



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU
MATRIMONIAL CAUSE NO. 5 OF 2019
UNDR ORDER 37 RULE 1&2 OF THE CIVIL PROCEDURE RULES 2010
AND IN THE MATTER OF SECTION 7 OF THE MATRIMONIAL PROPERTY RULES ACT
AND
IN THE MATTER OF SECTION 7 OF THE MATRIMONIAL PROPERTY ACT 2013
AND
IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012
AND
ARTICLE 45(3) & 48 OF THE CONSTITUTION OF KENYA 2010
AND THE INHERENT JURISDICTION OF THE HONOURABLE COURT
JNT.....APPLICANT
VS
DTK.....RESPONDENT
RULING

1. Before me is an interlocutory application dated 8th July, 2021 filed by JNT the applicant. By this originating summons the applicant seeks determination that is, the extent of her interest to properties listed thereof and whether those properties fall under the Matrimonial Properties Act, 2013. Pending the hearing of that Originating Summons the applicant seeks by the application under consideration an order injunction restraining the National Land Commission (hereafter the Commission) from paying money in the nature of compensation to DTK the respondent.

2. In the affidavit in support of the application, the applicant deponed that property MUGUGA/GITARU/(withheld) was hers and the respondent's matrimonial home. That the subject property under compulsory acquisition by the Commission for the construction of **James Gichuru junction – Rironi Junction (A104/B3)** Road project. The applicant further deponed that the Commission issued an award in respect of the compensation amount payable for the subject property. That compensation amount is payable to the respondent, the registered owner.

3. In response to the application, the respondent filed a Notice of Preliminary Objection and a replying affidavit.

4. By that replying affidavit, the objection the respondent argues that the subject property was not matrimonial home but that rather the same was inherited from respondent's deceased father. Respondent deponed that he and the applicant never lived on the subject property during the subsistence of their marriage. That it was he, the respondent who constructed a permanent shop on the subject property. Respondent further stated that he had not given his consent as required for the compulsory acquisition. He therefore denied that the compensation is likely to be paid to him by the commission any time.

5. The respondent deponed that this Court lacks jurisdiction to entertain the application in view of the provisions of **Section 112 and 113 of**

the Land Act.

6. The respondent was also of the view that the prayers cannot be granted in the absence of joining the Commission as a party in this action.

ANALYSIS

7. Section 6 of the Matrimonial Act provides that matrimonial property to include:-

"(a) The matrimonial home or homes

(b) household goods and effects in the matrimonial home or houses or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage."

8. It follows from that definition that the subject property is the type of property considered matrimonial property under that Act.

9. Section 7 of the Matrimonial Property Act provides that ownership of matrimonial property vests in a spouse according to contribution towards acquisition and shall be divided if the marriage is dissolved.

10. That indeed is the action before this Court. This Court is not required to determine who is entitled to receive the compensation from the Commission. What the applicant's claim is, is the determination that the properties listed in her originating summons are matrimonial property. The Commission as provided under **Section 112 and 113 of the Land Act** made a determination, after inquiry who was the interested party to the subject land. The Commission is not mandated to enter into inquiry of whether the property, the subject of compulsory acquisition is matrimonial property. That is the preserve of the courts. It is a judicial function.

11. The respondent therefore erred to submit that this Court has no jurisdiction.

12. The applicant has by her application, sought interlocutory injunction. This Court is constrained in what it can consider when determining an interlocutory injunction. This Court cannot delve into the facts of the case because to do so would usurp the discretion of court that shall hear the main suit: see the case **MBUTHIA VS. JIMBA CREDIT FINANCE CORPORATION & ANOTHER (1988) eKLR** thus:-

"The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions.

13. The often cited principles of granting an injunction as held in the case **GIELLA VS. CASSMAN BROWN (1973) EA** are that the applicant must prove:-

(i) A *prima facie* case with probability of success.

(ii) That the applicant will suffer irreparable harm if injunction is not granted.

(iii) On which side the balance of convenience lies.

14. The court in considering interlocutory injunction ought to opt for the lower risk to injustice.

15. The applicant is yet to have her case tried and determined. She has listed properties she alleges were matrimonial properties. On of these properties is the subject property. If indeed this Court after hearing this suit does determine that the subject property is matrimonial property and if the compensation for compulsory acquisition is paid to the respondent, the applicant would have gained an empty victory. In my view, it is imperative to preserve the proceeds of that compulsory acquisition until this Court does determine whether or not the subject property is matrimonial property.

16. I therefore find the applicant has shown *prima facie* case and has also shown that she will suffer irreparable harm if the injunction is not granted. Indeed, I am also of the view that the balance of convenience favours the granting of the injunction.

DISPOSITION

17. In respect to the Notice of Motion dated 8th July, 2021, I grant the following orders:-

(a) Pending the hearing and determination of this suit, an order is hereby granted restraining the respondent, **(DTK)** from receiving from the **National Land Commission** compensation in respect to property **MUGUGA/GITARU/(withheld)**.

(b) The costs of the application dated 8th July, 2021 shall be in the cause.

RULING DATED AND DELIVERED AT KIAMBU THIS 24TH DAY OF MARCH, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice

For Plaintiffs: - No appearance

For Defendants: - Mr. Muriithi holding brief for Mr. Thiga

RULING delivered virtually.

MARY KASANGO

JUDGE