



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MATRIMONIAL CAUSE NO. 6 OF 2016

MMM..... APPLICANT

Versus

LOO..... RESPONDENT

RULING

This Ruling relates to the Notice of Motion dated 26th February, 2016 brought under Order 40 Rules 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 3A of the Civil procedure Act and Section 12(3) of the Matrimonial Property Act No. 49 of 2013. It is brought by MMM, the Applicant, against LOO, the Respondent. It seeks the following orders:

- 1. That this Honourable court do certify this application as urgent and proceed to hear the same ex parte in the first instance.**
- 2. That this Honourable court be pleased to issue interim order for injunction restraining the Respondent from selling, leasing, mortgaging, charging, transferring the following properties pending the hearing and determination of the suit:**
 - i. Apartment A4 in Block A of Swara court, Sunrise Park located on L.R. [Particulars Withheld]Imara Daima.**
 - ii. Apartment A6 in Block A of [Particulars Withheld] court, Sunrise Park; located on L.R. [Particulars Withheld]Imara Daima.**
 - iii. House in Phenom Estate Phase 1 Estate Land Reference No. xxx/xxxx Nairobi.**
 - iv. The parcel of Land in [Particulars Withheld] Estate, Eldoret.**
 - v. The parcel of Land L.R No. [Particulars Withheld]in Amboseli.**
 - vi. Motor Vehicle registration number KBF [Particulars Withheld] Toyota Surf.**
- 3. This Honourable Court be pleased to issue an interim order for injunction restraining the Respondent from evicting the Applicant from Apartment A6 in Block A of [Particulars Withheld] court, Sunrise Park located on L.R. [Particulars Withheld]Imara Daima, Embakasi Estate.**
- 4. This Honourable court be pleased to direct that the rental proceeds derived from the property known as Apartment A4 in Block A of [Particulars Withheld] Court, Sunrise Park located on L.R. [Particulars Withheld]Imara Daima be shared equally between the Applicant and the Respondent.**
- 5. That this Honourable court be pleased to issue an interim order for injunction restraining the Respondent by himself, his agents, servants or workmen from doing any of the following acts that is to say, demolishing, removing, bringing down, wasting, damaging or in any manner whatsoever destroying any of the houses, buildings, fences and/or structures erected on any of the properties owned jointly by the Applicant and the Respondent pending the hearing and the determination of this suit.**
- 6. That the cost be paid by the Respondent.**

This application is supported by an Affidavit sworn by the Applicant on 26th February, 2016 in which she deposed that she got married to the Respondent under the Luhya and Teso customs and through customary marriage agreement on various dates as shown in that affidavit; that

they cohabited with the Respondent between 2005 and 2009; that during the pendency of their marriage they acquired, by joint effort and funds, matrimonial properties listed herein; that she filed for divorce which is pending hearing and determination at Milimani Commercial Courts and that the Respondent has since married another woman with whom he has children.

She deposed that the Respondent has been collecting rent from Apartment A4 in Block A of **[Particulars Withheld]** court, Sunrise Park located on L.R. [Particulars Withheld] Imara Daima, Embakasi Estate to her exclusion; that the Respondent is living with his wife and children in the House at Phenom Phase 1 Estate situated on Land Reference No. [Particulars Withheld] Nairobi; that the Respondent is now undertaking sale transactions on Apartment A4 and A6 in Block A **[Particulars Withheld]** Court, Sunrise Park located on L.R [Particulars Withheld] Imara Daima, Embakasi Estate; that he has altered the original sale agreement dated 3rd September, 2007 for Apartments A4 and A6 in Block A of **[Particulars Withheld]** Court, Sunrise Park located on L.R [Particulars Withheld] Imara Daima and that she is apprehensive that if the matrimonial property is not shared, the Respondent will maliciously, fraudulently and unlawfully proceed to dispose of the same and transfer to his wife. She also claims that she is entitled to half of the matrimonial property having made both direct and indirect contribution in the purchase of the same.

