



REPUBLIC OF KENYA



KENYA LAW
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**GJMM v PWK (Matrimonial Cause E012 of 2021)
[2022] KEHC 15683 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15683 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MATRIMONIAL CAUSE E012 OF 2021
RB NGETICH, J
NOVEMBER 24, 2022
IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013
AND
IN THE MATTER OF THE LAND REGISTRATION ACT 2012**

BETWEEN

GJMM APPLICANT

AND

PWK RESPONDENT

JUDGMENT

1. The applicant filed originating summons dated June 18, 2021 seeking an order that the properties listed hereunder are matrimonial property and a declaration that the applicant is entitled to a 50% share of the matrimonial properties.
 - a. Thika Greens House – LR No xxxx/x measuring 42 acres.
 - b. Ruiru East /Juja East Block x/xxxx with rental houses.
 - c. Naivasha/ Maraigushu Block xx/xxxx – 5 acres.
 - d. Samuru/Mutigiri Block x/xxxx.
 - e. Motor vehicle registration Number Kxx xxxx.
 - f. Motor vehicle registration No Kxx xxxx.
 - g. Motor vehicle registration No Kxx xxxx.
 - h. Motor vehicle registration No Kxx xxxx.



- i. [particulars withheld] bar and butchery along Haile Selassie Avenue.
 - j. [particulars withheld] butchery.
 - k. [particulars withheld] rental houses, bar and hotel and lodgings
 - l. [particulars withheld] inn at Thika.
2. Further that the applicant be at liberty to purchase the respondent's share of the above matrimonial property upon valuation or in the alternative, the said properties be sold and the net proceeds of sale be shared between the applicant and the respondent .
 3. The application is premised on the grounds that the respondent is the wife to the applicant having married in the year 1986 and the properties listed above were collectively acquired by the applicant and the respondent during the subsistence of the marriage
 4. The applicant averred that the respondent is alienating the matrimonial property by transferring the same to herself without the consent of the applicant. He added that the applicant and the respondent are not cohabiting together and the respondent has petitioned for divorce at the Thika chief magistrates court.
 5. The application is supported by the affidavit sworn by GJM on June 18, 2021 where he reiterated the grounds of the application.
 6. He further averred that due to the applicant's deteriorating health condition, the respondent has commenced alienating and disposing the matrimonial properties.
 7. He averred that his monthly expenditure on medication is Kshs 30,000/=, which he is struggling to raise as the respondent is misusing the monies channelled into the business resulting in the joint accounts being in overdrafts and if the actions of the respondent are not curtailed, the respondent is likely to face eviction and he is unable to settle elsewhere.

Respondent's response

8. In response, the respondent filed replying affidavit dated September 7, 2021. she averred that she has never been married to the applicant and the properties set out herein are not matrimonial property. She averred that she was married to the late TMM under statute in the year 1994 and they were blessed with four (4) issues of the marriage.
9. She further stated she resided with her late husband in their matrimonial home in Ngong but relocated to live with her children in Thika after the demise of her husband. She stated that the matrimonial house in Ngong was purchased by her late husband and attached copies of the transfer form and LCB consent. She denied cohabiting with the applicant in Ngong and Thika.
10. She further stated that the Thika matrimonial home was purchased from the proceeds of the sale of the Ngong house and the pension of her late husband.
11. She averred that she is a stranger to the properties known as Ruiru East/Juja East Block x/xxxx, Naivasha /Maraigushi block xx/xxxx, Samuru Mutigiri Block x/xxxx and Motor vehicle registration Kxx xxxx and [particulars withheld] Inn Thika.
12. She averred that LR xxxx/x was purchased by BWN, CKN and herself through financing from the Cooperative Bank and the same has since been disposed off . She attached a copy of the bank facility.



13. The respondent further stated that the applicant got married to EM through statute in 1994 and he could not therefore have capacity to conduct any other marriage. In respect to the child sired by herself and the applicant, she stated that the child was born out of a friend's relationship and denied any marriage to the applicant.
14. She further averred that her involvement with the applicant was purely business and at no point did they purchase property jointly and there is no matrimonial property for preservation or distribution by the parties.
15. She urged this court to dismiss the originating summons as the applicant has not come to court with clean hands; that there is no cause of action for determination before this court.
16. Directions were taken to canvass the application by way of a written submission. At the time of working on this ruling, the applicant had not filed his submissions.

