



**CAO v DOA (Matrimonial Cause 7 of 2019) [2022] KEHC 10478 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10478 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
MATRIMONIAL CAUSE 7 OF 2019**

**RPV WENDOH, J**

**MAY 26, 2022**

**BETWEEN**

**CAO ..... PLAINTIFF**

**AND**

**DOA ..... DEFENDANT**

**RULING**

1. This ruling is in respect to the plaintiff's Notice of Motion dated 5/9/2019 filed on 28/10/2019 (hereinafter 'application'). The plaintiff/ Applicant is seeking the following orders:-
  - a. Spent.
  - b. The defendant be ordered to disclose the details, here being the land registration number of the land where the matrimonial home sits.
  - c. That further to (b) above, the defendant be restrained by an injunction by himself, his agents, and or himself from selling, disposing off and/pr in any other way adversely dealing with the matrimonial property.
  - d. That pending the hearing and determination of this application inter parties, the defendant be restrained by way of an injunction by himself, his agents, and or servants from selling, disposing off and/or in any other way adversely dealing with the following:-
    - a. Motor Vehicle KCM xxxx Toyota
    - b. Motor Vehicle KCM xxxx Toyota
    - c. Motor Vehicle KCM xxxx Toyota
    - d. Motor Vehicle KCM xxxx Toyota
    - e. Costs be provided for.



2. The application is anchored on the grounds on its face and a supporting affidavit sworn by the applicant.
3. She deponed that she lived with the defendant as husband and wife from the year 2011 to 2016 and they were blessed with one child; that at the time when she started cohabiting with the defendant, he had no assets of his own; that they both worked in the family business known as [particulars withheld]; that she successfully managed the business in Nairobi from the year 2011 to 2016 while at the same time taking care of the family.
4. It was further deponed that during that period, they managed to acquire several properties including 4 motor vehicles; that she indirectly contributed to the establishment of the family matrimonial home by taking loans; that she took care of the defendant and also the issue they were blessed with; that the parties are currently separated and she is raising the child alone; that she is now seeking division of the matrimonial properties. The applicant asked the court to grant her the prayers she asked for.
5. The respondent filed a replying affidavit dated 8/11/2019. He admitted to having had an intimate relationship with the applicant which resulted in the birth of one issue but they have never been married; that he is now married with one wife and has a child; that he is an established surveyor in Migori County and he has never run a business by the name [particulars withheld] ; that he has never owned joint properties with the applicant and even a matrimonial home.
6. It was further stated by the respondent that he solely purchased the listed motor vehicles but he has since sold to different purchasers in order to offset pressing financial obligations; that this fact was also produced as evidence in Nairobi Children’s Case No. 403 of 2019; that the application is frivolous, made in bad faith and it should be dismissed with costs.
7. The applicant filed a further affidavit dated 11/12/2019. She deponed that in relation to the company being ran by herself and the defendant, she erroneously stated it was [particulars withheld] instead of [particulars withheld]. The applicant denied being aware of the changes which indicated that she had resigned from the company and transfer of her shares.
8. Directions were taken and the application was canvassed by way of written submissions. It is only the applicant who filed submissions which I have duly considered.
9. The issue for determination is whether the applicant has made out a prima facie case to be granted the orders prayed for.
10. The principles of granting of granting injunctive reliefs were discussed in the famous case of *Giella v Cassman Brown Co. Ltd* 1973 E.A. 358.

“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 harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”



11. In the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* Civil Appeal No. 39 of 2002, the court described prima facie case as:

“in civil case, it 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 been infringed by the opposite party as to call for an explanation or rebuttal from the latter”
12. The applicant submitted that they cohabited for a period of 5 years. Therefore, there is a rebuttable presumption that the parties herein were married. In their union, they were blessed with one issue, ran a business together, acquired several properties and also a matrimonial home. The applicant argues that these are Matrimonial Properties as defined under Section 2 of the *Matrimonial Property Act*.
13. The applicant further argued that there is a rebuttable presumption that property which was acquired during marriage is held in trust on behalf of both parties. Upon dissolution, the ownership shall be vested according to the contribution which each spouse made.
14. I have perused the documents annexed to the applicant’s affidavits. As for the company which she claims they ran together, annexed the documents are not legible at all. This court is unable to make out the communications that were done from the Office of the Registrar of Companies. In any event, this is a matrimonial cause. The issues of shareholding and transfer of shares cannot be litigated in this cause. The articles and the memorandum of the alleged company should deal with that issue.
15. On the properties that the applicant claims that they acquired together, she has listed 4 motor vehicles. From the annexures (P.I.O. II – V) of the Motor Vehicle Copy of Records, as of 27/10/2019 when the searches were done, the vehicles were purchased on diverse dates between the year 2014 – 2017 and they are still registered in the name of the defendant. The respondent deponed that he solely purchased them but he has already disposed of them. He annexed to his affidavit different sale agreements which show the vehicles were sold between the years 2017 - 2019 (DAO - 4).
16. The applicant in her further affidavit, did not confirm or deny the alleged sale of the motor vehicles. As matters stand, the court can only be left to believe that indeed the vehicles were sold off. Even if the motor vehicles are still in the names of the respondent, it is common notoriety that some purchasers do take time to change the particulars of a motor vehicle in the system or it takes rather too long. An order of injunction cannot issue against the said vehicles if the ownership has changed.
17. Finally, the applicant states that they had a matrimonial home which she wants the defendant to be compelled to disclose. It is her position that she contributed to building of their matrimonial home. If that be the case, it is quite telling that the applicant cannot pinpoint the exact location of the matrimonial home to require the respondent to disclose the same. It was their matrimonial home which she had the knowledge and full particulars of. Even if she does not have the particulars of the title, at least he would have mentioned the location e.g. in Migori Town. In the absence of that crucial piece of information, the court cannot confirm if at all there is a matrimonial home in existence in the first place. Besides, the court cannot grant an order of injunction against a property that is unknown. This is an issue that can only be resolved at the hearing.
18. The upshot is that, the Applicant has failed to establish that she has a prima facie case with high chances of success or that she will suffer irreparable loss if the order of injunction is not granted. Thirdly, there is no evidence that the balance of convenience tilts in her favour. The application dated 5/9/2019 has no merit and the same is dismissed. Costs shall be in the cause.
19. For avoidance of doubt, the interim orders issued on 28/10/2019 are hereby vacated.



**DATED, DELIVERED AND SIGNED AT MIGORI THIS 26TH DAY OF MAY, 2022**

**R. WENDOH**

**JUDGE**

**Ruling delivered in the presence of:-**

No appearance for the Plaintiff

Daniel Obado Adima for the Defendant

**Nyauke** Court Assistant

