



REPUBLIC OF KENYA



KENYA LAW
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**NNN v DKC (Matrimonial Cause E018 of 2021)
[2022] KEHC 13353 (KLR) (Family) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13353 (KLR)

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

FAMILY

MATRIMONIAL CAUSE E018 OF 2021

MA ODERO, J

SEPTEMBER 30, 2022

BETWEEN

NNN APPLICANT

AND

DKC RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion application dated November 2, 2021 by which the applicant NNN seeks the following orders:-

- “1. Spent.
2. Spent.
3. that pending hearing and determination of this application court be pleased to issue an order restraining the respondent himself, his agent, his servant, or anyone acting on his behalf from selling, transferring, alienating, or disposing of the suit properties to wit.
 - a) land reference number Kamulu Plot No xx/LR xxx/xxx under Certificate No xxx (Developed consisting of the matrimonial home).
 - b) motor vehicle registration No KBT xxxX Toyota Town Ace – colour white
 - c) motor cycle registration No KMEN xxxA – Shineray – Colour Green.



- d) M-pesa business with a float worth Kshs 74,000/- only.
 - e) shop on the rented plot at Buruburu Plot.
 - f) livestock at our matrimonial home: 7 cows, two (2) calves, 23 goats, 13 hens, four turkey ducks.
 - g) household goods bought during the subsistence of the marriage as per the annexed schedule.
4. That pending hearing and determination of the main suit herein, the honourable court be pleased to issue order restraining the respondent himself, his agent, his servant, or anyone acting on his behalf from selling, transferring, alienating, or disposing the suit properties as listed above.
 5. That this honourable court is pleased to grant such other or further orders as it may deem fit to grant.
 6. That costs of this application and suit be met by the respondent.”
2. The application which was premised upon section 1A, 1B, & 3A of the Civil Procedure Act, order 40 rule 1, order 51 of the Civil Procedure Rules and sections 2,6,7,9,12 and 17 of the Matrimonial Property Act and all other enabling provisions of the law is supported by the affidavits of even date sworn by the applicant.
 3. The respondent DKC opposed the application through his Replying Affidavit dated November 29, 2021. The matter was canvassed by way of written submissions. The applicant filed the written submission dated May 26, 2022 whilst the respondent relied upon his written submission dated June 20, 2022.

DIVISION - Background

4. The parties herein are a couple who got married to each other in the year 2004 under Kikuyu Customary Law. They cohabited as man and wife for a period of seventeen (17) years. The applicant avers that in the year 2021 the respondent kicked her out of the matrimonial home. The applicant then filed a Petition for Divorce in the Milimani Courts being Divorce Cause No E1158 of 2021. That cause is still pending determination.
5. The applicant states that during the subsistence of the marital union the couple purchased certain properties. The applicant avers that she contributed either directly or indirectly to the acquisition of the said assets.
6. The applicant states that she is apprehensive that the respondent may proceed to dispose of the matrimonial properties during the pendency of the divorce proceedings. She filed in the High Court the originating summons dated November 2, 2021 seeking declaratory orders in respect of the named properties. Contemporaneously with that originating summons, the applicant filed this Notice of Motion seeking presarvatory orders in respect of the same property.
7. As stated earlier the respondent opposed the application. The respondent confirms that he was married to the applicant. He stated that their marriage began to experience problems in the year 2016 due to the couples inability to bear a child. That the applicant walked out of the matrimonial home in July 2021. The respondent claimed that prior to the applicants departure the couple resided in a standalone rented property and not at LR Number Kamulu Plot No xx/ LR xxx/ xxx which the applicant claimed was the matrimonial home.



8. The respondent submits that the fact that the applicant has filed a Petition for Divorce does not amount to a dissolution of the marriage. The respondent states that the livestock at the home were all sold during the COVID period. He states that he purchased Plot No xx Kamulu alone and has been servicing the loan relating to purchase of said property alone.
9. The respondent further avers that the M-pesa business was being run by the applicant who has full control of the float. That motor vehicle registration KBT xxxX Toyota Ace was written off after an accident and no longer exists. That the shop in Buruburu is rented and cannot be deemed to be a matrimonial property. He urges the court to dismiss this application in its entirety.

DIVISION - Analysis and Determination

10. I have carefully considered the application before this court, the reply filed by the respondent as well as the written submissions filed by both parties. The only issue for determination is whether the preservative orders sought by the applicant ought to be granted.
11. The main bone of contention between the parties is whether the named properties constitute matrimonial property. Section 6 (1) of the Matrimonial Property Act provides 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 immovable and movable property jointly owned and acquired during the subsistence of the marriage.
12. Whilst both parties agree that the properties in issue were acquired during the subsistence of their marriage, the position of the respondent is that since he paid for the said properties alone, the applicant has no stake in the same
13. The question of whether or not the properties constitute matrimonial property as well as the question of whether or not the applicant is entitled to a share of said properties cannot be determined at this interlocutory stage. These are issues, which can only be determined after a full hearing of the suit at which both parties will be accorded the opportunity to adduce evidence in support of their position.
14. At this stage the court is only being asked to determine whether the injunctive orders being sought are merited. The circumstances under which an interlocutory injunction may be granted were set out in the celebrated case of *Giella vs Casman Brown & Company Limited* (1972) E.A. as follows:-
 - (1) The plaintiff must establish that they have a *prima facie* case with a high probability of success.
 - (ii) The plaintiff must demonstrate that they are likely to suffer irreparable loss that cannot be adequately compensated by an award of damages.
 - (iii) In the event the court is in any doubt the case is to be declared on a balance of probability.
15. The applicant stated that she was apprehensive that the respondent may move to dispose the named properties before the main suit is heard and determined. I am of the view that if the properties are disposed of then the applicant stands to suffer irreparable harm.
16. That being said the respondent stated that the livestock had been sold off during the COVID period. The applicant has not demonstrated that the livestock still exist. Regarding the motor vehicle



Registration KBT 680X the respondent stated that he said vehicle was written off a the result of an accident. In her written submissions, the applicant concedes that indeed, the said vehicle was written off after being involved in an accident. The court will therefore not make any orders in respect of the livestock or the said vehicle.

17. Finally regarding the rented shop in Buruburu this property being a rented shop does not belong to either the applicant or the respondent. The owner of the said shop is not a party to these proceedings and has not been heard regarding the orders being sought. Accordingly, will not make any orders in respect of this rented shop. Likewise, the applicant has not specified what household goods she seeks orders in respect of.
18. To merely cite ‘household goods bought during the subsistence of the marriage’ is too vague. What “household goods” were these – were they tables, chairs, plates cups etc. The nature of said goods is not specified. Court orders must be specific. The court will not issue vague orders.
19. The only asset remaining is the Plot No xx, Kamulu, which the applicant claims was the matrimonial home. The respondent denies that this was their matrimonial home and states that he singlehandedly purchased the said plot. The question of whether or not this property constitutes matrimonial property is yet to be determined. In the meantime, the said property ought to be preserved. Accordingly, I do allow this application and make the following orders.
 - (1) An order be and is hereby issued restraining the respondent, his agents or assigns from selling, transferring, alienating, or disposing of Land Reference number Kamulu Plot No 34/LR xxx/xxx under Certificate No xxx pending the hearing and determination of the originating summons.
 - (2) Each party to meet their own costs.

DATED IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022.

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MAUREEN A. ODERO

JUDGE

