



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**DIVORCE CAUSE NO. 8 OF 2019**

**MN.....PETITIONER/APPLICANT**

**VERSUS**

**CMM.....RESPONDENT**

**RULING**

The applicant filed an application on 22<sup>nd</sup> July, 2019 seeking the following orders;

- a) That the application be certified urgent and heard ex parte in the first instance
- b) That an interim injunction be issued restraining the respondent/his agents from interfering with;
  - i) Land Parcel No. ELDORET MUNICIPALITY BLOCK [XX] (KING'ONG'O) 4005 and all developments thereon.
  - ii) Land Parcel No. ELDORET MUNICIPALITY BLOCK [XXXX] and all developments thereon.
  - iii) Land Parcel No. ELDORET MUNICIPALITY BLOCK [XXXX] and all developments thereon.
  - iv) Land Parcel No. ELDORET MUNICIPALITY BLOCK [XX] (KING'ONG'O) and all developments thereon pending the determination of this application inter partes and thereafter pending the determination and hearing of the divorce petition.
- c) That pending the hearing and determination of this application inter-partes and thereafter pending the hearing and determination of the divorce petition, the respondent be barred from interfering with the applicant's place of business and abode.
- d) The manager Equity Bank Eldoret Branch pending the determination and hearing of the application and thereafter the divorce petition furnish the applicant with the loan status with respect to account number. XXXXXXXXXXXXXXX.

**APPLICANT'S CASE**

The applicant filed submissions on 15th October 2019. She relied on the case of *Giella v Cassman Brown and American Cyanamid Co. v Ethicon Limited (1975) A AER 504* on the threshold for granting orders for stay of execution. She summarised them as;

- a) There must be a serious issue to be tried
- b) Damages are not an adequate remedy
- c) Whether the balance of convenience lies in favour of granting or refusing the application

She cited the case of *Peter Mburu Echaria v Priscillah Njeri Echaria (2007) EKLR* and the case of *Agnes Nanjala William v Jacob Petrus Nicholas Vander Goes, Civil Appeal No. 127 of 2011*. She also relied on Section 2 of the Matrimonial Property Act.

She alleged that she begun cohabiting with the respondent as husband and wife in the year 1994 and they formalized their union on 30<sup>th</sup> October 2014. Annexure CCM1 and Annexure NN2 are evidence of the property having been acquired between 2009 and 2018 when the marriage between the petitioner and the respondent was still subsisting hence the properties fall within the definition of matrimonial property

under section 6 of the Matrimonial Property Act, despite the fact that they're registered in the name of the respondent.

She cited the case of *Mrao Limited v First American Bank* and further submitted that the respondent shall proceed to sell the other properties which are in his name. She deponed on paragraph 6 of her replying affidavit that he has sold the block of land known as Eldoret Municipality Block [XXXX]. If the properties are sold before the conclusion of this petition the applicant and her children stand to suffer great prejudice.

The respondent has not disputed the issue of protection and has stated he is not interested in the petitioners' place of business or abode. There being no objection, the said orders can be granted to protect the applicant against the respondent and for the safety of the children.

The applicant avers that there exists a prima facie case to enable the court grant orders of injunction.

#### **RESPONDENT'S CASE**

The respondent filed submissions on 18<sup>th</sup> December 2019.

He submitted that the properties are not matrimonial properties and they were in his name. He acquired them without the applicant's contribution. She has not laid any evidence on which the court can hold that the stated parcels of land are matrimonial property.

The applicant has admitted that the respondent already sold off the parcels of land thus an injunction cannot be issued over property that has already been sold. The said property was sold to pay off a debt.

The respondent stays in Eldoret Municipality/Block [XXXX] hence an injunction cannot be issued over the said land as the same will amount to an eviction.

The applicant never contributed to the acquisition of the said properties. The respondent acquired the properties by way of bank loans and loans from friends without the contribution of the petitioner. He annexed as CMM2 a bundle of loan agreements and documents showing the said loans. The petitioner cannot claim the properties are matrimonial properties to which she is entitled.

