



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL CASE NO. E018 OF 2021 (OS)

IN THE MATTER OF SUMMONS FOR DECLARATION OF MATRIMONIAL PROPERTY

IN THE MATTER OF MATRIMONIAL PROPERTY ACT, 2013

IN THE MATTER OF MATRIMONIAL CAUSES ACT, 2014

IN THE MATTER OF ARTICLES 45, 28, 27, 40, 19 & 20 OF THE CONSTITUTION

BETWEEN

DKG.....PLAINTIFF

VERSUS

EG.....DEFENDANT

RULING

1. The Plaintiff and the Defendant are divorced wife and husband, who were married for over 30 years. At the time of their marriage, they acquired various properties and assets together including NYAKI/MULATHANKARI/xxxx which was their matrimonial home. The Plaintiff claims that the Defendant has thrown her out of the matrimonial home and she has been left without any home, shelter and/or income. She filed the instant matrimonial cause having identified a myriad of properties and seeking for the distribution of the same between her and the Defendant.

2. Contemporaneous to filing the main suit, she filed an application dated 7th July 2021 seeking the following orders: -

i) Spent

ii) That the Defendant do relinquish to the Applicant the matrimonial home at NYAKI/MULATHANKARI/xxxx where the Applicant has been living all her life for onward shelter and occupation pending the hearing and determination of the application and the subsequent hearing and determination of the suit.

iii) That an order of temporary injunction do issue restraining the Defendant, his agents, relatives, servants, employees, assigns or anyone acting at his behest from evicting, entering into or in any manner whatsoever interfering with the Plaintiff's quiet possession, occupation and use of the matrimonial home in NYAKI/MULATHANKARI/xxxx pending inter partes hearing and determination of this application and thereafter pending hearing and determination of the main suit.

iv) That the Defendant do release M/V KBH xxx and M/V KBV xxx to the Applicant for her personal use forthwith.

v) That an order of temporary injunction do issue restraining the Defendant, his agents, relatives, employees, servants, assigns or any other person acting at his behest from selling, leasing, subdividing, transferring, damaging, excavating or in any manner dealing with properties: -

(a) NYAKI/KITHOKA/MWANIKA/xxx measuring 0.10 Ha

(b) NYAKI/KITHOKA/MWANIKA/xxx measuring 0.10 Ha

(c) NYAKI/ MULANTHAKARI/xxxx (matrimonial home) measuring 0.10 Ha

- (d) **NYAKI/KITHOKA/xxxx (fully developed apartments) measuring 0.10 Ha**
- (e) **NYAKI/KITHOKA/xxxx (fully developed apartments) measuring 0.101 Ha**
- (f) **NYAMBENE/URINGUx/xxxx**
- (g) **NYAMBENE/URINGUx/xxx**
- (h) **MERU/MBEUx/xxxx measuring 2.23 Ha**
- (i) **MERU/MBEUx/xxxx measuring 2 acres**
- (j) **MERU/MBEUx/xxxx measuring 0.40 Ha**
- (k) **MERU/MBEUx measuring 6 acres**
- (l) **[Particulars Withheld] Shop No. 3, 4 & 9 leased out situate in LR. No. xxxxx/xxx Machakos District**
- (m) **Maisonette House situate on L.R No. xxx/MAVOKO TOWN BLOCK xx**
- (n) **Maisonette House situate on LR. No. xxx/MAVOKO TOWN BLOCK xx ([Particulars Withheld] Farmers & Traders)**
- (o) **NAIROBI BLOCK xxx/xx(Nyayo Estate) (3 bedroom maisonette) matrimonial home**
- (p) **Properties owned by the family company [Particulars Withheld] Limited, all the buildings and developments thereof and the income from all the properties and M/V KNB xxxY, M/V KBP xxx, M/V KBN xxx, M/V KBH xxx, M/V KHMA xxx (Caterpillar & KDC xxx) pending the hearing and determination this application and subsequently hearing of the main suit.**
- vi) **That an order of inhibition do issue inhibiting any dealings with properties (a) to (p) at prayer v) above.**
- vii) **That the Honourable Court do hereby issue an order to the effect that all the rental income from all the properties listed in prayer 5 above be paid into a joint or a company account for accountability purposes.**
- viii) **That the Applicant be paid Ksh 200,000/= per month for subsistence from the incomes of the properties herein pending hearing and determination of the suit.**
- ix) **That the Applicant be and is hereby authorized to manage the properties within Meru County relating to this suit as she has been doing while the Defendant continues to manage the properties outside Meru County as he has been doing pending the hearing and determination of the suit.**
- x) **That the Defendant do produce and disclose all documents in relation to the properties subject to this suit.**
- xi) **That the costs of the application be provided for.**

