



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 77 OF 2019 (OS)**

**EKM.....APPLICANT**

**VERSUS**

**JDO.....RESPONDENT**

**RULING**

1. The Applicant EKM filed a Notice of motion dated 2<sup>nd</sup> December, 2019 brought pursuant to Section 1A and 3A of the Civil Procedure Act, Order 40 Rule 1 & 2, Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 90, 96(1) & (2), 104(2) of the Land Act and all other enabling provisions of the Law. In her application, she sought the following orders:

i. Temporary injunctive orders restraining the Respondent by himself, his agents and/or employees or whosoever is acting on his behalf from offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with the suit property Plot No. Kisumu/Dago/xxxx, within Ukweli Area, Kisumu Municipality in Kisumu County.

ii. Costs

2. The application was premised on the grounds set out on the face thereof and the affidavit sworn by the Applicant dated 2<sup>nd</sup> December 2019. In her affidavit, the Applicant deponed that she was married to the Respondent for 15 years and were blessed with three issues. However, the marriage irretrievably broke down and she petitioned for a divorce vide Nairobi Divorce Cause No. 1 of 2016 which was heard and determined. Consequently, the marriage was dissolved on 12<sup>th</sup> May 2017.

3. The Applicant averred that during the subsistence of the marriage, they jointly acquired the property known as Plot No. Kisumu/Dago/xxxx, within Ukweli Area, Kisumu Municipality in Kisumu County. She stated that her three children reside on the suit property which houses the matrimonial home. The Applicant claimed that the Respondent locked her and her children out of their home and is apprehensive that the Respondent intends to sell the property. She further claimed that unless the Court intervenes, she will suffer unprecedented and irreparable harm.

4. In response to the application, the Respondent filed grounds of opposition dated 17<sup>TH</sup> July, 2020 and a replying affidavit of similar date. In summation, the Respondent averred that he is the registered proprietor of the suit property having acquired it between the year 2010 and 2011 using his personal savings, and his employment and business income. He stated that he is in possession of the suit property where he lives with the issues of his marriage to the Applicant. He averred that upon purchase, he continuously developed the property by investing his time and resources.

5. The Respondent contended that the Applicant had never made any contribution to the acquisition, development and improvement of the suit property. Further, that after their divorce in 2017 the Applicant continued to reside on the suit property enjoying free housing, security, water, and other amenities until she voluntarily moved out on or about December, 2019. He denied claims by the Applicant that the property was acquired by their joint efforts. He asserted that even though the property was acquired during the subsistence of their marriage, the Applicant never participated in its acquisition or development. He refuted claims that he intends to sell the suit property and asserted that the suit property was his only home and has sentimental value to him and his children. He urged the Court to dismiss the application.

6. In a supplementary affidavit dated 19<sup>th</sup> June, 2020 the Applicant refuted claims by the Respondent that he was in possession of the suit property. She contended that the Respondent stays in Migosi estate in Nairobi and not in the suit property as alleged. Further, that their children stay with her and only visit the property when in Kisumu. She also stated that she still resides on the suit property while in Kisumu and that her personal property is still within the premises. The applicant claimed she found bank forms where the suit property was listed as a guarantee without her consent. She urged the Court to grant the orders sought to protect her interests thereon.

7. The application was canvassed by way of written submissions. In her submissions, the Applicant reiterated the contents of her affidavits and further submitted that her application had met the test for grant of injunctive relief. She submitted that **Section 17** of the Matrimonial Property Act grants rights to an individual to seek a declaration of rights to any property that is contested between that person and the spouse, or former spouse or person. She cited the case of **PWK vs JKG [2015] eKLR** that discussed financial contribution of a spouse, either direct or indirect towards acquisition of property. The applicant herein submitted that her home was at risk of being whisked away yet she had contributed to its acquisition and development.

8. The Applicant further submitted that through her expansive contribution to the acquisition both monetary and non-monetary, and her meticulous involvement in the development, she will suffer irreparable harm if the orders sought are not granted. She cited the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenei [2018] eKLR** where the court defined the term irreparable injury in the context of an injunction. It was further submitted that balance of convenience tilts in her favour as she is at risk of incurring financial loss as a consequence of the loss of her property and becoming destitute.

9. In his submissions, the Respondent stated that the standard on which a prima facie case must be established is well settled. The applicant should not merely state that she has a prima facie case, but should move further to discharge the standard of proof required. He submitted that the applicant had not demonstrated a prima facie case with any chances of success. To buttress this argument, he cited the case of **Nguruman Limited vs Jan Bonde Nielsen & 2 others [2014] eKLR**. Further, the Respondent submitted that with reference to the above cited case, if a prima facie case is not established, then irreparable injury and balance of convenience need not be established. He submitted that the application is therefore hopeless.

10. On whether the applicant risks suffering irreparable harm, the Respondent submitted that the Court must consider the availability of alternative remedies. That where alternative remedies are available and capable of adequately compensating the applicant, then the remedy of temporary injunction need not be issued. He averred that there exists alternative remedies to the applicant, namely an award of damages. He claimed that the applicant had not pleaded that he will be unable to satisfy an award of damages if so ordered and therefore a question of irreparable harm does not arise.

11. In conclusion, the Respondent submitted that the element of balance of convenience may be invoked in favour of the applicant only in instances where the Court is in doubt as to whether the applicant's case raises a prima facie case or whether the applicant stands to suffer irreparable harm. He asserted that since the applicant had not proven the two requirements the issue of balance of convenience does not arise. He cited the High Court decision of **Wild Living Company Limited v Varizone Limited [2019] eKLR** where the Court stated that the conditions to be met before an interlocutory injunction can be granted are expounded in of **Giella v Cassman Brown Co. Ltd 1973 E.A. 358**

12. From the foregoing, the issue for determination is whether the Applicant has made her case to achieve the threshold set for grant of the orders of injunctive relief sought.

