



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

MATRIMONIAL CASE NO. E001 OF 2022 (O.S.)

JWK.....APPLICANT

VERSUS

JKN.....RESPONDENT

RULING

1. The applicant and respondent married in 2004 and have seven children. Her learned counsel informed the court that six of the children are from a previous relationship.
2. The applicant avers that the respondent has turned violent and threatened to demolish their houses. The hostility intensified in the year 2019. On 19th September 2019 the respondent hit their eldest daughter with a spade when she tried to resist their eviction. She deposes that the respondent also destroyed her banana crop. Fearing for her safety, she and her children sought alternative accommodation.
3. She has thus filed an *originating summons* dated 26th January 2022 for division of matrimonial property known as *[particulars withheld]*. According to the annexed official search, the suit property is jointly registered in the name of the respondent and his sister, S.W.N. *[particulars withheld]*.
4. Pending the hearing of the suit, the applicant has lodged a *notice of motion* on even date (amended on the 18th February 2022) praying for injunction to restrain the respondent from evicting her from the land. The motion is predicated upon her deposition sworn on the 17th February 2022. There are photographs annexed to the original motion showing some structures which she avers is their matrimonial home.
5. The respondent was served but did not enter an appearance or attend to the hearing.
6. The principles governing the grant of *prohibitive injunctions* are well settled. See *Giella v Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience.
7. In *Mrao Limited v First American Bank of Kenya Ltd and others* [2003] KLR 125, the Court of Appeal stated that a *prima facie* case is one –

“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”.
8. The *originating summons* is pending for hearing. It would be prejudicial to delve too deep into the merits of the action at this stage. That will be the true province of the trial court.
9. But I can safely state the following: The order sought is a *discretionary remedy*. The applicant is married to the respondent and claims an interest in the suit property. The supporting affidavit does not state whether the marriage is registered or a customary marriage. What is material is that the parties are in *coverture*.
10. Section 2 of the **Matrimonial Property Act** defines matrimonial home as-

Any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property...

11. The application for injunction cannot succeed for the following reasons. To start with, the marriage between the parties has *not* been dissolved. It is trite and only logical that division of matrimonial property can only take place after dissolution of marriage. See generally **Peter Ndungu Njenga v Sophia Watiri Ndungu**, Court of Appeal, Mombasa Civ. App. No. 2 of 2000 [2000] eKLR, **EKM v HUM**, High Court, Kakamega, Cause 2 of 2018 [2021] eKLR, **MNW v WNM & 3 others**, High Court, Nairobi, Civil case 46 of 2012 [2013] eKLR.

12. I say that very carefully and *without* a final finding. But what this means is that the legal foundation upon which the amended *notice of motion* is grounded remains shaky.

13. I remain alive however that the court has inherent power to preserve the property. In this case however, there is no evidence before me of any intended sale or mortgage. Furthermore, the applicant concedes that the property is not owned *exclusively* by the respondent but in equal shares with his sister as earlier mentioned.

14. The *prohibitive* injunction sought is also overtaken by key events: the applicant avers that the matrimonial home was *partially* demolished by the respondent on 18th January 2022 and a report made to the police. The applicant and her children vacated the home and are now living elsewhere.

15. Granted those circumstances, I am hard pressed to say that the applicant has established a *prima facie* case for grant of a prohibitive interlocutory injunction. Having reached that conclusion, I do not need to weigh the balance of convenience. **Kenya Commercial Finance Company Ltd v Afraha Education Society** [2001] 1 E.A. 86.

16. The upshot is that the applicant's *amended notice of motion* dated 18th February 2022 is devoid of merit. It is hereby *dismissed* but with *no order on costs*. In the interests of justice, the *originating summons* shall be allocated a hearing date on *priority*.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 24TH DAY OF MARCH 2022.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Ms. Njuguna for the applicant instructed by Njeri Njuguna & Company Advocates

Ms. Susan Waiganjo, Court Assistant.