



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. E028 OF 2020

IN THE MATTER OF MATRIMONIAL PROPERTY ACT, 2012

MWGM..... APPLICANT

V E R S U S

PIM.....RESPONDENT

RULING

(1) Before this Court for determination is the Notice of Motion application dated **22nd October 2020** in which **MWGM** (the Applicant) seeks the following orders:-

1. SPENT

2. SPENT

3. THAT pending hearing and determination of the Originating Summons, an order of injunction do issue restraining the Respondent whether by himself or his representatives, servants, agents, and / or his agents and/or servants from alienating, selling, leasing, encroaching and/or trespassing, interfering, wasting, constructing further or further dealing in whatsoever manner with Shamba Poa [...] and [...] located at Utawala, Nairobi Block [...] located at Njiru and Ruiru West Block [...] the suit properties herein.

4. THAT costs of this application be in the cause.

(2) The Application which was premised upon **Order 40 Rule 1** and **Order 51** of the **Civil Procedure Rules 2010, Sections 1A, 1B** and **3A** of the **Civil Procedure Act Cap 21 Laws of Kenya** and was supported by the Affidavit of even date sworn by the Applicant.

(3) The Respondent **PIM** despite having been served with the application failed to file any reply to the same. The Respondent was duly served with a Hearing Notice dated **26th January 2021** as evidenced by the Affidavit of Service dated **5th March 2021** sworn by **Hamson Muia Makuthi**, a Court Process-Server. Despite receiving Notice of the hearing of the application the Respondent failed to appear in person or through Counsel on the hearing date. As such the application proceeded unopposed. Following directions made by this Court the same was canvassed orally on **24th June 2021**.

BACKGROUND

(4) The Applicant a teacher averred that she met the Respondent who is a banker in the year **1998** and that the two got married to each other under **Kikuyu Customary Law**. That following their marriage the couple built their matrimonial home in **Ruiru, Kiambu County** which home they still occupy. The Applicant told the Court that their marriage was blessed with two children namely;

(a) JWI born on **8th January 2020**.

(b) VIM born on **28th March 2008**

(5) The Applicant stated that during the course of their marriage the couple jointly acquired the following properties:-

(i) **Ruiru/Ruiru West Block [...]** – upon which the matrimonial home was built.

(ii) **Nairobi/Block [...]** Njiru

(iii) **Shamba Poa Certificates [...]** and [...]**Utawala**

(iv) **Plots in Isinya**

(v) **Gakuyu Plot**

(6) The Applicant avers that she came to learn that the Respondent secured a loan facility using the matrimonial home as security. That upon enquiry she was shown a spousal consent form allegedly signed by herself. The Applicant denies having ever agreed to the use of the matrimonial home as security for the loan and she categorically denies having signed a spousal consent to authorize the same. She alleges that her signature on the said consent was forged.

(7) The Applicant asserts that the various properties were acquired during the subsistence of the marriage, through the joint efforts of herself and the Respondent and as such she claims an equal share of said properties. The Applicant states that the Respondent has since been laid off work. She is apprehensive that he may proceed to sell off the remaining properties which are registered in his name without her consent. She claims that the Respondent recently sold off the family car at a throwaway price. Hence the present application seeking interim injunctive orders pending the hearing and final determination of the main Summons dated **22nd October 2020**.

ANALYSIS AND DETERMINATION

(8) The Applicant claimed that she and the Respondent got married under Kikuyu Customary Law in the year **1998**. She has annexed as proof of said marriage an Affidavit dated **8th August 2000** (Annexure '**MWG-1**'). The said Affidavit was sworn by both the Applicant **and** the Respondent, confirming that they got married to each other in **November 1998**.

(9) The Applicant herein is seeking for orders of temporary injunction. The principles for grant of interim injunctions is well settled in Kenyan law. These were stated in the celebrated case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973)E.A 358** where it was held that:-

“The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory 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.”

(10) The Applicant has alleged that during the course of their marriage the couple jointly acquired various properties. She has annexed copies of the ownership documents for said properties (Annexures '**MWG-2**') all of which are registered in the names of '**PIM**' the Respondent herein. The Applicant claims a **50% share** of the said properties on the basis that the same were acquired through the **joint** efforts of herself and the Respondent.

(11) At this stage the Court is required to satisfy itself that a prima facie case has been established. In **SILVESTER MOMANYI MARUGE –VS- GUIZAR AHMED MOTARI & ANOTHER (2012)eKLR, Odunga J** held that:-

“In determining this application, I am well aware that 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.”

(12) The Court of Appeal in **MRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003)KLR 125** defined what constitutes a prima facie case as follows:-

“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. This is clearly a standard which is higher than an arguable case.”

(13) At this stage the Court is **not** required to determine the merits of the Applicants claim over the said properties. All that the Court is required to determine is whether a prima facie case has been established. The Applicant has complained that the matrimonial home was used by the Respondent to secure a loan facility without her consent and/or authorization. She categorically denies having signed the spousal consent she was shown.

(14) The Applicant’s case is hinged on the fact that the property in question is matrimonial property and that the same was charged without her consent. **Section 2** of the **Matrimonial 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.”

(15) Further in **Section 6** of the **Matrimonial Act** the meaning of ‘**matrimonial home**’ is given as:-

(a) The matrimonial home or homes;

(b) Household goods and effects in the matrimonial home or homes;

(c) Or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

(16) Additional protection to the matrimonial home is provided under **Section 12(1)** thus;

“an estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.” [own emphasis]

(17) The Applicant has produced an Affidavit stating that she and the Respondent are husband and wife. The couple currently live on the matrimonial property and have not commenced any divorce proceedings. The affidavit states that they got married in **1998** and they established matrimonial home together. She says that her consent was **not** sought when the property was charged. That she did not sign any consent to allow the property to be charged. The Affidavit in question was signed in the year **2000**, whilst the properties in question were acquired during the subsistence of the marriage between **2015** and **2018**. Therefore there exists prima facie evidence that said properties were acquired during the marriage.

(18) Based on the material availed to this Court I am satisfied that a prima facie case has been established by the Applicant. It is clear that the subject properties ought to be preserved until the Originating Summons is heard and determined. Failure to grant the injunctive orders sought would likely subject the Applicant to suffer irreparable harm being the loss of the matrimonial home amongst other properties. Finally I am satisfied that this application has merit and I allow the same. Accordingly this Court makes orders as follows:-

(1) An order of injunction be and is hereby issued restraining the Respondent whether by himself or his representatives, agents and/or servants from alienating, selling, leasing, interfering, wasting, constructing upon or in any other manner whatsoever dealing with **Shamba Poa [...]** and **[...]** located at **Utawala, Nairobi Block [...]** located at **Njiru and RUIRU/RUIRU WEST BLOCK [...]** being the suit properties herein pending the hearing and determination of the Originating Summons dated **23rd October 2020**.

DATED IN NAIROBI THIS 13TH DAY OF AUGUST, 2021.

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MAUREEN A. ODERO

JUDGE