



**EWM v CGM; CGM (Interested Party) (Matrimonial Cause E056 of 2021)  
[2022] KEHC 13751 (KLR) (Family) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13751 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MATRIMONIAL CAUSE E056 OF 2021  
M THANDE, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**EWM ..... APPLICANT**

**AND**

**CGM ..... RESPONDENT**

**AND**

**CGM ..... INTERESTED PARTY**

**RULING**

1. The applicant EWM filed the originating summons (OS) herein dated 6.9.21 against the respondent claiming seeking in the main a declaration that the properties listed below which are registered in the name of the respondent or under his control, are jointly owned by the parties and held in trust for the applicant and that she is entitled to 50% of the same. The following are the properties:

- LR No xxxx/xx, Mlolongo
- LR No xxxx/xx, Mlolongo
- LR No xxxx/xxx, Athi River
- LR No xxxx/xx, Athi River
- 10 acres in Nanyuki bought in 2015
- Motor vehicle KCU xxxZ Toyota
- Motor vehicle KCM xxxx Toyota
- Motor vehicle KBZ xxxx Toyota



Motor vehicle KDC xxxx Lorry

KBZ xxx Van

KBJ xxx S Wagon

KBQ 935H S Wagon

KBL xxx S Wagon

Blue Bubble Homecare Limited

Apricot Holdings Limited

Absa Bank account No xxxx; Blue Bubble Homecare Products Limited

Equity Bank account No xxxx; Blue Bubble Homecare Products Limited

Equity Bank account No xxxx; CGM

Equity Bank account no xxxx; Blue Bubble Homecare Products Limited; Branch Oasis (Uganda)

2. In addition to the OS, the applicant filed an application of even date, seeking orders restraining the respondent, his agents or people acting under his instructions, pending the hearing and determination of the suit, from alienating, charging, disposing, transferring and/or for any connected purposes the following properties acquired during the subsistence of the between the parties:

LR No xxxx/xx, Mlolongo

LR No xxxx/xx, Mlolongo

LR No xxxx/xxx, Athi River

LR No xxxx/xx, Athi River

10 acres in Nanyuki bought in 2015

Motor vehicle KCU xxx Toyota

Motor vehicle KCM xxx Toyota

Motor vehicle KBZ xxx Toyota

Motor vehicle KDC xxx Lorry

KBZ xxx Van

KBJ xxx S Wagon

KBQ xxx S Wagon

KBL xxx S Wagon

Blue Bubble Homecare Limited

Apricot Holdings Limited

Funds in bank accounts Absa Bank, Equity Bank held by Blue Bubble Homecare Products Limited and account in Equity Bank held by the respondent.

3. The applicant averred that the parties began to cohabit in 2009 and are blessed with 3 minor children. The applicant further stated that on October 27, 2020, the respondent moved out of the matrimonial home and Divorce Cause No E693 of 2021 between the parties has been filed. It is the applicant's contention that the respondent has threatened to dispose of the matrimonial properties. She urged



that unless the orders sought are granted, she stands to lose enormously, while no prejudice will be suffered by the respondent.