Applicant's Case

3. The application is supported by the Applicant's supporting affidavit. She claims that she has been married to the Defendant for over 30 years within which period they have jointly acquired a myriad of properties; That the Defendant has kicked her out of the matrimonial home and from all other properties and has also taken away all the family motor vehicles; That she has no shelter, no food, no means of transport and that she is suffering and is a vulnerable person yet she worked hard to acquire the properties; That the income generated from their assets is a minimum of Ksh 1,600,000/= per month which is all going to the Defendant; That she has been deprived of her human dignity, has been mistreated; That her immediate prayer is to be restituted back to her matrimonial home where she has been living all her marriage while the Defendant lived in their Nairobi home.; That she prays for M/V KBH xxx and KBV xxx for personal use and Ksh 100,000/= for subsistence pending hearing and determination of the suit; That unless the orders sought are granted, the Defendant will continue to squander the incomes from the developed properties; That the action of kicking her out of their matrimonial home has reduced her to a vagabond with no shelter or source of livelihood.

4. In her supporting affidavit, she claims that she used to receive pocket money of Ksh 50,000/= per month which the Defendant has stopped giving her since March 2020. She also claims that she used to use M/V KBH xxx and KBV xxx for her personal use and running businesses in Meru. She claims that she resigned from being a teacher in 2012 and that she used her income for the acquisition, development and improvement of their matrimonial property home. She claims to have specifically resigned so as to invest and expand their family business. She has annexed electricity and water accounts and statements.

Defendant's Case

5. The application is opposed by the Defendant who filed a replying affidavit sworn on 19th July 2021. He avers that the Applicant and himself got married in 1997 but their marriage was dissolved vide the Judgement of the Court on 25th May 2021; That in the divorce

proceedings, the Applicant admitted that in March 2020, she willfully walked out and deserted their matrimonial home at NYAKI/MULATHANKARI/xxxx and that she carried all her belongings and never returned to date; That he has never sold or attempted to sell any matrimonial property; That not all the properties listed by the Applicant are matrimonial properties including NYAKI/KITHOKA/MWANIKA/xxx and NYAKI/KITHOKA/MWANIKA/xxx which are held in trust for their children; That NYAKI/MULATHANKARI/xxxx is their matrimonial home where he lives with his two children MMG and JMG aged 10 years and 8 years respectively; That these two children were adopted from a children's home namely Ripples International and they were placed under their care in 2014; That the Applicant deserted her matrimonial home and it is inconceivable for her to ask the Court to order him to surrender the property where he lives with the children.

6. He avers that NYAKI/KITHOKA xxxx and NYAKI/KITHOKA xxxx are not matrimonial properties and that he has never owned NYAMBENE/URINGUx/xxxx and MERU/MBEUx; That he bought NYAMBENE/URINGUx/xxx way before their marriage and it is not matrimonial property; That they had agreed for MERU/MBEUx/xxxx and xxxx to be transferred to their children; That MERU/MBEUx/xxxx was gifted to him by his niece; That he is not aware of [Particulars Withheld] Shop No. 3 & 4 but he is only aware of Shop No. 9 which he bought with his own money; That he is not aware of Masionette House situate on LR. No. xxx/MAVOKO TOWN BLOCK xx and [Particulars Withheld] Farmers & Traders; That NAIROBI BLOCK xxx/xx(Nyayo Estate) is not matrimonial property but is owned by a company called [Particulars Withheld] Limited; That he owns M/V KBV xxxY which he uses to transport the children to school and the Applicant did not make any contribution in its acquisition; That M/V KBH xxx was sold a long time ago; That M/V KBP xxx and KBN xxx are owned by companies known as [Particulars Withheld] Farm Ltd and [Particulars Withheld] Africa Ltd; That M/V KHMMA xxxM is an old caterpillar wheel loader that is no good and in any event, the Applicant did not contribute to the same; That he bought M/V KDC xxxW very recently after the dissolution of the marriage; That there is no matrimonial property generating income; That the prayer for Ksh 200,000/= subsistence as well as reinstatement to the matrimonial home are neither here nor there and that similar application had been made in Milimani Divorce Petition No. 150 of 2020 and Misc Application No. E2774 of 2020 and the Court dealt with them hence the order sought is *res judicata*; That the Applicant has her own vehicle M/V KAU xxx which she uses to run her business.

