



**EKM v LM'I (Matrimonial Cause E005 of 2022)
[2022] KEHC 13393 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MATRIMONIAL CAUSE E005 OF 2022
EM MURIITHI, J
SEPTEMBER 30, 2022
IN THE MATTER OF MATRIMONIAL PROPERTY ACT, 2013
AND
IN THE MATTER OF ARTICLE 45(3) OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF ORDER 37 OF THE CIVIL PROCEDURE RULES
BETWEEN
EKM PLAINTIFF
AND
LM'I DEFENDANT**

RULING

1. On 9/3/2022, the applicant filed her Notice of Motion dated then brought under Order 40 Rules 1, 2 & 3 of the *Civil Procedure Rules*, Sections 1A, 1B & 3A of the *Civil Procedure Act* and Section 17 of *Matrimonial Property Act*, 2013. That application was heard in chambers on 11/3/2022 where the court issued an order for status quo to be maintained for 7 days. The unspent orders therein are:
 3. That pending the hearing and determination of this Originating Summons, the Honorable Court be pleased to issue an of inhibition inhibiting any dealings with LR Nos. Ntima/ntakira/xxxx, Ntima/ntakira/xxxx, Plot No. Txxx Gakoromone and Plot No. xxx Kithima Maili Saba.
 5. That pending the hearing and determination of this Originating Summons, the Honorable Court do issue an order of temporary injunction against the respondent restraining the defendant/respondent from selling, transferring, using as collateral or in any way dealing with any of motor vehicle Reg. No. KAT xxxT Toyota Rav 4.



6. That pending the hearing and determination of this Originating Summons, the Honorable Court do issue an order compelling the Defendant to pay to the plaintiff Ksh. 60,000 per month for upkeep till the plaintiff is restored to her matrimonial house and/or [particulars withheld].
7. That costs of this suit be provided for.
2. The grounds upon which the application is founded are set out in the body of the application and supporting affidavit of EKM, the applicant herein sworn on even date. She avers that she and the respondent are lawfully married and have lived together as husband and wife for over 24 years. They solemnized their union on 30/10/1997 at Assistant Registrar's House Nanyuki under Mohammedan Marriage, Divorce and Succession Act, Cap 156 of the Laws of Kenya, and were blessed with 3 issues. In the course of their marriage, they acquired matrimonial properties worth over Ksh.50,000,000 comprising of real estate, [particulars withheld] business and motor vehicles, most of which are registered in the respondent's name to hold in trust for the family. They established [particulars withheld] (henceforth called the shop) which she solely run, and managed from its inception in 2007 growing its value to Ksh.6,000,000. She attributes the success and growth of the said shop to her selfless efforts and contribution. She avers that she solely paid taxes on behalf of the said shop until 2016 when the respondent changed its KRA registration details. She accuses the respondent of misrepresenting to her that he only had one wife, but she later learnt that he had 4 other wives.
3. She avers that the respondent assaulted her when she questioned him about his many extra marital affairs. When their marriage broke down, she instituted divorce proceedings in Nyeri Kadhis Court, and converted back from a Muslim to a Christian. The respondent would insult her in the presence of his son from his 1st wife namely K and employees, in a bid to evict her from the Shop. As if that was not enough, the respondent became very violent and changed the shop to his name. In a calculated move to frustrate her efforts of running the shop, the respondent secretly took her bank statements and used them to procure a bank loan of Ksh.4,000,000, which money he squandered. Unable to bear the frustrations any longer, she prematurely retired, only to be called a parasite by the respondent soon thereafter. In June 2019, she slipped outside their compound, fractured her leg and had K-nails fixed. While she was recovering from the said injury, the respondent, after unsuccessfully trying to obtain the log book of her Motor Vehicle Registration No. KCL xxxF, descended on her with blows and kicks thereby re-fracturing her leg. The respondent's thirst for women deepened and he eventually kicked her out of their matrimonial home on/or about 2/6/2021, leaving her homeless and destitute. She avers that they have rental houses on their matrimonial properties fetching monthly income of Ksh.95,000 and the shop which generates at least Ksh.150,000 per month. She wants the respondent to be ordered to be giving her Ksh.60,000 monthly, since she also contributed to the acquisition of the properties. After she got married to the respondent, he forced her to sell her own plot No. 1xxb Maritati Market worth Ksh.1,000,000, so that they could develop his plot No. 1xx Ngusishi Market. After the sale of plot No. 1xx Ngusishi, the respondent used the proceeds thereof to purchase and develop L.R No. Ntima/ntakira/xxxx, which is their matrimonial home. Plot No. Kithima Maili Saba xxx, although purchased by the respondent was developed using proceeds for the shop, and she claims a 50% share. Plot Nos. Gakoromone Txxx and Nyaki/nkabune were equally bought with the proceeds from the shop, and she claims 80% and 90% shares thereof respectively. She wants a 95% share of motor vehicle Registration No. KCL xxxF Toyota Fielder, which she singlehandedly purchased, and an equal share of Motor vehicle Registration No. KAT xxxT. She avers that she obtained loans from various financial institutions in order to be able to purchase or develop the aforementioned properties. She prays for a share of her properties acquired during the subsistence of the marriage, save for Ntima/ntakira/xxxx which is the matrimonial home of the other wives.