4. The respondent opposed the application vide his replying affidavit sworn on 2.11.21. He admitted to cohabiting with the applicant and having 3 children with her but denied the existence of any marriage between them. He denied that the applicant made any contribution towards the acquisition of the listed properties and further denied that the same are in his name. He further stated that any property in the name of a company does not belong to him and that he is an employee of the same. The only property that was in his name was motor vehicle KBZ xxx which he sold prior to the filing of this case. The same was sold to enable him support his family due to the economic difficulties brought about by the Covid-19 pandemic. He denied that the applicant stands to suffer any prejudice and stated that the orders granted will affect his operations.
5. There is a second application herein. The second application dated 2.11.21 is filed by C (C), seeking to be joined in these proceedings as an interested party. He also seeks orders setting aside, discharging or varying the orders of 8.9.21. Charles' interest in the matter herein is motor vehicle KBZ xxx, which he claims he purchased from the respondent and of which he is the bona fide registered owner. He asserted that the orders were granted unlawfully, unprocedurally and unjustly as the applicant did not exhibit ownership documents. He prayed for the immediate release of the said motor vehicle to him.
6. The applicant opposed the application vide her grounds of opposition dated 23.11.21. Her grounds are that motor vehicle KBZ xxx is not available for transfer on account of the orders of 14.9.21 by this court restricting transfer. The applicant further contends that the application is bad in law and seeks to set aside the orders of the court. She termed the application a scheme between the respondent and Charles to defeat the orders of this court of 14.9.21.
7. The third application is by the applicant and is dated 10.11.21 seeking the following orders:
  1. Spent.
  2. Spent.
  3. This honourable court be pleased to make a factual finding that the respondent's agents, servants, employees, nominees and assigns herein is ex facie in contempt of clear court orders made on September 14, 2021.
  4. This honourable court do issue a notice to the respondent's agents, servants, employees, nominees and assigns requiring the aforesaid to show cause why contempt of court proceedings should not be commenced against them personally.
  5. In the event the respondent's agents, servants, employees, nominees and assigns fail to show cause as set out in paragraph (4) this honourable court do proceed to cite the aforesaid respondent's agents, servants, employees, nominees and assigns of contempt of the order issued on September 14, 2021 and to impose a sentence upon them as stipulated by law.
  6. That this honourable court be pleased to convict the respondent's agents, servants, employees, nominees and assigns for contempt and sentence them to civil jail for a period of six months or any other period that this honourable court will deem fit and appropriate in the circumstances.
  7. That costs of this application be provided for.
8. The grounds upon which this application is premised are that on 14.9.21, this court issued orders prohibiting the respondent from alienating, charging, disposing of or transferring the suit properties. The order was served on the respondent on 16.9.21. To defeat justice, the respondent has been



disposing of the suit properties in respect of which the orders of 14.9.21 were issued. The applicant stated that the children's court in Case No E498 of 2021 between the parties directed that Motor vehicle KBZ 249G be preserved for use by the parties' children. A recent search shows that the motor vehicle is in the name of C, having been transferred in spite of the order. The applicant accused the respondent and C of entering into an agreement backdated to 2.7.21 and 2.9.21 in respect of the motor vehicle, with a view to defeating justice.

9. C opposed the application vide his replying affidavit sworn on 16.11.21 by which he denied the allegations by the applicant. He contended that the orders in question were made in his absence and are prejudicial for denying him his right to property. He asserted that he purchased the motor vehicle lawfully, legally and procedurally. At the time the orders were made on 14.9.21 the vehicle already belonged to him, having been issued with the logbook on 1.9.21. He denied the existence of any order directing that the motor vehicle be preserved for the children. Charles further stated that the date in the agreement of 2.9.21 was an error and that the agreement was signed on 2.7.21 a fact confirmed by the advocate who drew the agreement vide an affidavit sworn on 16.11.21.
10. In his replying affidavit sworn on 17.11.21, the respondent opposed the application and aligned himself with the sentiments expressed by Charles in his replying affidavit.
11. Parties filed their written submissions which I have duly considered. It is noted that the applicant's submissions are confined to the applications dated 2.11.21. and 10.11.21. No submissions were made in respect of the application dated 6.9.21. On his part, the respondent submitted on the application dated 6.9.21 while C submitted on his application dated 2.11.21.
12. The issues that fall for determination are:
  - i. Whether the orders of 14.9.21 are prejudicial to Charles.
  - ii. Whether Charles should be joined in the proceedings herein as an interested party.
  - iii. Whether the respondent and interested party are in contempt of Court.
  - iv. Whether the orders sought in the application dated 6.9.21 should be granted.