Submissions

7. Counsel for the parties made oral submissions before the Court on their respective contentions as set out above.

Determination

8. The key question in the determination of this application is whether or not the Applicant has set out a *prima facie* case to enable this Court grant her the temporary reliefs she is seeking in accordance with the decision in *Giella vs Cassman Brown 1978 EA 358*. A *prima facie* case in the context of matrimonial property claim is established by showing an interest in the matrimonial properties by means of contribution to the acquisition of the property. Contribution is defined under Section 2 of the Matrimonial Properties Act as follows: -

“Contribution” means monetary and non-monetary contribution and includes-

(a) Domestic work and management of the matrimonial home;

(b) Child care;

(c) Companionship;

(d) Management of family business or property; and

(e) Farm work;

9. It being that the parties hereto were indeed married and are now divorced, the first aspect by way of contribution has been established. Next is to look at the definition of a matrimonial property to determine whether the properties listed in the Applicant's application are matrimonial properties. Section 7 provides for ownership of matrimonial property by contribution as follows: -

7. Ownership of matrimonial property

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

10. Section 6 of the Matrimonial Property Act defines matrimonial property as follows: -

6. Meaning of Matrimonial Property

(1) 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.

11. According to the Applicant, there are two matrimonial homes, one in Meru i.e NYAKI/MULATHANKARI/xxxx and the other in Nairobi i.e NAIROBI BLOCK xxx/xx (Nyayo Estate). She claims to have been staying in the former while the Defendant has been staying in the latter. The Defendant claims otherwise. He states that he occupies NYAKI/MULATHANKARI/xxxx which is the only matrimonial home and he stays thereon with his two children. According to him, NAIROBI BLOCK xxx/xx is not matrimonial home and is owned by their company called [Particulars Withheld] Limited.

12. Matrimonial home is defined under Section 2 of the Matrimonial Property Act 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;

13. Occupation and ownership are key in determining whether property constitutes matrimonial home. There is no evidence which was adduced to confirm who owns NAIROBI BLOCK xxx/xx. It is however admitted that NYAKI/MULATHANKARI/xxxx is matrimonial home. The Defendant only states that the Applicant voluntarily left and deserted the home and cannot now purport to want to go back. To this Court’s mind, what the Defendant is attempting to argue is that the Applicant is estopped from claiming interest in the matrimonial home because of her alleged voluntary desertion of the home. This notwithstanding, the property remains a matrimonial property within the meaning of the Act. Principles of estoppel cannot override express statutory provisions of law. This Court is of the view that an arrangement has to be made pending the hearing and determination of the suit for the livelihood of the Applicant whose interests are protected under Article 45 (3) of the Constitution. To this extent, she has set out a *prima facie* case with respect to access to the matrimonial home which is admittedly her most pressing and urgent prayer, the property in which is registered in their joint names.

14. The Court however notes that the parties hereto are divorced and it may not be practical for them to live in the same house even though temporarily pending hearing and determination of the suit. Save for the fact that the Defendant claims to be living in Meru and not in Nairobi as the Applicant had initially represented to this Court, this Court would not have hesitated to order for the Applicant’s immediate access to the home. The Defendant claims that allowing the Applicant access to the matrimonial home will be tantamount to evicting him and the children with whom he lives therein. This Court must find an appropriate balance and will consider this in giving its final orders, so as not to prejudice either party and not to aggravate any hostility between the parties.

15. With respect to release of the motor vehicles M/V KBH xxxL and KBV xxxY for personal use, the Defendant claims that he solely owns M/V KBV xxxY which he uses to transport the children to school and that M/V KBH xxxL was sold a long time ago. He claims that M/V KBP xxx and KBN xxxW are owned by companies known as [Particulars Withheld] Farm Ltd and [Particulars Withheld] Africa Ltd and that M/V KHMMA xxxM is an old caterpillar wheel loader that is no good and in any event, the Applicant did not contribute to the same. He claims to have bought M/V KDC xxxW very recently after the dissolution of the marriage.

