



REPUBLIC OF KENYA



KENYA LAW
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**JWM v TMM (Civil Case E060 of 2021)
[2022] KEHC 356 (KLR) (Family) (22 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY
CIVIL CASE E060 OF 2021**

MA ODERO, J

APRIL 22, 2022

BETWEEN

JWM APPLICANT

AND

TMM RESPONDENT

RULING

1. Before this Court for determination is the originating summons dated 14th September 2021 by which the Applicant JWM seeks the following orders:-
 1. Spent
 2. That in the interim, this Honourable court be and is hereby pleased to issue an order restraining the Respondent whether by himself, his agents, servants and/or employees or otherwise howsoever form alienating, disposing selling, encumbering, assigning, transferring or in any other manner dealing with properties:
 - i. Nairobi Block xx/xxx, Buruburu Phase 5 Extension, House No. 221
 - ii. Land parcel No.xx/Kahuti/xxxx – 3.2 acres – Muranga
 - iii. Land Parcel No. xxKahuti/xxxx - Matrimonial Home in Muranga
 - iv. Plot located in St Mary's Muranga Township 100x100.
 - v. 4 Plots in Kayole 100x100
 - vi. Plot No. xxx/xxx temporary occupation licence (belongs to the Nairobi City/county Council and we pay Kshs 7,500 per month to occupy.



3. That in the interim, the Honorable court be and is hereby pleased to preserve the following properties:
 - i. Nairobi Block xx/xxx, Buruburu Phase 5 Extension, House No. xxx
 - ii. Land parcel No.xx/Kahuti/xxxx – 3.2 acres – Muranga
 - iii. Land Parcel No. xx/Kahuti/xxxx - Matrimonial Home in Muranga
 - iv. Plot located in St Mary’s Muranga Township 100x100.
 - v. 4 Plots in Kayole 100x100
 - vi. Plot No. xxx/xxx temporary occupation licence (belongs to the Nairobi City/county Council and we pay Kshs 7,500 per month to occupy.
 4. That this Honorable court issue an order declaring that the Applicant has equal beneficial interest in the properties, and proceeds from the jointly registered matrimonial properties;
 - i. Nairobi Block xx/xxx, Buruburu Phase 5 Extension, House No. xxx
 - ii. Land parcel No.xx/Kahuti/xxxx – 3.2 acres – Murang’a
 - iii. Land Parcel No. xx/Kahuti/xxxx - Matrimonial Home in Murang’a
 - iv. Plot located in St Mary’s Murang’a Township 100x100.
 - v. 4 Plots in Kayole 100x100
 - vi. Plot No. xxx/xxx temporary occupation licence (belongs to the Nairobi City/county Council and we pay Kshs 7,500 per month to occupy.
 5. That this Honorable court be pleased to declare that the Applicant is entitled to the properties on the basis of both financial and non-financial contribution towards acquisition.
 6. That the Honourable Court be and is hereby pleased to issue an order compelling the Respondent to submit any documents pertaining the Nairobi Block xx/xxx, Buruburu Phase 5 Extension, House No. xxx, Land parcel No.xx/Kahuti/xxxx – 3.2 acres – Muranga, Land Parcel No. xxKahuti/xxxx - Matrimonial Home in Murang’a, Plot located in St Mary’s Murang’a Township 100x100, 4 Plots in Kayole 100x100, Plot No. xxx/xxx temporary occupation licence (belongs to the Nairobi City/county Council and we pay Kshs 7,500 per month to occupy for purposes of clarification and transparency.
 7. That the honorable court be pleased to grant such other orders or relief as may be just and fit in the circumstances.
 8. That the Respondent be ordered to pay the costs.”
2. The summons was premised upon Article 41, 45 (3), 68 (iii) of the [Constitution of Kenya, 2010](#), Sections 3, 3A of the [Civil Procedure Act](#) Order 40 of the [Civil Procedure Rules](#), Sections 2, 6, 9, 14 and 17 of the [Matrimonial Property Act](#) 2013 and all other enabling provisions of the law. The application was supported by the Affidavit of even date sworn by the Applicant as well as her Further Affidavit dated 30th November 2021.
 3. The Respondent TMM opposed the application through the Replying Affidavit dated 2nd November 2021. The application was canvassed by way of written submissions. The Applicant relied upon



the written submissions dated 30th November 2021 whilst the Respondent relied upon his written submissions dated 4th February 2022.

Background

4. The Applicant averred that she got married to the Respondent on 1st December 1977 but that the marriage was dissolved in the year 2020. She further averred that during the course of their union the couple acquired the various properties cited in the summons.
5. The Applicant states that in the year 2000 she relocated to the USA with the full knowledge and consent of her husband who often visited her there. She states that the Respondent is in possession of the ownership documents for the named properties. That she is apprehensive that the Respondent may proceed to sell and/or otherwise dispose of the matrimonial properties before the full hearing and determination of her summons. She therefore seeks interlocutory orders of preservation of the said properties pending determination of the suit.
6. On his part the Respondent concedes that he got married to the Applicant in the year 1977. He states that the couple cohabited as man and wife until the year 2000 when the Applicant deserted the matrimonial home and re-located to the United States of America. The Respondent denies that the named properties constitute matrimonial property. He asserts that he solely acquired and developed Nairobi/Block xx/xxx Buru Buru Phase 5 Extension House No. 221 (herein after the 'Buruburu Property'). That land parcel xx/Kahuti/xxxx Muranga consisting of – 3.2 acres was a gift from his father and the Respondent further avers that Plot xx/Kahuti/xxxx Muranga is not matrimonial property as it is a subdivision of Loc xx/Kahuti/xxx, which parcel of land has been in his family for generations.
7. The Respondent states that he is a stranger to the following land parcel (i) Plot No. xx/Kahuti/xxxx,
(ii) Plot located in St Mary's Muranga Township,
(iii) Four (4) plots in Kayole.
8. The Respondent states that it was he who applied to the then Nairobi City Commission acquire Plot No. xxx/xxx Nairobi and was issued with the license to the same, and that he connected water & electricity to the plot and has been maintaining the same to date. The Respondent maintains that the Applicant surrendered all rights to the said Plot No. xxx/xxx when she decided to relocate to the USA. He therefore opposes the grant of any interlocutory orders.

