



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. E006 OF 2020 (OS)

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT, 2013

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF THE LAND ACT NO. 6 OF 2012

ATG aka ATL.....APPLICANT

VERSUS

TML.....RESPONDENT

RULING

1. The applicant ATG aka ATL and the respondent TNL got married on 28th December 1996 and got three children. The marriage was dissolved in Milimani Chief Magistrate's **Divorce Cause No. 554 of 2014** by *decree nisi* dated 30th March 2017 which was made absolute on 30th April 2017.
2. Before this court is their dispute over the determination of matrimonial property. When the respondent filed the originating summons dated 10th July 2020, he sought a declaration that the 4 bedroomed maisonette No. 3 erected on LR No. [...] within Nairobi Area in Lavington Estate along Convent Drive was matrimonial property whose acquisition they had jointly contributed to in the ratio of 75%:25% in his favour. He sought that the property be sold and he gets 75% of the proceeds and the applicant gets 25%. In the alternative, the property be sold and the proceeds be shared equally between them.
3. The applicant opposed the originating summons and made a counterclaim in which she gave a list of properties that she said were matrimonial properties whose acquisition she had contributed to at 75% and the respondent's contribution was 25%. She asked that the properties be sold and she gets 75% of the proceeds. One of the properties was Kajiado/Kaputiei – [...].
4. The instant application is dated 7th September 2020. The applicant seeks that the court does issue a temporary injunction to restrain the respondent by himself, his employees, assigns, servants or agents, from transferring, interfering with, charging, leasing, selling, disposing or constructing on Kajiado/Kaputiei – [...] until the dispute between them has been heard and determined.
5. In response, the respondent denied that the property was part of the matrimonial property. His case was that he inherited the property from his late father following **Succession Cause No. 31 of 2010**.
6. It is common ground that the property is registered in the name of the respondent, but that the applicant had lodged a caution against the title. Without reference to the applicant, the respondent moved to the Chief Magistrate's Court at Kajiado in **Civil Misc. Application No. 8 of 2019** and obtained an order for the Land Registrar Kajiado to remove the caution. When the applicant went to the court with an application seeking the review of the order and to have the Land Registrar reinstate the caution, she was unsuccessful. The court observed that the court could not competently deal with the application as it had no jurisdiction over matrimonial property. The application was struck out.

7. The respondent's contention was that it would be *sub judice* for this court to grant an order of injunction over the property. That cannot be true. The dispute between them at Kajiado court was not about the determination of matrimonial property. When he went to that court he was seeking the removal of a caution. He did not seek an injunction over the property. He filed a miscellaneous application. When he obtained the order, that brought the matter to a closure. There is therefore no suit pending between them at Kajiado court. Effort by the applicant to obtain an order for review was unsuccessful.

8. When the main cause is heard, the court will be asked to determine whether or not Kajiado/Kaputiei- [...], which measures about 50 acres, was part of the parties' matrimonial property. The applicant deposed that the respondent wishes to sell the property, and pointed to the clandestine removal of the caution she had lodged on the title as evidence of the intention to sell. In the supporting affidavit she made reference to other matrimonial properties that the respondent had unilaterally sold. They included LR No. Ngong/Ngong/[....] and motor vehicle KAM [....].

9. The respondent did not deny that he has sold some of the matrimonial properties. He did not deny that he wants to sell the property, although he stated that he was aggrieved when he found out that the applicant had cautioned the land.

10. It is material that the respondent has admitted in his replying affidavit that he is building a house for his new wife on this disputed property. Of course, such construction will materially affect the character and nature of this property that the applicant is seeking to benefit from on account of her marriage and contribution.

11. It is important to point out that the property may have been inherited by the respondent, but the applicant is entitled to show that she subsequently contributed to the development of the property. This is indeed her case.

12. Under **section 9** of the **Matrimonial Property Act (No. 49 of 2013)** –

“9. Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

I will bear this provision in mind in determining this application.

13. It is evident that the respondent is interfering with the disputed property by constructing thereon a house for his new spouse. There is also a demonstrated intention on his part to dispose of the property, or part of it. I am mindful that under **section 2** of the **Act**, contribution to the acquisition of matrimonial property may be financial or non-financial. It is evident to me that the applicant has, at this preliminary stage of the case, shown that she had acquired sufficient spousal interest in Kajiado/Kaputiei-Central/[....] that ought to be protected by order of a temporary injunction until the dispute is heard and determined. I find that she will suffer irreparably if an injunction is not granted.

14. In reaching this decision, I have considered the written submissions by counsel of the parties. I have borne in mind the principles governing the grant of an interlocutory injunction as were enunciated in **Giella –v- Cassman Brown [1973] EA 358**, and in many subsequent cases.

15. The result is that I allow the application dated 7th September 2020 with costs.

DATED AND DELIVERED ELECTRONICALLY NAIROBI THIS 25TH MARCH 2021.

A.O. MUCHELULE

JUDGE