDENT

RULING

1. The applicant B.J.L. and the respondent J.K.L. got married on 24th June 1997 under the **African Christian Marriage and Divorce Act (Cap. 151** now repealed). The marriage lasted until the applicant filed **Divorce Cause No. E086 of 2021** at the Chief Magistrate's Court at Ruiru. The cause has not been heard and determined.

2. In the originating summons dated 13th October 2021 the applicant listed various properties comprising houses, parcels of land, motor vehicles and a sewing machine which she claimed were jointly acquired by the couple during the subsistence of their marriage, although registered in the respondent's name. She sought that they all be declared to be matrimonial property and asked that they be divided equally between them, or deal with them as the court deemed fair and just.

3. What concerns the court at this stage was the prayer that, pending the resolution of the divorce cause and the hearing and determination of the originating summons, an order be issued preserving the matrimonial properties, that the applicant be allowed to stay in their matrimonial home being Kitengela House No. xx and she be allowed to use vehicles KCG xxx Prado and KCC xxx Pickup until the cause is heard and determined.

4. The properties in question were enumerated in paragraphs 3 and 5 of the originating summons as follows:-

- a) Rongai/Rongai Block 2/xxx Chepseon
- b) Kericho/Kipsitet/xxx
- c) Kapweldon – Kericho No. xxx
- d) Kipk -West Kasheen
- e) Greatwall Mlolongo 2 Apartments
- f) Plot No.xxx Nakuru – Kericho Highway
- g) Brooke Centre Plot No. xxx
- h) Kitengela House No.xxx

- i) Kitengela House No. xxx
- j) Apartment No. xxx – 3 Bedroom situated on L.R. Number 209/xxx – Nairobi
- k) Rongai (2 Properties)
- l) Kericho (3 Properties)
- m) Kipkeleon West, Coffee farm (1 property)
- n) Kilimani Home (Bric Apartments)
- o) 3 Bedroom house next to State House
- p) Kipsitet 2 properties (9 acres and 2 acres)
- q) Ngatumek Farm (7 acres)
- r) Ringa Home (6 acres)
- s) Toyota Rush (Registration Numbers Unknown).
- t) 2 Prados (Registration Numbers Unknown).
- u) Ford Ranger Double Cabin.
- v) Nissan Pick Up (Registration Number KCC xxxR).
- w) Toyota (Registration Number KCW xxxM).
- x) Toyota S.Wagon (Registration Number KCG xxxV).
- y) Massey Ferguson wheel/Tractor (Registration Number KTCB 711U).
- z) Massey Ferguson wheel/Tractor (Registration Number KTCB xxxU).
- aa) Isuzu Lorry/Truck (Registration Number KCY xxxA).
- bb) Hino Lorry/Truck (Registration Number KCC xxxU).
- cc) Sewing machine.

5. The application alleged that the respondent had evicted her from their matrimonial home, and that he had forcefully taken motor vehicle KCG 676V from her.

6. The respondent replied to the application and admitted that their relationship had deteriorated beyond repair, and that was why he cross-petitioned for divorce. Of the listed properties, he stated that Rongai/Rongai Block 2/xxx, Kericho/Kapsitet/xxx, Kapweldon-Kericho No. xxx, Kipk – West Kasheen, Greatwall Mlolongo Apartments, Plot No. xxx Nakuru/Kericho Highway, Brooke Centre Plot No. xxx, Kitengela House No. xx, Kitengela House No. xx, Apartment No. xx situated on LR No. 209/xxx Nairobi, Rongai 2 properties, Kericho 3 properties and Kipkelion West Coffee Farm were unknown to him. The same for 3-bedroom house next to State House, Kipsitet 9 acres and 2 acres and Ngatumek 7 acres. Of the vehicles, he stated that he did not own a Toyota Rush, Toyota Prado, Ford Ranger, tractors Ferguson KTCB xxxU and KFCB xxxU and Isuzu lorry truck KCY xxxA. He denied owning motor vehicles KCG xxx and KCCxxx.

7. Regarding the matrimonial home, his case was that the applicant had moved out of the house on her own volition following a situation where she was confronted while bringing her boyfriend here, and following which she stated that she wanted to leave and go and stay on her own. As for vehicle KCG xxxV, the respondent stated that he found a stranger driving it in Eldama Ravine. He reported to police who recovered the vehicle.

