REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MATRIMONIAL CAUSE NO 2 OF 2019 (OS)

JMC..APPLICANT

VERSUS

FMN..................................RESPONDENT

R U L I N G

1. The undisputed background to the Originating Summons filed by the Applicant, **JMC** on 19th March 2019 is that the Applicant and **FMN** (the Respondent) got married in 1996 during their cohabitation sired four children. They also operated an electrical appliances business in Thika town, and in the course of cohabitation acquired several properties.

2. The couple is now estranged and living separately since 2014 or 2015. At the heart of the present dispute is the ownership of the assets acquired during the marriage, but more specifically a business stall described as stall **No. […] Madaraka Market** which is currently occupied and operated by the Applicant. The Applicant's motion filed contemporaneously with the Originating Summons was prompted by two notices served on him.

3. The first notice was dated 24th July 2018 and is from the firm of **Kamiro R. N. & Co. Advocates** and stated in part:

> **"Dear Sir,**
>
> **RE: STALL NO. […] – MADARAKA MARKET THIKA**
>
> **Under instructions of our client FNM who is the owner of Stall No. […] – Madaraka Market Thika, we write you as hereunder: -**
>
> **THAT you have been in occupation of our client's stall whereby you have neglected/refused to pay monthly rent. Full particulars whereof are well within your knowledge.**
>
> **TAKE NOTICE that our client is desirous that you vacate her stall No. […] – Madaraka Market as she wants to utilize the same herself.**
>
> **WE HEREBY give you thirty days (30 days) notice from the date hereof to vacate our client stall No. […] Madaraka Market Thika."** (sic)

4. This notice was followed by another, in similar terms, and dated 20th February 2019.

5. By his instant application, the Applicant seeks an injunction to restrain the Respondent ***"from evicting and/or excluding the Applicant and/or in any way interfering with the Applicant's peaceful possession and use of the matrimonial property stall No. […] situate in Madaraka Market Makongeni Estate Thika."***

6. According to the Applicant, after the couple's separation, he remained in occupation of the subject stall and continued to run it. He assets that the stall was acquired through the couple's joint efforts during cohabitation and is therefore matrimonial property. He states that the stall remains his only source of income, after he released another family property being stall **No.[…], to** the Respondent. The Applicant states that he was apprehensive that the Respondent will carry out the threat contained in the second notice, and forcefully take possession of the stall No. […] Madaraka Market (hereinafter the disputed property). The foregoing is the gist of the Applicant's affidavit in support of the motion.

7. In her replying affidavit the Respondent list six assets acquired by the couple during cohabitation. However with regard to the stall No. […] disputed (the disputed property), she asserts that she purchased the asset through her own effort in 2017, and that the Applicant is

currently seized of the control of other matrimonial asserts including another **stall No. […]** and the profits therefrom, has not supported the children of the marriage who are in the custody of the Respondent and that the disputed property is the only asset available to the Respondent.

8. The motion was heard by way of written submissions, the parties reiterating their respective affidavit evidence and the applicable principles. The court has considered the material canvassed by the parties. Before considering the merits of the motion, I find it pertinent to observe that the Originating Summons as drawn does not appear to comply with Section 17 of the Matrimonial Property Act. Subsection (1) thereof states that:

> **"A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of that person."**

9. The language employed in the above section suggests that the prayers to be sought under the Section take the form of a prayer for a declaration. The Applicant's Originating Summons takes the format of questions typical of ordinary Originating Summons under Order 37 of the Civil Procedure Rules or a notice to show cause and the summons includes a prayer (No. 4) for certain payments, clearly not envisaged in the section. Moreover, it does appear now that there are several other properties acquired during the cohabitation of parties, not just the stall which is the subject of the Originating Summons.

10. The Respondent has sought through her affidavit to introduce these other assets and to seek certain prayers in regard thereto. The Respondent must consider filing a substantive pleading in respect of those properties as depositions in an affidavit cannot take the place of a pleading. Equally, the Applicant must within 21 days of this ruling amend his Originating Summons to comply with the format anticipated in Section 17 of the Matrimonial Property Act, and while at it, also amend the title of the application which currently erroneously refers to "Division of Matrimonial Properties".

11. Now turning to the motion, itself, the principles governing the grant of interim injunctions are well settled. In **Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] e KLR,** the Court of Appeal restated the principles enunciated in **Giella V Cassman Brown & Co. Ltd [1973] E A 358** and observed that the role of the judge is merely to consider whether the principles for the grant of an interlocutory injunction had been met and that the court ought to be careful not to determine with finality and issues arising.

12. The Court further observed that:

> **"...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already ...... by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:**
>
> **In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:**
>
> **a) establish his case only at a *prima facie* level**
>
> **b) demonstrate irreparable injury if a temporary injunction is not granted.**
>
> **c) allay any doubts as to (b) by showing that the balance of convenience is in his favor."**

13. The Court elaborated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. Such that, it is not enough that the Applicant establishes a prima facie case, he must further successfully establish irreparable injury, that is, injury for which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the adequacy of damages, the court will consider the balance of convenience. Conversely, where no *prima facie* case is established, the court need not consider irreparable injury or balance of convenience. The Court of Appeal emphasized that the standard of proof is to *prima facie* standard.