4. The application was opposed by 2 replying affidavits of LM'I, the respondent herein, sworn on 10/5/2022 and 16/5/2022. He deposes that the application is an afterthought, unmerited and only meant to frustrate him, because the applicant wants to reap where she did not sow. Although he admits that the applicant is his wife, he contends that she left the matrimonial home on her own accord when he asked her to give him the log book for KCL xxxF, so that he could use the proceeds from its sale to offset a loan they took at I & M Bank. He avers that the said motor vehicle was solely purchased by him as exhibited by the annexed copy of agreement and payment receipt. He avers that the applicant on one occasion stole the said motor vehicle while he had parked it outside the court precincts, took it to Muthara and attempted to remove the car track. He reported the loss to the police vide OB No 32/22/11/2021 but when the vehicle was tracked and recovered in someone's house, he was instead charged with giving false information. He accuses the applicant of fraudulently transferring the above motor vehicle to herself when he gave her money to go and settle a loan they had taken to purchase it. He avers that he is the lessee of the premises where the shop is and he has been paying for its electricity and water bills alone. He has sublet the said premises to tenants who pay rent to him, and although the applicant has occasionally been assisting in selling goods at the shop, she cannot claim a share of the same, as it proceeds are used to sustain the family, service the loan with I & M Bank and pay school fees for all the children. He purchased Motor vehicle KAT xxxI KAV 4 from his son-in-law, but when he completely refused to transfer it to him despite having paid for it in full, he instituted a case to have him compelled to do so. He avers that Plot No. Txxx Gakoromone was sold to offset the loan they took with I & M Bank. He avers that he bought Ntima/ntakira/xxxx way back in 1992 before he married the applicant, and is where his first wife and her children live while Plot No. 3xx Kithima Maili Saba was given to him by a counselor. He avers that he bought Nyaki/nkabune/xxxx for the applicant and therefore she cannot claim to be destitute and a pauper. He avers that all his other wives and sons have also been assisting in running the shop, and the applicant is being selfish in her demands. He avers that his fourth wife resides in Parcel No. Ntima/ntakira/xxxx together with the applicant's children. He contends that the applicant ran away on her own accord when she realized that the bank had advertised one of the properties for sale, and her claim for a 95% share of most of the properties is unsustainable because her contribution towards their purchase is nil. According to him, the value of the properties he owns is merely speculative as no evidence has presented towards that end. There is also no evidence to show that he intends on disposing any of his properties.
5. The applicant swore a supplementary affidavit on 3/6/2022 insisting that she was chased out of her matrimonial home, after being assaulted by the respondent. After reporting the matter to the police, she was issued with an OB Number and a P3 form but the matter has not taken off as the respondent has been frustrating the process. She avers that she had nothing to do with the loan with I & M Bank, which was taken by the respondent and his son MK under the name [particulars withheld]. She avers that the said loan was taken in order to develop Plot No. 21xx where the respondent lives with his first wife, and thus it would be unfair to require her to repay the same. She maintains that she purchased motor vehicle Registration No. KCL xxxF using a loan she took with NCBA Bank. She avers that the respondent only travelled to Mombasa to collect Motor vehicle Registration No. KCL xxxF after which he was issued with a delivery note. She contends that she is the registered owner of Motor Vehicle Registration No. KCL xxxF, and the respondent was charged with giving false information when he reported to the police that she had stolen his car. She avers that she is the one who has been paying rent, electricity and water bills for the shop since its commencement, as shown by the annexed single permit. She even secured loans from KWFT and Family Banks in order to buy stock for the shop, and thereafter built rental houses which the respondent continues to enjoy the income therefrom alone. In refuting the allegation that the proceeds from the shop are used to support the children, she avers that all the children, save for one YM'I and ZN, are independent adults. She avers that the other houses have



