



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
IN THE CIVIL CASE NO. E040 OF 2020 (O.S.)
MATTER OF THE MATRIMONIAL PROPERTY ACT, 2013
IN THE MATTER OF THE LAND REGISTRATION ACT
ALM.....APPLICANT
VERSUS
MTSM.....RESPONDENT
RULING

1. The applicant ALM and the respondent MTSM formally got married on 9th December 2017 but had since June 2017 been living as husband and wife. They have a child who was born on 6th April 2019. The applicant filed a petition dated 7th September 2020 at the Chief Magistrate's Court at Milimani seeking the dissolution of the marriage. The petition has not been heard and determined.
2. The applicant filed the originating summons dated 25th November 2020 against the respondent. The substance of the summons was that in the cause of the marriage certain named properties were acquired in respect of which she sought declaratory and other orders. Her case was that she bought some of the property and contributed to the purchase of the others. Her contribution was through her salary income as she was employed, she participated in the management of the family business, contributed by doing domestic work and the management of the matrimonial home and, lastly, contributed through farm work, taking care of the child, and companionship.
3. The properties in question were Ngong/Ngong/xxxx, Kajiado/Kaputiei – Central/xxxx, Kakamega/Shitochi/xxx, Nairobi Block xxxx and motor vehicle registration number KCG xxxx Subaru Forester.
4. Along with the summons was a notice of motion which sought an order restraining the respondent by himself, his servants and/or agents from selling, alienating, transferring, subdividing, encumbering or in any other way disposing any of these properties pending the hearing and determination of the cause. This ruling relates to the notice of motion.
5. The respondent filed a replying affidavit dated 19th February 2021 to oppose the application. The parties filed further affidavits.
6. Subsequently, the applicants counsel M/s Kiguatha filed written submissions dated 27th May 2021 which were responded to by Mr Wasilwa for the respondent. The submissions were dated 21st June 2021.
7. Before I deal with the evidence of either side as contained in the rival affidavits, it is important to appreciate the principles of law that are relevant to the application. Under **section 6(1)** of the **Matrimonial Property 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.”

8. Section 7 of the Act provides that –

“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.”

Section 2 of the Act defines contribution to mean

“(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.”

“Family business” means any business which is run for the benefit of the family by both spouses or either spouse, and generates income or other resources wholly or part of which are for the benefit of the family.

9. Section 14 of the Act provides that –

“14. Where matrimonial property is acquired during marriage—

a. in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and

b. in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

10. Lastly, section 9 of the Act states that 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.

11. It is true that for an applicant to be issued with an interlocutory injunction, he has to 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 the application on the balance of convenience. These principles were enumerated in **Giella –v Cassman Brown & Co. Ltd [1973] EA 358**, and reiterated in numerous subsequent decisions. In **Mrao Ltd –v- First American bank of Kenya Ltd & 2 Others**, it was held that the applicant must show a clear and unmistakable right to be protected which is directly threatened by the 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.

12. The applicant’s case was that the couple operated three accounts at [Particulars Withheld] Branch, for the purposes of paying their household expenses and making investments. Their salaries went into the accounts. The applicant maintained a personal account from which she drew money to buy plot No. xxxx Kahawa Sukari. She got it registered in their joint names. They sold the plot for Kshs.5,800,000/= which they put in the joint account. The money was used to buy several properties, including Nairobi Block xx/xxx. She continued that Ngong/Ngong/xxxxx was bought by the respondent using a loan advanced to him by one Pauline Nyamu. She subsequently took a loan of Kshs.757,800/= which she put in the joint account, and from there used the money to repay the loan to Pauline Nyamu. She acknowledges that the respondent bought Kajiado/Kaputiei – Central/xxxx before the marriage. She, however, advanced the respondent Kshs.350,000/= to put in his car business. This made the respondent to say he would give her an interest in the property. He gave her the title documents to keep. Regarding Isukha/Shitochi/xxx, her case was that the respondent bought the three plots thereon from the owners, but that she contributed to the developments thereon. Kshs.1,575,000/= came from the sale of Plot No. xxxx Kahawa Sukari to fund the developments.

14. There is Nairobi Block xxxx which the applicant stated that she bought without any contribution from the respondent. She spent Kshs.3,000,000/= towards the purchase and Kshs.774,930/= on taxes and fees. The balance of Kshs.11,000,000/= was financed through mortgage from Stanbic Bank Ltd on her account and she is still repaying. The couple had motor vehicle KCQ xxxx which they jointly bought but that it was involved in an accident. The insurance paid which enabled them to buy KCG xxxx Subaru.

15. In response, the respondent denied the claims by the applicant. His case was he bought Ngong/Ngong/xxxxx way before meeting the applicant. He explained that he was the one who in 2010 had bought Plot No. xxx in Kahawa Sukari for Kshs.1,000,000/= and later sold it to a couple for Kshs.3,000,000/=. This was the money he used to buy Ngong/Ngong/xxxxx in 2016. Regarding Kajiado Kaputiei-Central/xxxx, he stated that he had bought it on 22nd May 2014 from one Peter Gitau for Kshs.470,000/=. This was before their marriage. Regarding Kakamega/Shitochi/xxx he narrated how he had single handedly bought it for Kshs.900,000/=. He spent Kshs.65,500/= on survey. Three months after they separated he got a loan of Kshs.3,000,000/= which he used to develop it. He stated that regarding Kahawa

Sukari/xxxx he raised Kshs.980,000/= by borrowing and the applicant raised Kshs.765,000/=. The applicant took a further loan that was used to complete the payment. The respondent went on to state that they had jointly contributed to the purchase of Nairobi Block xxxx, which was put on Mortgage from Stanbic Bank Ltd. The deposit was paid from the sale of Kahawa Sukari Plot No. xxxx. The property is in joint names of the couple. He stated that he had alone bought KCG xxxx, but that they had jointly bought KCT xxxx. The respondent acknowledged that, while they were married they operated a joint account into which their salaries went for the purpose of paying household expenses and making investment.

15. When the parties will finally be heard and cross examined on their evidence it will become clear how much contribution, if at all, either party made towards the acquisition and or developments of the property in question. It is clear from the evidence that when the parties married, they agreed to open a joint account into which their salaries went. They agreed that the money from the account would be used to pay household expenses and to undertake investment. The court will have to interrogate the bank statements to find out how much each ultimately deposited into the account, when the money left the account and what it went to finance. I further consider that the respondent admitted in his replying affidavit that the couple operated family business on and off. The respondent admitted that there are some property whose acquisition the applicant contributed to.

16. I stated in the foregoing that, in terms of property bought and/or developed in the course of the marriage, contribution may be financial or non-financial.

17. Applying the principles of law to the evidence so far revealed, I determine that the applicant has discharged the burden placed on her, and find that justice will be best served by protecting the property in the application until the cause has been heard and determined. Consequently, the respondent, and those acting under him, shall not sell, subdivide, transfer, charge or in any other manner alienate: -

- a. Ngong/Ngong/xxxxx;
- b. Kajiado/Kaputiei – Central/xxxx;
- c. Kakamega/Shitochi/xxx; and
- d. Vehicle KCG xxxx Subaru;

until the cause has been heard and determined, or until any further order of the court.

18. Costs shall abide the cause.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2021

A.O. MUCHELULE

JUDGE