The Respondent through his Replying Affidavit dated 25th August, 2017 opposed the Notice of Motion. He deposed that the Applicant did not make any contribution, material or otherwise, in the acquisition of the so-called matrimonial property and the said properties were acquired exclusively and solely through his own funds without any financial or other input by the applicant. He deposed that the Motor vehicle KBF [Particulars Withheld] Toyota surf was imported by him from Japan and the full purchase price of Euro 6,670 was paid by him from his Euro currency account No. xxxxxxxxxxx Standard chartered Bank Eldoret Branch. He further claimed that he purchased L.R No. Eldoret Municipality/Plot No. [Particulars Withheld] (sub-plot) measuring 1/8th situated at Pioneer Estate, Eldoret for Kshs. 625,000/-. He stated that L.R No. [Particulars Withheld], Phenom Estate was purchased by him and that though the Applicant's name appears in the documentation she did not make any contributions. That he paid the full price of 4,700,000/- by instalments which he has explained in his affidavit. On sub plot 58 L.R. No. [Particulars Withheld] Amboseli court, Nairobi, he stated that the sale of the aforementioned plot commenced following a Letter of offer addresses to him dated 8th April, 2011 and that he paid a deposit of Kshs. 400,000/- but since the sale fell through, the deposit he had paid was refunded to him after executing the Deed of settlement. He stated that he used to assist the Applicant with paying school fees for her siblings and also funded her university education expenses. He stated that he has always been financially stable and gives details of his employment history and salary earned. He further stated that the fact that the applicant held a job with **[Particulars Withheld]** International between March, 2007 and March 2008 and that she annexed bank account statements is not and cannot constitute proof of contribution.

On 29th November, 2017 the Applicant filed a Further Affidavit sworn on the same date where she stated in response to paragraphs 4 and 5 of the Respondents Replying Affidavit that various properties were registered in the Respondent's name in trust for her. She further stated that during the period 2005 to 2008 they were residing in Sri Lanka with Malster International and it was mutually agreed that they would jointly invest in properties in Kenya with the Respondent handling the transactions of acquisition of the property. She stated that while purchasing Motor vehicle KBF xxxA Toyota Surf the Respondent requested her to issue a cheque towards payment of import duty for Kshs. 540,000/- Cheque No. 100003 to his sister JO who was assisting in clearing the motor vehicle since they were both residing abroad. That in the interest of the marriage she agreed that the said motor vehicle be registered in the sole name of the Respondent. She further stated that on diverse dates between 1st January 2006 and 30th March 2009 she made both cash and cheque payments to the Respondent's standard chartered Bank account totalling to Kshs. 3,412,510/- towards the purchase, maintenance and improvement of L.R. No [Particulars Withheld], Phenom Estate; L.R. No. [Particulars Withheld] Flats A4 and A6 **[Particulars Withheld]** Court, Nairobi; L.R No. Eldoret Municipality/ Plot No. [Particulars Withheld] and sub plot xx L.R. [Particulars Withheld] Amboseli court. That in respect of Flats A4 and A6 **[Particulars Withheld]** Court on L.R. No [Particulars Withheld] the Respondent being a trustee ought to have informed her of the change of vendors from MC to **[Particulars Withheld]** Properties Ltd. That it was in bad faith and in breach of trust that the Respondent proceeded to have the above-mentioned flats registered in his sole name on 20th December, 2016 when the injunction application was still pending determination. She also claims that she has been in gainful employment from 2002 to date and has neither been in debt nor declared bankrupt. She also states that the Respondent only contributed Kshs. 86,742/- towards her fees at the university while she paid Kshs. 600,000/-.

On 7th September, 2017 the Respondent filed a further affidavit sworn on 6th December 2017 in which he has stated that the Applicant's exhibit "MMM6" which is said to be bank statements do not reveal the bank that generated them and does not bear the stamp authenticating them and he therefore requests the court to dismiss them because they cannot be verified. He further claims in relation to motor vehicle KBF xxxA Toyota Surf that the documents were never in existence as at October 2008 as asserted by the claimant and they do not bear the name of his sister JO and therefore duty could not have been processed in the month of October as deposed by the Applicant. That the applicant has not annexed the Bank statement in respect of the cheque No. 100003 for Kshs. 540,000/-.