### **Whether the Orders of 14.9.21 are Prejudicial to C**

13. It is necessary at the outset to look at the orders made by this court on 8.9.21 and issued on 14.9.21. The court restrained the respondent, his agents or people acting under instructions from alienating, charging, disposing of, transferring any properties acquired during the subsistence of the marriage between the parties. The orders which were to remain in force until 11.11.21 were extended on 17.3.22. The orders covered the motor vehicle which C claims to be his.
14. The applicant submitted that the matter herein relates to matrimonial property dispute between the applicant and the respondent. Her contention is that the sale of the motor vehicle by the respondent to C was a crafty scheme to defeat the ends of justice. She claims that the agreement for sale was dated 1.9.21. She submitted that the court issued the said orders impartially in adherence to article 50(1) of the Constitution, in order to mete out justice to the parties herein. In view of this, the applicant argues that the orders are not prejudicial to C.
15. On his part, C submitted that at the time the orders were issued, he had already been registered as the owner of the motor vehicle. He contended that the applicant ought not to have included the motor vehicle in the suit herein as the same does not belong to the respondent. When confronted on the discrepancy in the date of the agreement in respect of the motor vehicle, Charles stated the agreement was entered into on 2.7.21 and that the date of 2.9.21 on page 1 was a genuine typographical error.



16. I have looked at the exhibited documents relating to the motor vehicle. Page 1 of the agreement for sale indicates that it was made on 2.9.21. The signature page however indicates that both the respondent and Charles signed the same on 2.7.21. The logbook in favour of C indicates that the same was issued on 1.9.21. Had the agreement been entered into on 2.9.21 as contended by the applicant, then the logbook would not have been dated 1.9.21.
17. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* stipulates:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
18. The applicant desired the court to believe that the sale of the motor vehicle by the respondent to C was a scheme to defeat justice. She was under a legal obligation to place before this court, evidence to support her claim. She has however failed to do so and her burden of proof remains undischarged. Accordingly, based on the material before me and in the absence of evidence to the contrary, I find that the motor vehicle belongs to Charles and belonged to him on 8.9.21 when the orders were made. Having so found, it follows that the orders issued on 8.9.21 and extended on 17.3.22 are prejudicial to him.

#### **Whether Charles Should Be Joined In The Proceedings Herein As An Interested Party**

19. In his application dated 2.11.21, Charles seeks to be joined in these proceedings as an interested party, because the said motor vehicle which belongs to him has been included in the properties in respect of which the applicant seeks orders in this suit. His interest in the suit is limited to the motor vehicle in respect of which the orders of 8.9.21 were issued.
20. The applicant opposes the application and contended that the suit herein touches on the matrimonial property acquired during the subsistence of the marriage between her and the respondent. She termed Charles a busy body without locus to challenge matrimonial proceedings. She further submitted that Charles purchased the motor vehicle which was the subject of the proceedings herein. To allow the orders sought in the application dated 2.11.21 will be tantamount to rewarding a busybody and a contemnor. The applicant urged the court to dismiss the application.
21. *Black's Law Dictionary* tenth edition defines an interested party as:
- A party who has a recognisable stake (and therefore standing) in a matter.
22. In the case of *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR, Mativo, J (as he then was) considered an application for joinder and had this to say:
- The elements to be to be satisfied where a party seeks to be enjoined in proceedings as an interested party are that:-
- a. the intended interested party must have "an identifiable stake"
  - b. or legal interest
  - c. or duty in the proceedings



23. The learned Judge went on to state:

A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights.[4] In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established.[5] It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty in the proceedings directly identifiable by examining the questions involved in the suit.

24. In the case of *Justin Kithinji Nderi & 2 others v Director of Public Prosecutions & another; Njiru Micheni Nthiga (Interested Party)* [2020] eKLR, Limo, J considered an application for joinder and stated:

"Similarly in *SKOV Estate Ltd & 5 others v Agricultural Development Corporation and another* Hon Justice Sila Munyao held similar views this:

"18. In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation..."

25. C has demonstrated to the satisfaction of the court that he is the owner of the motor vehicle. Adverse orders have been issued against him with regard to the motor vehicle. Accordingly, he has a legal and identifiable interest and also a duty to participate in these proceedings. The rules of natural justice require that he must be given an opportunity to be heard. Further, given the allegations by the applicant that the motor vehicle was sold to Charles during the pendency of these proceedings, she ought to have been at the forefront in seeking his joinder. Indeed, it will be in the applicant's interest that C be joined in these proceedings, to enable her demonstrate that the sale of the motor vehicle was sold to him to defeat justice as she alleged and to get appropriate orders, if successful.