Respondent's submissions

17. Counsel for the respondent filed submissions on July 25, 2022 reiterating the contents of the replying affidavit. Counsel submitted that the applicant had no legal capacity to marry the respondent as per section 9 of the Marriage Act which prohibits a married person in a monogamous marriage from contracting another marriage.
18. And further submitted that the properties described by the applicant do not fall under the purview of matrimonial property; that the issue of the marriage between the applicant and the respondent has not been determined.
19. Further, the court has no jurisdiction to determine matrimonial property before the dissolution of the marriage and cited the case of ZSN vs WNO (2019) where the court declined to share out the matrimonial property before the dissolution of the marriage.
20. Counsel urged this court to find the applicant has not met the threshold for granting an injunction should it find it has jurisdiction.
21. On the issue of a prima facie case, counsel submitted that the applicant has never contributed to the acquisition of the assets owned by the respondent and the respondent has not disposed of any property in an attempt to defeat the applicant's claim.
22. The respondent further submitted that the applicant has not demonstrated any damages to be caused if the orders sought are not granted but on the contrary, the respondent will be prejudiced and will suffer irreparable damage; the respondent will suffer embarrassment and will be denied an opportunity to utilize her hard-earned properties. The respondent urged this court to dismiss the applicant's application.

Analysis and determination

23. I have considered grounds of the application, the affidavit in response and the respondent's submissions and find issues for determination as follows:-
 - a. Whether there exist/existed a marriage between the applicant and the respondent and if so whether the same has been dissolved.
 - b. Whether the properties in question are matrimonial property.
 - c. Whether the court should issue the orders sought.



(a) Whether there existed any marriage between the applicant and the respondent and if so whether the same has been dissolved?

24. The onus of proving the existence of a marriage between the applicant and the respondent lies on the applicant as per section 107 of the *Evidence Act* which provides:

' (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 those facts exists.'

25. Section 11(1) (c) of the *Marriage Act* 2014 provides as follows:-

(1) A union is not marriage if at the time of the making of the union

(c) Either party is incompetent to marry by reason of a subsisting marriage.'

26. The applicant's argument is that he was married to the respondent. The respondent stated that the applicant was married by the statute to E in 1994 and she was also married to T in the year 1994 under statute. The respondent denies being married to the applicant. No document was availed to prove the marriage between the parties herein. The respondent however admitted having a child with the applicant born out of friendship relationship between her and the applicant.

27. Further, there is no evidence on record that the marriage that subsisted between each party herein and their spouses were dissolved.

28. From the foregoing, there is no prove that the applicant and the respondent had the capacity to marry, neither is there evidence of marriage being contracted between the applicant and respondent. I therefore find that the applicant failed to prove that a marriage existed between him and the respondent.

(b) Whether the property amount to matrimonial property.

29. Section 6 of the *Matrimonial Property Act* defines matrimonial property as follows:-

(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.

30. It is trite law that for a property to qualify as matrimonial property, the same must have been acquired or developed during the existence of the marriage. The respondent's argument is the property in question does not amount to matrimonial property as no marriage existed between her and the applicant.

31. The applicant on the other hand contends he was married to the respondent. There is however no evidence of marriage, neither is there any proof of dissolution of the marriage if it existed. Apart from stating that there is a divorce case filed in Thika, the applicant has not given any details on the same. Before the division of matrimonial property, there is need to prove that a marriage between parties has been dissolved.

32. In the absence of marriage and its dissolution, a claim for declaration of interest in the property as per section 17 of the Matrimonial Act cannot stand.

33. From the foregoing, the respondent is a stranger to the properties known as Ruiru East/Juja East Block x/xxxx, Naivasha /Maraigushu block xx/xxxx, Samuru Mutigiri Block x/xxxx and Motor vehicle



registration Kxx xxxx and [particulars withheld] Inn Thika. She stated that her matrimonial home was acquired by the husband and not the applicant.

34. Having found there is no existence of a marriage and its dissolution between the applicant and the respondent, the properties listed herein cannot form matrimonial properties.

(c) Whether the applicant is entitled to the reliefs sought?

35. The principles under which an injunction order can be granted have been set in the well-celebrated case of *Giella -vs- Cassman Brown* where a party seeking an injunction must; establish a prima-facie case with a probability of success; likelihood of suffering irreparable damage which cannot be compensated in monetary terms and proof that on a balance of convenience justice tilts in his favour.
36. The applicant contends the respondent is misusing the monies channelled into the business as well as transferring the properties into her name without the consent of the applicant. The applicant further points out that he is terminally ill in dire need of medical care and he spends Kshs 30,000/= monthly on medicines.
37. Having found that there is no proof that the properties listed are matrimonial properties, I decline to allow reliefs sought.

Final orders:-

1. The originating summons is hereby dismissed.
2. Costs to the respondent.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 24TH DAY OF NOVEMBER, 2022.

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RACHEL NGETICH

JUDGE

In the Presence of:

Kinyua/Martin – Court Assistant

No Appearance by Parties

For Applicant – Absent

For Respondent – Absent