He further stated that paragraph 6(iii) of the Applicant's Further Affidavit relation to a transaction of Kshs 700,000/- of 20th August 2007 vide Cheque No. 00100248 that there is no evidence that the transaction relates to the purchase of property; paragraphs 6(V) relating to cheque No. 100255 of 19th February, 2008 for Kshs. 658,000 was dishonoured on 20th February, 2008 and does not show that it was for the purchase of any of the properties claimed; paragraph 6(vi) relating to cheque No. 100255 for the sum of Kshs. 258,000/- does not reflect in the statement; that the on amount of Kshs. 700,000 on 22nd February, 2008 from Consolidated Bank Account No. xxxxxxxx there is no evidence that it was used to pay for any of the properties in issue; that paragraph 6(ix) in relation to a transaction for Kshs. 71,500 on 30th June 2008, there is no evidence that it was for payment of stamp duty and that he had no obligation to inform the Applicant of the change of vendors as she had said she was not interested in the property.

The Respondent has also filed Grounds of Opposition dated 1st September, 2017 to the effect that:

1. There is no averment in the Originating summons dated 26th January 2017 nor in the Notice of Motion on the same date nor in the Supporting Affidavits filed to the effect that the Applicant made any contribution in the acquisition of the property she claims and in light of the provisions of Sections 7 and 9 of the Matrimonial Property Act and case law, the pleadings by the applicant have not demonstrated a prima facie case.

2. The material placed before the Honourable court by way of evidence in the Replying Affidavit of the Respondent show that the so-called Matrimonial Property claimed by the Applicant was acquired solely by the Respondent and there is no prima facie case laid out by the Applicant to warrant the issuance of the orders sought in the Notice of Motion.

This matter is being canvassed by way of written submissions. The Applicant's Submissions are dated 29th November, 2019. In her submissions she has identified two issues for determination:

(a) Whether the Plaintiff/Applicant has any claim to the properties herein.

(b) Whether the threshold for issuing an interim injunction has been satisfied.

The submissions are on record and I need not repeat what is stated in this ruling. In summary, the Applicant reiterated her averments in her Supporting Affidavit and further affidavit and stated that she was married to the Respondent customarily and that the property acquired during the subsistence of their marriage was acquired jointly and for common use by both of them. She claims that the property they acquired is matrimonial property as defined under Matrimonial Property Act 2013 and therefore the property should be divided between the two of them if they divorce or their marriage is otherwise dissolved. She also submits that she made direct and indirect contribution to the acquisition of the property as shown in her affidavits where she gives evidence of the cash contributions. She also claims that she offered companionship to the defendant/Respondent during coverture of their marriage, tending to the management of their home and through efficient management of their family business, a butchery they co-owned and proceeds were utilized by the family. She gives details of the contributions she has made towards the acquisition of the matrimonial property under reference.

On her second issue she relies on the case of **A.N.M –vs- P.M.N Civil Suit No. 14 of 2015**, where Lady Justice Muigai held that, **“A party may seek injunctive relief if the party can establish by evidence the grounds set out in the landmark case of Giella –vs- Cassman Brown & Co Ltd (1973) E.A. 358 and E.A. Industries –vs- Trufoods (1972) E.A 420. A party shall present evidence to establish a prima facie case with probability of success. The party shall demonstrate that if the act or omission is not enjoined, the aggrieved party shall suffer irreparable loss, damage or injury. The court where in doubt may grant an injunctive relief on a balance of convenience.”**

She relied on the decision of the Court of Appeal in **Mrao Limited- vs- First American Bank of Kenya Limited & 2 others (2003) e KLR**, where the Court stated that:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

On this she submits that she is a co-owner and joint tenant in the properties mentioned and therefore is the rightful joint tenant and joint owner of the properties aforementioned. She argues that registration as the owner of the suit properties is prima facie proof of absolute ownership as provided by **Sections 24(a) and (b), 26(1) and 30(3) of the Land Registration Act 2012** which is echoed in **Zacharia Onsongo Momanyi –vs- Evans Omurwa Onchagwa (2014) eKLR** and in **Jane Wambui Ngeru –vs- Timothy Mwangi Ngeru (2015) eKLR**. She further reiterates the fact that she was married to the Respondent and that the property acquired during the subsistence of their marriage are matrimonial property as defined in the Matrimonial Properties Act, 2013 and the Land Law (Amendment) Act 2016.