16. The Applicant has annexed copies of searches from NTSA for the various vehicles as follows: -

- i) M/V KBV xxx showing the Defendant as the owner as at 17th June 2021
- ii) KHMA xxx showing the Defendant as the owner as at 11th May 2021
- iii) KBN xxx showing [Particulars Withheld] Limited as the owner as at 11th May 2021
- iv) KBP xxx showing [Particulars Withheld] Farm Limited as the owner as at 11th May 2021
- v) KBH xxx showing the Defendant as the owner as at 11th May 2021
- vi) KBV xxx showing the Defendant as the owner as at 11th May 2021

17. From the above, it is clear that M/V KBV xxx, KHMA xxx, KBH xxx and KBV xxx are registered in the Defendant’s name. In addition, the Defendant admits to own M/V KDC xxx which he claims to have bought recently after the dissolution of the marriage. Although he claims that KBH xxx was sold a long time ago, he has not given the particulars of this sale and/or adduced any evidence to confirm this. Despite the fact that none of the vehicles are registered in her name, the Applicant may have indeed made contributions which Section 2 of the Matrimonial Property Act recognizes as being both direct and indirect monetary and non-monetary. On a balance of probabilities, this Court is inclined to find that the Applicant has an interest in the said vehicles and therefore is entitled to a vehicle and the Defendant ought to surrender at least one of the vehicles to her pending full hearing and determination of the matter. .

18. With respect to the prayer for orders restraining dealing in the properties, this Court has observed the evidence by the Applicant in form of searches and title deeds as follows: -

- i) Search over MBEUx/xxxx measuring 0.4 Ha showing the Defendant as the registered owner.
- ii) Search over MBEUx/xxxx measuring 2.23 Ha showing the Defendant as the registered owner.
- iii) Title deed over NYAKI/KITHOKA/MWANIKA/xxx showing the Defendant and MMG (minor) as the owners.
- iv) Title deed over NYAKI/KITHOKA/MWANIKA/xxx showing the Defendant and JMG (minor) as the owners.

v) Search over NYAKI/KITHOKA/xxxx showing [Particulars Withheld] Limited as the owner.

vi) Search over NYAKI/KITHOKA/xxxx showing [Particulars Withheld] Limited as the owner.

vii) Search over NYAKI/MULATHANKARI/xxxx showing the Defendant and the Applicant as joint owners.

viii) Search over MBEU1/xxxx showing the Defendant as the owner.

19. These are the only properties for which evidence of ownership has been adduced. From the above, only one property reflects the name of the Applicant i.e NYAKI/MULATHANKARI/xxxx which is the matrimonial home. There is however the element of non-monetary contribution which this Court has to factor. Section 28 of the Lands Registration Act also identifies spousal rights over matrimonial property as one of the overriding interests that will affect the lands register without it being noted on the register. In the premises, this Court finds that the balance of convenience tilts towards preserving the properties for which registration in the name of the Defendant has been proven pending the hearing and determination of the suit.

20. With respect to the properties registered in the name of [Particulars Withheld] Limited, the Applicant has annexed a search from the Companies Registry showing herself, the Defendant, and 2 others as shareholders. This Court will not make any orders at this stage with respect to the said properties in light of the fact that the company is a separate legal person and even then, it is not a party to this suit. In any event, pursuant to the provisions of the Companies Act, it may not be possible to dispose or interfere with the properties in the absence of consensus in the form of resolution from among the shareholders and any interests therein can be dealt with as provided for under the Companies Act.

21. With respect to subsistence of Ksh 200,000/= per month, this Court observes that there is no evidence which has been laid to support this claim. The Applicant has not adequately demonstrated any basis for arriving at this amount. Should the Applicant be claiming to be entitled to any such earnings from businesses jointly owned, this determination may be made upon evidence of such income at the substantive hearing of the suit.