14. Regarding the definition of a *"prima facie case"* the Court stated:

> **"Recently, this court in <u>Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others</u> [2003] KLR 125 fashioned a definition for "*prima facie case*" in civil cases in the following words**:
>
> ***<u>"In civil cases, a</u>*** <u>**prima facie**</u> ***<u>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</u>*** <u>**prima facie**</u> ***<u>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. That is clearly a standard, which is higher than an arguable case</u>."***
>
> **We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an 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. <u>We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in</u>**

discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed." (emphasis added)

15. A *prima facie* case is built upon evidence and the applicable law. The chief plank upon which the Applicant's case is premised is that he had already *"set up a shop at stall number […] Makongeni Estate"* at the time he got married to the Respondent, that he subsequently 'allowed' the Respondent to oversee the day -to- day operations of the shop while continuing to inject capital into it *"by regularly replenishing stock of the wares*" and later was able to purchase the stall which he initially rented. The problem is that there is no evidence beyond these bare statements to establish, first of all, of the nature of the interest held in the disputed stall, which I presume is a market stall leased from the County Government, or evidence or the date of alleged purchase of that interest by the Applicant. No agreement is annexed to the supporting affidavit. The Applicant did not even tender a copy of the lease agreement in respect of the initial period when he claims to have first rented the stall.

16. According to the Respondent, the two parties started the business jointly and she was responsible for running the business; that she allegedly purchased the stall *after* separating from the Applicant. Again, she too has not supported this claim through evidence such as the sale agreement allegedly executed between her and the son of one **Priscilla Mucheke** who apparently initially leased the stall to the couple. She also did not profer a copy of the alleged initial lease in respect of the stall. What is not in dispute is that the Applicant remained in possession of the stall after he and the Respondent separated.

17. In order to succeed, the Applicant needed to demonstrate that he holds the lease or a superior interest to the Respondents by virtue of having "acquired" the stall prior to his marriage to the Respondent. There is no evidence to support his alleged ownership of the stall or interest therein. He has not demonstrated a *"clear and unmistakable right to be protected which is directly threatened by the act sought to be restrained."* Moreover, it appears from uncontroverted affidavit material that after the separation of the parties, the Applicant retained control of the majority of the couple's assets, including rental houses and another stall described as stall No. […] which is leased and the profits therefrom. It therefore appears unlikely that the disputed stall represents the Applicant's sole source of income.

18. Secondly, even if the Applicant were unable to continue his business at the disputed stall, he could utilize stall No. […] which is currently leased out. And because as I have said, these stalls appear to be located County Government markets, without the benefit of leases from the County or such other official records, the court is wary of any invitation to determine who between the disputing parties is the rightful occupant thereto. That in my view seems to be a matter falling within the auspices of the relevant office in the County Government of Kiambu.

19. Finally, the orders sought by the Applicant are discretionary in nature. A party approaching the court *ex parte* in the first instance as the Applicant did, is under an obligation to state as fully as possible, all the material facts of the case which are within his knowledge. The Applicant in approaching this court confined himself to only two assets, namely, the disputed stall and a stall No. 4/65. It has now turned out from the Respondent's material that indeed there could be several other assets possibly acquired during the cohabitation of the parties. The Applicant has not offered any explanation for the exclusion of these other assets, while pursuing his prayers in respect of the disputed stall.

20. In the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989) e KLR** the Court of Appeal **(Kwach JA)** in considering this duty stated:

> **"This duty of candour has been dealt with in a number of decided cases…. In The Andria (vasso) [1984] QB 477…. The Court of Appeal in its judgment which was read by Robert Goff L J said at page 491 G:**
>
> **"It is axiomatic that in exparte proceedings there should be full and frank disclosure to the court of facts known to the applicant , that failure to make such disclosure may result in the discharge of any order made upon the exparte application, even though the facts were such that, with full disclosure an order would have been justified…. Examples of this principle are to be found in the case of exparte injunctions…. The same principle was dealt with in the case of Brink's Mat Ltd v Elcombe [1988] 3 ALL ER 188.**"

21. In the latter case the court discussed what constitutes material non-disclosure and consequences attaching thereon. In the case of **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others (1995) e KLR** the Court of Appeal **(Cockar JA)** the court stated that where a court sets aside an *exparte* injunction on grounds of material non-disclosure which was not an innocent act, the court was at liberty not to proceed to hear the application on merits. Citing the words of **Viscount Reading CJ** in the case of **The King vs the General Commissioners for the Purposes of income Tax Act in the District of Kensington ex parte Princess Edmond De Polignac (1917)1 KB 486 at page 496:**

> **"Before I proceed to deal with the facts, I desire to say this. Where an exparte application has been made to this: where an exparte application has been made to this court for a a rule nisi or other process, if the application was not candid and did not fairly state the facts, the court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding has only been set in motion by means of a misleading affidavit."**

22. The foregoing appears to apply to this case even though no ex parte orders had been granted to the Applicant. He owed a duty of candour to this court to frankly declare at the earliest, all the facts as he was seized of, and not to present selective depositions to influence the court in

his favor. I think I have said enough to demonstrate that the Applicant has failed to demonstrate a prima facie case with a probability of success, or that he will suffer irreparable damage if the motion is dismissed. I find no merit in the motion and dismiss it with costs.

SIGNED AND DELIVERED ELECTRONICALLY TO THE PARTIES ON THIS 25TH DAY OF JUNE 2020.

C. MEOLI

JUDGE