



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

CIVIL CASE NO. 65 OF 2019

TNK.....APPLICANT

VERSUS

JKN.....RESPONDENT

RULING

1. The Application coming for consideration in this Ruling is dated 8.10.2019 seeking the following orders:

(i) THAT this matter be certified as urgent.(spent)

(ii) THAT this Honourable Court do issue a temporary order of injunction against the Respondent by himself, his servants and or agents from disposing, selling, transferring, alienating or otherwise interfering or dealing with parcel No. LR NO. [...] BLOCK 2, PLOT NO. [...] and an Isuzu Lorry Reg. No. KBS [...] pending the hearing of this application inter-parties.

(iii) THAT this Honourable Court do issue a temporary order of injunction against the Respondent by himself, his servants and or agents from disposing, selling, transferring, alienating or otherwise interfering or dealing with parcel No. LR NO. [...] BLOCK 2, PLOT NO. [...] and an Isuzu Lorry Reg. No. KBS [...] pending the hearing and determination of this application

(iv) THAT this Honourable Court do issue a temporary order of injunction against the Respondent by himself, his servants and or agents from disposing, selling, transferring, alienating or otherwise interfering or dealing with parcel No. LR NO. [...] BLOCK 2, PLOT NO. [...] and an Isuzu Lorry Reg. No. KBS [...] pending the hearing and determination of this suit

(v) THAT costs of this application be provided for.

2. The Application is supported by the Affidavit of the Applicant TNK dated 3.10.2019 in which she has deponed as follows:

(i) THAT she got married to the Respondent on or about the year 2003 in a Kikuyu Traditional Customary Wedding Ceremony conducted in Molo, Nyandarua County which was attended by family and friends.

(ii) THAT before the said marriage, she was a potato trader at Gikomba and after the union they merged their businesses since the Respondent was trading in the same line.

(iii) THAT from their Savings they managed to buy a piece of land at Kayole but the Respondent registered the property in his sole name.

(iv) THAT subsequently they embarked on construction of the Matrimonial home into which they moved in 2006.

(v) THAT in 2009 moved the business to Muthurwa and bought a Lorry with a bank loan from Family Bank after raising a deposit with two loan facilities from Kenya Women Finance which the Respondent guaranteed.

(vi) The Applicant said after purchasing the lorry Reg. No. KBS [...] they said vehicle was registered in the name of the Respondent.

(vii) They then embarked on hiring farms in Molo to plant their own potatoes.

(viii) THAT the Respondent started sabotaging the business and in the year 2016 he also bought a piece of land in Molo without telling the Applicant and he disposed of it in 2017 and that act of deception greatly affected the Applicant.

(ix) THAT she is not seeking a declaration that the Motor Vehicle Reg. No. KBS [....] and the property LR. [....] BLOCK 2 are jointly owned by herself and the Respondent.

3. The Respondent filed a Replying Affidavit dated 23.10.2019 in which he denied that he ever married the Applicant.

4. He further deposed that's the property LR No. [....] Block 2 is exclusively his and that the Applicant did not contribute any money to the purchase of the same.

5. The Respondent also deposed that he personally bought the Lorry Reg. No. [....] with a loan from Family Bank which he is still repaying.

6. He further stated that he sold the property LR No. [....] block 2 to one Douglass Onkware who is now the rightful owner.

7. The Respondent further stated that the Applicant's first marriage is still subsisting and valid.

8. The parties filed written submission which are a retaliation of the averments in the affidavits. I have considered the said submissions.

9. The grounds for granting an injunction are outlined in the case of Giella Vs Cassman Brown and Co. Ltd. [1973] E.A. 358 as follows:

“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 E.A. INDUSTRIES -VS- TRUFOODS (1972) EA 420.”

10. In the case of Suleiman – v- Amboseli Resort Ltd (2004) KLR 589, Ojwang Ag. J (as he then was) stated thus:

“Counsel for the Defendant urged that the shape of the Law governing the grant of injunctive relief was long ago, in Giella – v- Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at 780 – 781: - A fundamental principle of ... that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’... Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella –v- Cassman Brown, the court has to consider the following questions before granting injunctive relief:

i) Is there a prima facie case.

ii) Does the applicant stand to suffer irreparable harm.

iii) On which side does the balance of convenience lie.

Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief should always opt the lower rather than the higher risk of injustice... if granting the applicant's prayers will support the motion towards full hearing, then should grant those prayers. I am unable to say at this point in time that the Applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly there would be a much larger risk of injustice if I found in favour of the Defendant than if I determined this application in favour of the applicant. ”

11. I find that the Application dated 8.10.2019 is seeking preservation of the property LR No. [....] Block 2 Plot [....] and Isuzu Lorry Reg. No. [....] (hereafter referred to as the suit properties) pending the hearing of the Originating Summons also dated 8.10.2019 in which the Applicant is seeking declaratory orders.

12. The issues for determination in the Application dated 8th October 2019 are as follows:

(i) Whether the Applicant has established a prima facie case with probability of Success.

(ii) Whether the Applicant will suffer irreparably if the injunction is not granted

(iii) Who pays for the costs of the Application?

13. The applicant alleges that the suit properties were purchased during the subsistence of her marriage to the Respondent.

14. The Respondent denied subsistence of a marriage and stated that the applicant has a first marriage which is still subsisting.
15. The Respondent also said he has already sold the property to one Douglas Onkware who is now the rightful owner.
16. I find that the Respondent did not enjoin the said buyer as a party to this case.
17. The Court already gave temporary injunction on 16.10.2019 and the issue requires ventilation by oral evidence during the hearing of the originating Summons filed herein.
18. I find that the Applicant has established that she has a prima facie case with probability of Success and further that she stands to suffer irreparably if the injunction is not granted.
19. I find that the balance of convenience tilts in favour of the Applicant who stands to suffer irreparably should this court find that the suit properties are matrimonial property.
20. I accordingly allow the application dated 8.10.2019 and direct that both parties file their witness statements in the Originating Summons within 30 days of this date.
21. The Costs of the Application will abide in the cause.
22. This case will be mentioned on 20.4.2020 for compliance and for a hearing date.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 6TH DAY OF MARCH, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.