22. As to his defence that the claim to the matrimonial property and to maintenance are *res judicata*, this Court has had a chance to peruse the Judgment of the Divorce Cause and observes that the Court therein declined to make any determination on the issue of matrimonial property and correctly indicated that division of matrimonial property is the preserve of the High Court. In addition, a claim for maintenance during or upon divorce of spouses is entirely different from payments out of property claimed to be jointly owned by the spouses. The matters are not therefore *res judicata*.

Conclusion

23. As the fact of marriage (and divorce) between the parties has been established, there is evidence and circumstance upon which the Applicant could claim to have contributed to the acquisition of properties the subject of this suit. Indeed, the matrimonial home is situate on a property registered in the joint names of the parties. Pending hearing and determination of the rights of the parties to the properties, the Court finds it necessary to preserve the properties and protect them from alienation by the Defendant who in most of them is registered as the owner, having regard to the manner of acquisition of an interest in matrimonial property by **direct and indirect, monetary and non-monetary contribution** and, in the case of immovable property, the unregistered overriding interests of a spouse under Section 28 of the Land Registration Act.

24. The court finds the applicant's prayer for access and use of one motor vehicle pending determination of the rights of the parties to be justified on the principle of equality of parties to a marriage even after dissolution of the marriage under Article 45 (3) of the Constitution.

25. However, as regards the prayer for the deposit of all rental income from the suit properties, the Court finds it not only disruptive to make the order but also impractical and cumbersome to implement and it may be remedied by an order for expedited hearing of the dispute for the determination of the parties' respective interests in the properties with an order for account as necessary.

26. Although the Applicant is entitled to interest in, and access and occupation of, the matrimonial home which is registered in the joint names of the parties, the fact of bitter divorce may make it impossible for the parties to live on the same property and may expose them to risk of physical harm. In the interest of safety of the parties, the Court will make an order for inspection of the said property to determine the feasibility of joint occupation before making orders of access or other alternative provision.

27. The claim for payment of the sum of Ksh 200,000/= for subsistence from the income of the properties herein was not supported by evidence and the same is not granted at this stage. As regards the properties registered in the names of the company, the Court will not at this stage make orders thereon, being in a third party name who has not been joined as a party to the suit and there being no demonstrated reason to lift the corporate veil and in any event, the same may be dealt with under the provisions of the Companies Act.

ORDERS

28. Accordingly, for the reasons set out above, the Court makes the following orders:-

i) An order of temporary injunction shall issue restraining the Defendant, his agents, relatives, employees, servants, assigns or any other person acting at his behest from selling, leasing, subdividing, transferring, damaging, excavating or in any manner dealing with properties: -

(a) NYAKI/KITHOKA/MWANIKI/xxx measuring 0.10 Ha

(b) NYAKI/KITHOKA/MWANIKA/xxx measuring 0.10 Ha

(c) NYAKI/ MULANTHAKARI/xxxx (matrimonial home) measuring 0.10 Ha

(d) MERU/MBEUx/xxxx measuring 2.23 Ha

(e) MERU/MBEUx/xxxx measuring 2 acres

(f) MERU/MBEUx/xxxx measuring 0.40 Ha

pending hearing and determination of the main suit.

ii) The Defendant shall forthwith release Motor Vehicle registration No. KBV xxx to the Applicant for her personal use pending the hearing and determination of the suit.

iii) In the interests of ensuring safety of parties, the Advocates of the respective parties are hereby directed, pursuant to their duty under section 1A (3) of the Civil Procedure Act to assist the court in giving effect to its overriding objective to do justice, to mutually agree on a date when they will inspect together with the parties the premises at NYAKI/MULATHANKARI/xxxx for purposes of determining the feasibility and suitability of an order granting the Applicant joint possession and access to the property while the Defendant continues to reside thereon.

iv) In the event the inspection at iii) above reveals that the premises are not conducive for the joint possession and access by parties, the Defendant shall provide the Applicant with suitable alternative residential area pending the hearing and determination of the suit.

v) The parties to appear in Court after fourteen (14) days on the 26th August 2021 for mention for compliance and for further orders based on findings of the inspection at iii) above and or the alternative arrangements as per iv) above.

vi) Costs in the Cause.

Order accordingly.

DATED AND DELIVERED ON THIS 12TH DAY OF AUGUST, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Thangicia M. David & Co. Advocates for the Applicant

M/S Laichena, Mugambi & Yieko Advocates, LLP for the Defendant