### **Whether the Respondent and interested party are in contempt of Court.**

26. The applicant seeks that the Respondent and C be found to be in contempt and punished for disobeying the court orders She contended that the Court issues orders on 14.9.21 which prohibiting the Respondent from alienating, charging, disposing of or transferring the suit properties. The order was served on the Respondent on 16.9.21. To defeat justice, the respondent sold the motor vehicle yet the Children's Court in Case No. E498 of 2021 between the applicant and the Respondent directed that Motor vehicle KBZ xxx be preserved for use by their children.

27. As the court has found, the motor vehicle was sold on 2.7.21. By the time the OS and application for injunction dated 6.9.21 were filed and the orders issued on 14.9.21, the motor vehicle had already been registered in favour of C. Accordingly, the orders issued had been overtaken by events and cannot apply to events that had already taken place. In view of this, the Respondent and C cannot be said to be in contempt of the orders issued after the acts giving rise to the alleged contempt.

28. The applicant submitted that the Court in Children's Case No E498 of 2021 between her and the respondent, had made an order preserving the motor vehicle for the children. No such order was



however exhibited. In any event if such order did in fact exist which is denied by the Respondent, the correct forum for seeking the orders sought is the Children's Court and not in this Court.

**Whether the orders sought in the Application dated 6.9.21 should be granted.**

29. The applicant seeks orders restraining the respondent, his agents or people acting under his instructions, from alienating, charging, disposing, transferring the properties listed in the OS, pending the hearing and determination of the suit.
30. The respondent has opposed the application stating that other than the motor vehicle sold to C, none of the other listed properties belong to him.
31. The purpose of any interlocutory orders is to preserve the status quo pending the hearing and determination of the suit. order 40 rule 1 of the *Civil Procedure Rules* provides for cases in which temporary injunction may be granted:
  1. Cases in which temporary injunction may be granted  
Where in any suit it is proved by affidavit or otherwise—
    - a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
    - b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
32. The grant of injunctive orders is discretionary. In the case of *Giella vs Cassman Brown & Company Limited* (1973) E A 358, the court set out the following conditions that an applicant must satisfy for the grant of an interlocutory injunction:

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.
33. The applicant has moved this court under the *Matrimonial Property Act*. In order for the applicant to demonstrate that she has a prima facie case with a possibility of success, she must satisfy the Court that the properties in respect of which she seeks orders are jointly owned by herself and the respondent or by the Respondent alone. Other than listing the properties, the applicant has not exhibited a single document to demonstrate ownership of the properties. The effect of this, is that the court would run the risk of issuing orders on properties that belong to third parties, as it did with the motor vehicle.
34. Further as to the contention that the applicant will suffer irreparable loss if the orders sought are not granted, the court is not persuaded. The applicant did not place any evidence to demonstrate that the suit properties are matrimonial property or that they are registered in the name of the respondent or in their joint names. Notably some of the assets are companies. The applicant has not even told the court who the shareholders of the companies are and what her interest in the said companies is. Similarly, she has listed bank account numbers of the said companies. Due to the nature of the proceedings herein, this court lacks the jurisdiction to make any orders regarding bank accounts held by the said companies.



What would be of interest to the court are any shares held by the applicant and the respondent in the said companies. The applicant has not placed before the court, any material to support her claim over the properties listed in the OS thereby failing to discharge the evidentiary burden placed upon her by section 107 of the *Evidence Act*.

35. Further, even if the applicant had proved to the court that the properties belonged to the respondent, she was still under an obligation to demonstrate to the court that the same were in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree or that the respondent threatened or intended to remove or dispose of the same. This the applicant failed to do. Accordingly, I find that the applicant has not met the test for the grant of a temporary injunction.
36. In the end and in view of the foregoing, I make the following orders:
- i. The application dated 2.11.22 is allowed on terms that CG is hereby joined in these proceedings as an interested party.
  - ii. The application dated 6.9.21 lacks merit and the same is hereby dismissed.
  - iii. The application dated 10.11.21 lacks merit and the same is hereby dismissed.
  - iv. Costs in the cause.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2022.**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... for the Applicant  
..... for the Respondent  
..... for the Interested Party  
..... Court Assistant