The respondent is not interested in the place of business or the place of abode of the applicant. Further, she has not stated where these premises are thus the court cannot issue a blanket order.

The applicant cannot obtain orders pertaining to the respondent's bank account as it is personal. Granting the said orders will amount to an infringement of the respondent's right to privacy. She is not the respondent's guarantor and neither does she have any interest in the said account.

There is no prayer for division of property in the petition before the court on the basis of which the application before the court can be found. The application is premature and cannot be filed in a divorce cause.

The application has not met the threshold for the orders sought and should be dismissed.

#### **ISSUES FOR DETERMINATION**

- a) Whether the alleged properties are matrimonial property
- b) Whether the application has met the threshold for stay orders

#### **WHETHER THE PROPERTIES ARE MATRIMONIAL PROPERTY**

Article 45 (1) (3) of the Constitution states:

***“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”***

Section 6 of the *Matrimonial Property Act, No. 49 of 2013* defines matrimonial property as:

***(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.***

In order for the property to qualify as matrimonial property it has to have been acquired during the subsistence of the marriage.

In her supporting affidavit the applicant annexed a certificate of marriage evidencing that they were formally married in 2014. She claimed that they had cohabited prior to that since 1994 but there was no proof of the same.

In the Court of Appeal in *Phyllis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another* [2009] eKLR it was held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held as follows: -

***“Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed” (own emphasis)***

In the premises the petitioner has failed to establish long cohabitation and therefore the appropriate date that the court will take as the date of marriage is that on the Marriage Certificate.

The next issue to determine matrimonial property is to establish when the said properties were acquired. Land Parcel No. ELDORET MUNICIPALITY BLOCK [XX] (KING'ONG'O) 4005 was acquired in 2015; Land Parcel No. ELDORET MUNICIPALITY BLOCK [XXXX] was acquired in 2009 and Land Parcel No. ELDORET MUNICIPALITY BLOCK 21(KING'ONG'O)/[XXXX] was acquired in 2018. The respondent submitted that he resides on Land Parcel No. ELDORET MUNICIPALITY BLOCK [XXXX] but the title was not annexed.

The applicant admitted that indeed the respondent has sold ELDORET MUNICIPALITY BLOCK [XXXX]. Given that the same was acquired in 2009 it would not form matrimonial property in the present circumstances.

Land Parcel No. ELDORET MUNICIPALITY BLOCK [XX] (KING'ONG'O) 4005 and Land Parcel No. ELDORET MUNICIPALITY BLOCK [XX](KING'ONG'O) 1907 were acquired in 2015 and 2018 respectively and can therefore be considered matrimonial property as they were acquired during the subsistence of the marriage.

The applicant has not proven that there is any likelihood that Land Parcel No. ELDORET MUNICIPALITY BLOCK [XXXX] was acquired during the subsistence of the marriage. Further, the respondent deponed that he resides on said property therefore issuing injunctive orders against him is tantamount to evicting him. The applicant never stated where matrimonial home is or was. Likewise, the applicant has not stated the premises of her place of business or abode; therefore, it would be an order with no specificity if the same was granted and that would be an order in vain.

The prayer for the details of Equity Bank Account No. XXXXXXXXXXXXX cannot be granted as the account is a personal account belonging to the respondent and thus the same would amount to an invasion of privacy. The applicant did not establish any relationship with the bank in respect to the account. She claims to have consented to the loan facility but she did not provide any documentary evidence to prove the same.

In the premises the application succeeds in terms of prayers for an injunction on Land Parcel No. ELDORET MUNICIPALITY BLOCK [XX] (KING'ONG'O) 4005 and Land Parcel No. ELDORET MUNICIPALITY BLOCK [XX](KING'ONG'O) 1907.

The other prayers sought fails as there is no specificity as to the applicant's place of business or abode and there is no relationship between herself and the bank loan, to warrant access to the loan status.

Cost be in the cause.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET VIA EMAIL TO THE ADVOCATES THIS 30TH DAY OF APRIL, 2020.**