The Respondent filed his submissions dated 22nd January, 2017 on 22nd January 2018. He reiterates his averments that the Applicant did not put any efforts, funds or any contribution towards the acquisition of the properties in question. He claims that he has demonstrated how he acquired the properties and that the law regarding Matrimonial property is clear. He relied on Section 7 Matrimonial Property Act.

He further stated that a party making a claim to the matrimonial property must prove his/her contribution to its acquisition and this is an imperative required by law. He claimed that the Applicant has not given evidence to show acquisition or contribution to that property and that she can therefore not lay any claim on the property. He stated that the decision in **Giella –vs- Casman Brown and Co. Ltd (1973) E.A 358** conclusively settled the principles upon which the equitable relief of injunction shall be given and the court at page 360 stated as follows:

“First an Applicant must show a prima facie case with the probability of success. Secondly, an 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.”

He submitted that the law under Section 7 and 9 of the Matrimonial Property Act No. 49 of 2013 and relevant case law require that an Applicant must demonstrate and give evidence of contribution. He argued that the Applicant's case does not demonstrate this as her incoherent bank statements do not prove any evidence of contribution. That he has in turn filed evidence that show he acquired the property solely.

He further submitted that the Applicant's claim is untruthful as much it is without basis because it has no evidence placed before the court by the Applicant to support it. He further states that the Application by the Applicant does not meet the test in **Giella –vs- Cassman Brown** and that the property was acquired by the Respondent and it therefore belongs to him and the balance of convenience lies with the Respondent.

Analysis and Determination

In determining this matter, I need to remind the parties that what is under determination here is not subdivision of matrimonial property. What is before me is a Notice of Motion to determine if the injunctive orders sought therein can issue. As far as I am aware, given the evidence before me, the marriage between the Applicant and the Respondent has not been dissolved. This is what the Applicant has told the

court, that the divorce she filed is pending determination. To my mind therefore, the issue for determination is whether the Applicant has satisfied the court that she deserves the orders she is seeking.

There is no dispute that the Applicant and Respondent were married. The Applicant stated that they were married customarily and were cohabiting between 2005 and 2009 during which the properties were acquired. The fact of marriage is not disputed by the Respondent. He only denied that the Applicant contributed to the acquisition of the property under dispute. Section 6 (1) of the matrimonial property Act gives the meaning of matrimonial property as the matrimonial home or homes; household goods and effects in the matrimonial home or homes or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. While I find that the totality of proof that the properties listed in this Notice of Motion and what each party contributed is yet to be presented before this court, I cannot fail to appreciate that the Applicant and the Respondent are married and lived as a couple within the country and outside the country. It cannot be denied that the spouses in their own way contributed to the marriage. It is my view that during the pendency of marriage, both parties acquired certain rights which this court must protect pending the hearing and determination of their divorce and the distribution of the property they may have acquired upon proof of individual contribution towards its acquisition.

The law under order 40 (1) of the Civil Procedure Rules provides as follows on the issue of when temporary injunctions can 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.

In this matter the Applicant has set out the grounds upon which she seeks for injunction in her application. She has stated that the Respondent is undertaking sale transactions of Apartments A4 and A6 in Block A of **[Particulars Withheld]** Court, Sunrise Park located on L.R **[Particulars Withheld]** Imara Daima. She also claimed that the Respondent has altered the original sale agreement dated 3rd September, 2007 for the above-mentioned properties in order to exclude her from sale transactions of the properties. She has argued that she is a co-owner and rightful joint tenant in the properties herein and that registration as the owner of the suit properties is prima facie proof of absolute ownership as provided in section 24(a) and b, 26(1) and 30(3) of the Land Registration Act, 2012. I am satisfied with her argument at this stage. It is my finding that the Applicant has established a prima facie case with a probability of success. I am persuaded by the court in **SJM v MK [2020] eKLR** where the court stated that:

“The Court’s first task is to determine if the Plaintiff has established a prima facie case with a probability of success once the full case is ventilated. I must be careful to reiterate that this first Giella factor does not suggest that the Applicant must establish with certainty that she will succeed on the merits; only that she raises an arguable case with a probability of success (see, for example, Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125).”