Analysis and Determination

9. I have carefully considered this application, the Affidavit filed in Reply as well as the written submission filed by both parties. The Respondent submitted that the present application was misplaced as there was no evidence tendered to show that his marriage to the Applicant had actually been dissolved. However, the Applicant has annexed to her Further Affidavit dated 30th November 2021 (Annexure 'JWM'7) a copy of the Decree Nisi which was made absolute on 30th June 2021 in Divorce Cause No. E1003 of 2020. This is proof that the marriage between the two stands dissolved.
10. The Applicant is by her summons seeking the grant of an interlocutory injunction to preserve the named properties pending the hearing and determination of the main summons.



11. The principles for grant of interim injunction are now well settled in Kenyan Law as stated in the case of *Giella Vs Cassman Brown & Co. Ltd* [1973] E.A where it was held 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."

12. Therefore in order to merit the orders being sought the Applicant must show that she has a prima facie case. The case of *Mrao Ltd Vs First American Bank Of Kenya Ltd*, the Court of Appeal defined what constitutes a prima facie case 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 Applicants care upon trial. This is clearly a standard which is higher than an arguable case."

13. Likewise in the case of *Nguruman Ltd v Jan Blonde Nilesen & 2 others* [2014] eKLR, the Court held that:-

"..... the party on whom a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent to the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positons of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed." (own emphasis)

14. The Applicant has claimed that the properties which she has listed in her summons constitute matrimonial property. Section 6 of the Matrimonial Property Act 2013 defines Matrimonial Property as follows: -

- "(1) For the purposes of this Act, matrimonial property means –
- a. the matrimonial home or homes;
 - b. household goods and effects in the matrimonial home or homes; or



- c. any other immobile and movable property jointly owned and acquired during the subsistence of the marriage.”
15. Therefore matrimonial property will include the matrimonial home as well as any property jointly owned and/or acquired during the subsistence of the marriage. It is not for the court at this interlocutory stage to make a determination on which properties constitute matrimonial property. All that is required is that a prima facie case has been shown.
 16. It is conceded by the Respondent that the ‘Buru Buru Property’ was the matrimonial home of the couple. It was the home in which the couple cohabited as man and wife until the year 2000 when the Applicants moved to the USA.
 17. Regarding Plot No. xxx/xxx Nairobi, the Applicant averred that it was she who applied for the Plot. That she has invested heavily in the development of the said plot. The Respondent indicated his willingness to share the said property equally with the Applicant.
 18. The Applicant insists that Plot No. xx/Kahuti/xxxx in Muranga is their rural matrimonial home and claims that she contributed towards the development of the same. The veracity of this claim can only be ascertained at the full hearing of the suit.
 19. Whereas the Respondent claims to have no knowledge of Plot No. xx/Kahuti/xxxx, the Applicant asserts that the said property was gifted to their son during his wedding. That she and her son placed a caution on the said property, but later learnt that the Respondent had sold off the plot without her knowledge and/or consent.
 20. The Applicant has annexed to her Further Affidavit the Respondents Declaration of Income, Assets and Liabilities filed on 1st November 2015 (Annexure ‘JWM-6’). In that declaration the Respondent has included as one of his assets Plot No. xx/Kahuti/xxxx. It is clear that at some point in time this parcel of land belonged to the Respondent. This proves that the Respondent was dishonest in his denial of any knowledge of this plot. Given the concession by the Applicant that the said property was sold to an un-named third party, the same cannot be subject to an injunction issued by this court.
 21. Based on the above, I am satisfied that the Applicant has shown a prima facie case. The nature and extent of the Applicants beneficial interest in the said parcels of land is a matter which remains to be determined upon a full hearing of the suit. I am of the view that failure to grant the interlocutory injunction sought will subject the Applicant to the risk of irreparable harm being loss of matrimonial home and other assets, should said properties be sold or disposed before determination of the main suit.
 22. I am persuaded that the present application has merit. However, I do not feel there is any need to direct that the Title Documents be surrendered to the court. Finally, I allow this application and make preservative orders as follows: -
 - (i) Pending hearing and determination of the main suit the Respondent whether by himself, his agents, servants and/or employees be and/is hereby restrained from alienating, disposing, selling, encumbering, assigning, transferring or in any other manner whatsoever dealing with the following properties-
 - (a) Nairobi Block xx/xxx, Buruburu Phase 5, Extension House No. xxx.
 - (b) Land Parcel No. xx/Kahuti/xxxx – Muranga
 - (c) Plot located in St Mary’s Muranga Township 100x100**
 - (d) 4 Plots in Kayole 100x100**



- (e) Plot NO. xxx/xxx – Temporary occupation licence belonging to Nairobi City Council.**
- (ii) This being a family matter each party shall pay its own costs.

DATED IN NAIROBI THIS 22ND DAY OF APRIL 2022.

MAUREEN A. ODERO

JUDGE