8. For the rest of the properties, his case was that he acquired them alone without any assistance from the applicant. He stated that the applicant was a woman of means who owns businesses and rental properties.

9. In her further affidavit, the applicant stated that she took a short break from the respondent after being advised by the Doctor following her medical condition, and that when she returned the respondent denied her access and asked her never to set foot in the property. She is being forced to live in rental premises.

10. It is clear from paragraph 4 of the originating summons and paragraph 11 of the further affidavit that the applicant does not know in

whose name the properties in question have been registered. The problem with this is that the court can be placed in a situation where it will make orders of preservation over properties that belong to third parties without affording those parties an opportunity to be heard. Under these circumstances, the most appropriate thing to do is to wait for evidence to be given regarding the acquisition of the property and their ownership status, before a declaration is made over them.

11. The properties the respondent admitted he owns, although on mortgage or on hire purchase, were Kilimani Home, Nissan Pickup KCC xxxR, Toyota Corolla KCW xxxM, Toyota Station Wagon KCG xxx and Hino Lorry KCC xxxU. The other was the Kitengela Home. For Ringa Home, he stated that it is in his parents' home. It is their rural matrimonial home.

12. I have read and considered the written submissions by M/s Bundi for the applicant and Mr. Sigei for the respondent.

13. Under **section 6** of the **Matrimonial Property Act (No. 49 of 2013)**, matrimonial property includes the matrimonial home or homes and any immovable or movable property that was acquired during the subsistence of the marriage. Under **section 7** of the **Act**, ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition. Under **section 2** of the **Act**, contribution means monetary contribution and includes:-

“a) domestic work and management of the matrimonial home;

(b) child care;

(c) companionship;

(d) management of family business or property; and

(e) farm work.”

14. **Section 14(a)** of the **Act** provides that where matrimonial property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse.

15. The couple has been married for 24 years, and have children. The respondent is a Member of Parliament and the applicant is a lecturer at Kenyatta University. This is evident from the pleadings. One cannot estimate which way the case will go, but considering the applicable law it is certain that the applicant has a stake in the property in paragraph 11 of this ruling. Now that the property is in the hands of the respondent, this stake has to be protected, at least to preserve the property until it is decided how much stake of each the parties have. This is because, subject to the divorce, the property will under **section 7** of the **Act** be subject to division. Over the property in paragraph 11, I find that the applicant has demonstrated a *prima facie* case and a right that needs to be protected, otherwise she may suffer irreparable loss and damage (**Giella –v- Cassman Brown & Co. Ltd [1973]EA 358; Mrao Ltd –v- First American Bank Kenya Ltd & 2 Others [2003]KLR 125**).

16. Regarding the matrimonial home at Kitengela House No. xx, it does appear clear that because the respondent found a man here, which the applicant denies, he decided that the applicant should vacate the premises. This he stated in paragraph 6 of his replying affidavit. I consider that **section 12(3)** of the **Act** provides that –

“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.”

On the basis of this provision, I direct that, because the parties are still married, the applicant shall immediately be allowed by the respondent to occupy the matrimonial home on Kitengela House No. xx. This is until this cause is heard and determined. In making this order, I bear in mind that the couple has another matrimonial home at Kilimani (Brit Apartment) and Ringa Home that the respondent can continue to occupy. I have also noted in the foregoing that the applicant has a *prima facie* stake in all homes.

17. Lastly, there is the issue of motor vehicle KCG xxxV that the respondent had given the applicant to use, even after they had separated. He got the police to help recover the vehicle because it was being driven by a stranger. According to the applicant, she was actually found driving it herself. Police stopped her but she was able to explain to them that she was rightfully in possession but that the respondent came and forcefully took it away from her. Whatever is the correct version, the evidence contained in the affidavits shows that the respondent has access to many family vehicles. This particular vehicle is a family vehicle. The only one that the applicant was using. She has a *prima facie* interest in this and in all the vehicles. I have already stated in the foregoing that there is a rebuttable presumption that he holds this vehicle in trust for her. This being the case, I direct that the respondent surrenders vehicle KCC xxxV immediately for the use of the applicant until this case is heard and determined.

18. I ask that costs be in the cause.

DATED and SIGNED this.....day of MARCH 2022

A.O. MUCHELULE

JUDGE

DATED and DELIVERED electronically at NAIROBI this 28TH day of MARCH 2022

A.O. MUCHELULE

JUDGE