It is my considered view that the Applicant, through her application, Affidavits and submissions, has demonstrated the first test in establishing whether the injunction should be granted. She has shown that there exists a prima facie case with probability of success.

In establishing the second test for granting an injunction this court should consider whether the Applicant will suffer **irreparable injury, which would not be adequately compensated by an award of damages**. The Applicant has argued that after being disserved by the Respondent she continued to reside in their then matrimonial home from 2009 that being Apartment A6 in Block A of **[Particulars Withheld]** Court, Sunrise Park located on L.R **[Particulars Withheld]** Imara Daima. She claims that the Respondent is undertaking sale transactions on the above-mentioned property and also on Apartment A4. She also states that the Respondent has also altered the original sale agreement to the above-mentioned properties.

The Respondent in his argument is adamant that the Applicant did not contribute to the acquisition of the matrimonial property and that he solely and exclusively acquired the same. He has stated how he contributed to the matrimonial properties herein and his direct contribution amounts to **Kshs. 11,913,000/-**. The Respondent does not deny that he failed to inform the Applicant of the change of vendor from MC to **[Particulars Withheld]** Properties Limited claiming that the Applicant had stated that she was not interested in the above-mentioned properties. The Respondent also shows he signed sub – leases prepared between **[Particulars Withheld]** Properties Ltd (as opposed to MC) as lessor, **[Particulars Withheld]** Court Management Co. Ltd as the manager and himself as lessee and the same was registered as No. I.R **[Particulars Withheld]** and I.R **[Particulars Withheld]**.

This action of non- disclosure by the Respondent and exclusion of the Applicant and the continued claims that he solely contributed to the acquisition of matrimonial property poses a threat that he may dispose of the properties without informing the Applicant. There is therefore a threat that the Applicant may lose the place she calls home if injunction is not granted. I am satisfied therefore that by the actions of the Respondent shown above, there is danger that the circumstances stated under Order 40 may befall this property before the issue of each party’s contribution towards the acquisition of the property under dispute is determined. I am satisfied that the Applicant may suffer irreparable injury, which would not be adequately compensated by an award of damages.

This court has no doubt in its mind about this matter as to resort to the balance of convenience. But even if I were to stretch this matter further and discuss the issue on the balance of convenience, it is clear to me that it is the Applicant who stands to suffer greater harm if injunction were not granted. I am guided by the case of **Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR**, where the court discussed the issue on balance of convenience. The court in that case expressed itself as follows:

"Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies. "

The Applicant deserves the orders she is seeking. I therefore allow the Notice of Motion dated 26th February 2016 and grant the following specific orders:

1. That an interim order of injunction is hereby issued restraining the Respondent from selling, leasing, mortgaging, charging, transferring the following properties pending the hearing and determination of the suit:

i. Apartment A4 in Block A of [Particulars Withheld] court, Sunrise Park located on L.R. [Particulars Withheld] Imara Daima.

ii. Apartment A6 in Block A of [Particulars Withheld] court, Sunrise Park; located on L.R. [Particulars Withheld] Imara Daima.

iii. House in [Particulars Withheld] Estate Phase 1 Estate Land Reference No. [Particulars Withheld] Nairobi.

iv. The parcel of Land in [Particulars Withheld] Estate, Eldoret.

v. The parcel of Land L.R No. 3 [Particulars Withheld] in Amboseli.

vi. Motor Vehicle registration number KBF [Particulars Withheld] Toyota Surf.

2. That an interim order of injunction is hereby issued restraining the Respondent from evicting the Applicant from Apartment A6 in Block A of [Particulars Withheld] Court, Sunrise Park located on L.R. [Particulars Withheld] Imara Daima, Embakasi Estate pending the hearing and determination of this suit.

3. That an interim order for injunction is hereby issued restraining the Respondent by himself, his agents, servants or workmen from doing any of the following acts that is to say, demolishing, removing, bringing down, wasting, damaging or in any manner whatsoever destroying any of the houses, buildings, fences and/or structures erected on any of the properties owned jointly by the Applicant and the Respondent pending the hearing and the determination of this suit.

4. That this being a family dispute, I order that each party bears own costs in respect of this Application.

Prayer No. 4 is declined. I find no evidence supporting the same. orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF JULY 2021.

S. N. MUTUKU

JUDGE