



**MWK v AWW (Civil Suit E012 of 2022)  
[2022] KEHC 15689 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15689 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL SUIT E012 OF 2022  
RB NGETICH, J  
NOVEMBER 24, 2022**

**BETWEEN**

**MWK ..... PLAINTIFF**

**AND**

**AWW ..... DEFENDANT**

**RULING**

1. This is a ruling on notice of motion filed by the plaintiff on March 4, 2022 seeking the following orders;
  - a. Spent
  - b. Spent
  - c. Pending the hearing of the suit, an interim order do issue restraining the defendant from accessing the matrimonial home namely BHC- xx Balcon Estate (Muigai Inn) which is a subdivision of LR No xxxx/xxx within Panorama Estate located at Kenyatta Road Juja within Kiambu County and/or disposing of, selling or otherwise dealing adversely with the said property.
2. The application is premised on the grounds that the plaintiff and the respondent were married under the Kikuyu Customary Law and have been cohabiting as husband and wife since 2002 in different places and are blessed with two(2) issues in the marriage.
3. The applicant averred that the said marriage was dissolved on January 19, 2022 by the Thika Cmcc No 21 of 2020 and after the dissolution, the defendant has been cruel to a point of issuing death threats to her and the children. She averred that defendant has since left the matrimonial property but occasionally visits unnoticed and causes violence. She stated that the property was jointly acquired by the parties during the subsistence of the marriage.



4. The application is supported by the annexed affidavit sworn by MW sworn on March 4, 2022. She averred that the plaintiff and the defendant cannot live under the same roof as he has been violent and molesting the plaintiff. She stated that the matrimonial property was acquired in the joint effort of the parties; however, she played the biggest role in the contribution and development of the properties as she took out various loans.
5. She stated that the defendant has since left the matrimonial house. She prayed to be allowed to retain the matrimonial house where she is living with the children and the defendant be given the Mavoko Plots.
6. In response, the defendant filed a replying affidavit sworn on April 26, 2022 by Anthony Wambugu Wanjohi. He averred that the application is ill-conceived, made in bad faith, frivolous, vexatious and an abuse of the court process and ought to be struck out. He further averred that this court lacks the jurisdiction to issue the orders sought by the Plaintiff as per section 24 of the [Protection Against Domestic Violence Act](#).
7. He stated that the plaintiff is intend at depriving the defendant of the matrimonial home which they built together and the trial court lacked the jurisdiction to bar the defendant from accessing the matrimonial home. The allegation of the purported brutality is aimed at provoking the emotions of the court.
8. On April 28, 2022, directions were taken to canvass the application through written submissions. Both parties complied.

#### **Plaintiff/applicant's Submissions**

9. Counsel filed submissions on June 2, 2022. He submitted that the application is brought under Order 40 rule 1 of the [Civil Procedure Rules](#) and Section 63 of the [Civil Procedure Act](#). It is submitted the trial court failed to rule on the issue of the molestation as the same would amount to depriving the defendant of the matrimonial home. Counsel pointed out that the court is vested with the original jurisdiction in civil and criminal matters as per Article 165(3) (a) of the [Constitution](#).
10. Counsel further submitted that the matter relates to matrimonial property and the test for determining prima facie case is whether the parties were married and whether the property in dispute is matrimonial property; that the plaintiff has established a *prima facie* case. That the plaintiff has proved her contribution to the acquisition of the matrimonial property.
11. Counsel pointed out the plaintiff will suffer irreparable harm if the orders sought are not granted. The balance of convenience lies in favour of the plaintiff and the children who have been staying in the matrimonial home and know no other home.
12. In conclusion, it was submitted that the plaintiff has satisfied the threshold for granting interim orders.