their own businesses, which include [particulars withheld] Co. Limited and [particulars withheld], which they depend on. She avers that she is the one who purchased land parcel No. 10xx, but has never entered the said parcel due to a pending court case. When she met the respondent, she sold all her assets and used the proceeds therefrom to purchase Plot No. 1xx Ngusishi, which was subsequently sold in order to buy land parcel No. 38xx, their matrimonial home.

Analysis and Determination

6. Having read the application and the responses thereto, the issue that this court discerns for determination is whether the prayers sought should issue.
7. The undisputed facts from the pleadings are that the parties herein are still legally married, although the applicant had commenced divorce proceedings in 2004. They continued to live together as husband and wife until 2021, when the applicant left the matrimonial home. Whereas the applicant contends that she was kicked out by the respondent, the respondent maintains that the applicant eloped on her own volition.
8. At the core of these proceedings is an [particulars withheld] Shop, which each party claims to be theirs. It is said to be generating income which is only enjoyed by the respondent, to the applicant's detriment.
9. Section 17 of the *Matrimonial Property Act*, provides that, "(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person. (2) An application under subsection (1)— (a) shall be made in accordance with such procedure as may be prescribed; (b) may be made as part of a petition in a matrimonial cause; and (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes."
10. Section 12 of the *Matrimonial Property Act* provides that, "(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise. (2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds. (3) 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."
11. There is proof that the respondent has been cruel and physically abusive to the applicant as seen from the divorce proceedings. The respondent's cruelty was reported to Meru Police Station vide OB No. 37/02/06/2022. This court notes the contents of the P3 form dated 29/10/2021 and filled by Dr. Seth M. Maare on 5/11/2021. The respondent contends that his other wives reside in Plot No.s Ntima/ Ntakira/ 2xxx and 3xxx, while the applicant avers that she used to live in Plot No. 3xxx.
12. There is no doubt that the applicant was actively involved in the running of the shop as shown by the correspondences annexed to her supplementary affidavit. It is admitted by the respondent in his replying affidavit that the shop has tenants who pay rent to him.
13. This court finds that the applicant, having been unlawfully kicked out of her matrimonial home, with no income to support herself together with her children, one of whom is still a minor, is deserving of the orders sought. Although section 12(3) of the *Matrimonial Property Act* outlaws eviction of a spouse from their matrimonial home during the subsistence of the marriage, in this case however, it would be impractical to order the applicant to be restored to her matrimonial home, which, as admitted by the respondent, is currently occupied by his 4th wife.



Orders

14. In the interests of justice and to preserve the substratum of the Originating Summons, the court allows the application dated 9/3/2022 in the following terms:

1. That pending the hearing and determination of this suit, an order of inhibition is hereby issued inhibiting any dealings with LR Nos. Ntima/ntakira/3xxx, Ntima/ntakira/2xxx, Plot No. Txxx Gakoromone and Plot No. 3xx Kithima Maili Saba.
2. That pending the hearing and determination of this suit, an order of temporary injunction is hereby issued restraining the respondent from selling, transferring, using as collateral or in any way dealing with any of motor vehicle Reg. No. KAT xxxT Toyota Rav 4.
3. That pending the hearing and determination of this suit, an order is hereby issued compelling the respondent to pay to the applicant a monthly sum of Ksh. 60,000/=
4. Each party to bear its own costs.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER, 2022.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

M/S Thurania Atheru & Co. Advocates for the Plaintiff.

M/S J. Nelima Associates & Co. Advocates for the Respondent.