13. In the celebrated case of **Giella vs Cassman Brown [1973] E.A 358**, an injunction order can only issue upon proof of a prima facie case with a probability or likelihood of success, proof of irreparable damage that cannot be compensated in monetary terms and, assessment on a balance of convenience on which side justice tilts in favour of. In **Nguruman Ltd vs Jan Bonde Nielsen and 2 others CA No. 77/2012** and **Kenya Commercial Finance Co. Ltd vs Afraha Education Society (2001) Vol 1 EA 86**, the court held that all the three conditions and stages must be applied as separate, distinct and logical hurdles which must be surmounted sequentially.

14. The applicant's case is hinged on the claim that the property in issue is matrimonial property and that the Respondent intends to alienate it without her involvement to her detriment. **Section 2** of the Matrimonial Property Act defines matrimonial home as follows:-

**“Matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”**

Further in **Section 6(1)** of the Matrimonial Property Act provides that:

**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.**

15. The applicant is seeking orders of injunction. The principles for granting of injunctions are well settled in Kenyan law. The court is at this stage required to satisfy itself that there is a prima facie case established. In the persuasive case of **Silvester Momanyi Marube –vs- Guizar Ahmed Motari & Another [2012] eKLR**, Odunga J. held that:-

**“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for Injunction although the court cannot find conclusively who is to be believed or not, the court is not excluded from expressing a prima facie view of the matter and the court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.”**

16. The Court of appeal in **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** considered what constitutes a

prima facie case and held that:

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

17. The Applicant has pleaded that the property was acquired and developed jointly a sentiment which the Respondent vehemently disputes. The parties attached copies of their respective banks statements, deposit slips and other documentary documents in support of their respective claims. The Respondent argues that the suit property does not constitute matrimonial property and that the Applicant did not in any way contribute towards its acquisition and development although he acquired it during the subsistence of their marriage. Further, that the property is registered in his name and he has proprietary rights as he is in possession and occupation of the property. However, these are issues that can only be canvassed at the hearing of the main suit.

18. At this stage, the Court is required to satisfy itself that a prima facie case has been established. In my view, the applicant has demonstrated that she has a case on the distribution of the suit property. However, this is not the only factor that the court will consider in determining whether to grant an injunction or not.

19. The next issue for consideration by the Court is whether the applicant has demonstrated that she is likely to suffer irreparable injury that cannot be compensated by award of damages. As cited by the Applicant in her submissions, the term irreparable injury was defined by the court in the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai [2018] eKLR** 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.

20. In the instant case the applicant is apprehensive that the respondent is likely to dispose of the suit property that is not jointly registered yet it was jointly acquired and developed. This allegation was vehemently denied by the respondent in his pleadings. He claimed that the applicant voluntarily moved out of the property on or about December 2019 and he is in actual possession. On her part, the Applicant claimed that the Respondent has denied her access to the suit property.

21. From the pleadings, there is conflicting evidence of who is in actual possession of the property. The applicant claims that there is an attempt to evict her and goes on further to state that she visits the property when in Kisumu. The respondent states that he resides on the property with the children of their marriage, yet the said children are still residing in Nairobi with their mother, the applicant herein. That being said, the property is registered in the respondent’s name.

22. The importance of this suit to the parties has already been alluded to elsewhere above. In her many affidavits now before the Court, the Applicant has demonstrated that she has an arguable case. The Respondent has equally demonstrated that he shall at the hearing require from the Applicant strict proof of her claimed contribution towards acquisition of the suit property. What cannot be gainsaid is the need to preserve the suit property pending the hearing of the suit.

23. **Order 40 Rule 7** of the Civil Procedure Rules, 2010 as read with **Section 3A and 63 (e)** of the Act grants Court powers to issue Orders as may be necessary for the ends of justice to be met. These powers are so given in a bid to enable Courts to further the overriding objectives of the Act and to ensure that it attains its Constitutional mandate of ensuring that justice is done to all.

24. It is my considered view that in the circumstances of this case the court should make orders for injunctive relief pending the hearing and determination of the suit. The Respondent will not be prejudiced by the injunctive orders. In view of the provisions of **Section 6 (1) (c)** of the Matrimonial Property Act, the Applicant has established a prima facie case with a probability of success. She has also established that she will suffer irreparable loss if the prayer sought is not granted.

25. In **Mobile Kitale Service Station vs Mobil Oil Kenya Ltd & Another [2004] eKLR**, Warsame J held *inter-alia*;

“...an interlocutory injunction is given on the court’s understanding that the defendant is trampling on the rights of the plaintiff. An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where it is shown that the person’s conduct with respect to matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter. The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose - to shield a party against violation of the legal rights a person is seeking.”

26. The upshot of the above analysis is that this property needs to be preserved to avoid one of the parties becoming a holder of a barren result. Accordingly, the application dated 2<sup>nd</sup> December, 2019 is allowed in the following terms:-

i. An injunction be and is hereby issued restraining the Respondent by himself, his agents and/or employees or whosoever is acting on his behalf from offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with the property known as Plot No. Kisumu/Dago/xxxx, within Ukweli Area, Kisumu Municipality in Kisumu County.

ii. Costs to be in the cause.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 29<sup>TH</sup> DAY OF JULY, 2021**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of .....Advocate for the Applicant**

**In the presence of.....Advocate for the Respondent**