#### **Respondent's Submission**

13. Counsel for the respondent filed submissions on May 31, 2022 and submitted that the application was frivolous, vexatious, inept, bad in law and an abuse of the court process. This court lacks the jurisdiction to hear and determine the issue in question. The Plaintiff had not demonstrated through evidence that the defendant was abusive.
14. The current application amounts to appealing the lower court judgment as the issue of the molestation was determined with finality by the trial court through its judgment dated January 19, 2022. The



plaintiff ought to have filed an appeal against the judgement of the trial within thirty 30 days from the date of delivery of the judgment, as per section 79G of the [Civil Procedure Act](#).

15. Counsel further submitted that the current application is *res-judicata* and urged the court to down its tools. The issues raised in this application of molestation were canvassed in the trial court.
16. Counsel submitted the applicant has not demonstrated the presence of a *prima facie* case with a probability of success. The applicant ought to have deponed two (2) affidavits, one in support of the notice of motion application while the other in support of the originating summons.
17. Counsel submitted that both the defendant and the Plaintiff should be allowed to stay in the matrimonial home and if any party molests the other then criminal proceedings are to be instituted against the offending party.
18. In conclusion, counsel contends that since no appeal has been preferred against the judgment of the lower court, the court lacks the jurisdiction to determine the issue.

### **Analysis and Determination**

19. I have considered the application herein, the respondent's replying affidavit and the parties' submissions. The issue for consideration is whether the applicant has demonstrated sufficient reasons to warrant a grant of an interim order of injunction pending the hearing and determination of the originating summons.
20. Order 40 rule 1 of the [Civil Procedure Rules](#) provides:
  - “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;
    - 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 order.”
21. The plaintiff/applicant in this case seeks interim orders against the defendant. She contends that the defendant is the registered owner of the matrimonial home and she is apprehensive that defendant will dispose of the property as well as interfere with the plaintiff's occupation of the matrimonial property.
22. The plaintiff contends that during the subsistence of the marriage, they jointly contributed to the acquisition of the matrimonial property with her taking up loans to help in the development and construction of the matrimonial property. She annexed copies of the bank statements. On the other hand, defendant contends the only contribution made by plaintiff towards the acquisition and development of the matrimonial house was Kshs 130,000/=. He stated that he contributed to the acquisition of the property and attached an M-pesa statement as well as his loan application form and his bank statement.
23. Defendant contends the interim orders sought by plaintiff will amount to permanently locking him out of the matrimonial home. From the evidence adduced the defendant has since left the matrimonial



home and only the plaintiff/applicant and the children are occupying the house. The applicant seeks interim orders to preserve the property from being disposed off by the defendant.

24. Before granting the orders sought, the court should be satisfied that the applicant has a prima facie case. The applicant submitted that the defendant will dispose off the matrimonial property which is in his name and if the orders are not granted, she will suffer irreparable loss. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR, the court stated as follows;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury”.

25. In the instant case, the applicant is apprehensive that the respondent is likely to dispose off the matrimonial home which is registered in his own name and that they jointly contributed money for acquisition of the property. The applicant also fears for her life and that of the children as the respondent has been abusive on various occasions.

26. Each party here is claiming interest in the property. I note that the applicant has raised issue of violence on part of the respondent and she has fears that he may dispose off the property during the pendency of this suit. I note from averments that the applicant lives with the children and in my view, it will be in the best interest of the children for the applicant to remain in the matrimonial home with the children and at the same time an order to preserve the property be issued.

27. Final orders:

1. Pending hearing and determination of this suit, the applicant and the children to exclusively occupy the matrimonial home namely BHC- xx Balcon Estate (Muigai Inn) which is a subdivision of LR No xxxx/xxxx within Panorama Estate located at Kenyatta Road Juja within Kiambu County and/or
2. The respondent is hereby restrained from disposing, selling or otherwise dealing with property in Order 1 above.
3. The costs shall abide by the outcome of the suit.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**RACHEL NGETICH**

**JUDGE**

**In the Presence of:**

Kinyua/Martin – Court Assistant

No Appearance by Parties

For the Plaintiff – Absent

For the Defendant – Absent

