



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NO.9 OF 2020

IN THE MATTER OF SECTIONS 17 OF THE MATRIMONIAL PROPERTY ACT

CWW.....APPLICANT

VERSUS

PWM.....RESPONDENT

RULING

This is a ruling on application dated 18th June 2020. It seeks the following orders: -

a) Spent

b) Spent.

c) That pending the hearing and determination of this suit this honorable court be pleased to issue an order of temporary injunction restraining the respondent himself, his agent, his servants from entering, erecting structures, selling, transferring, alienating, disposing, tilling, cultivating, leasing, threatening or in any way interfering with the subject parcels of land Njoro/Njoro Block x/xxx (Ngondu), Njoro/Njoro Block x/xxx (Ngondu), Plot No. xx Unga Employees Co-op Savings & Credit, Egerton University Workers Housing Cooperative Society Limited, Phase VI Site Two Plots. No. xxx, Egerton University Workers Housing Cooperative Society Limited, Phase VI Site Two Plot No. xxx, L.R. xxxxx/xxx NO. xx measuring approximately ¼ acres, L.R. xxxxx/xxx NO. xx measuring approximately ¼ acres and three motor vehicles [particulars withheld] Station Wagon Toyota Spacio, [particulars withheld] Station Wagon Fielder and [particulars withheld] Trail jointly owned together with this plaintiff in any manner whatsoever.

d) Costs of the application.

2. Grounds on the face of the application are that the applicant/plaintiff is the wife of the respondent having married in the year 1995 but separated in the year 2016; that the parties herein purchased properties listed above together and despite them being registered in the name of the respondent, he holds them in trust for and on behalf of the applicant; that at the time of separation the original documents of the properties remained with the respondent/defendant.

3. That the respondent has been trying to sell the properties which are for the benefit of the children and unless restrained the children will be disinherited.

4. The application is supported by the applicant's affidavit sworn on 18th June 2020. She restated grounds on the face of the application. She further stated how they acquired and developed the listed properties

5. She averred that the respondent stands to suffer no prejudice should this Court issue prayers sought.

6. In response, the respondent filed notice of preliminary objection dated 24th June 2020. The gist of the preliminary objection is that this cause is *res judicata* as it was wholly compromised and resolved on 28th November 2016 before **Justice Ndungu** in **Matrimonial Cause No.19 of 2016 CWW Vs PWM**.

7. The respondent filed submissions dated 8th July 2020 in support of preliminary objection. The respondent submitted that the applicant filed application under certificate of urgency dated 28th July 2016 in Matrimonial Cause No.19 of 2016 seeking injunction to restrain the

respondent herein from selling, alienation or transferring properties listed on page one of the submissions and rental income in property known as Egerton University Workers Housing Cooperative Society Limited, Phase VI Site Two Plot No. xxx be shared equally between plaintiff and defendant; and respondent be restrained from selling household items which formed part of matrimonial property; and respondent be ordered to release the applicants personal effects; and proceeds of 3 motor vehicles be deposited in court pending court's further directions.

8. The respondent submitted that the two matters are "*pari materia*" and quoted **section 7 of the civil procedure Act** which provide as follows:-

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decide by such court."

9. The respondent submitted that the mutual settlement of the former suit is for all purposes and intends a valid decision and urged this Court to uphold the preliminary objection.

ANALYSIS AND DETERMINATION

10. I have perused annexures attached to submissions by the respondent and do note that Matrimonial Cause No. 19 of 2016 was filed between the parties herein with application under certificate of urgency dated 28th July 2016.

11. I have also seen an order by **Justice Ndungu** dated 28th November 2016 and issued 5th December 2016 in which he ordered withdrawal of the suit pursuant to notice of withdrawal dated 27th October 2016 together with all orders issued previously in the case.

12. It is evident that Succession Cause No.19 was not heard and determined on merit; it was withdrawn pursuant to notice of withdrawal dated 27th October 2016. This matter cannot therefore be said to be *res judicata*.

13. On the merits of this application, the applicant has averred that the properties listed are matrimonial property jointly purchased and that the respondent has all original documents; and he may dispose them before this matter is heard and determined.

14. The respondent has not filed any affidavit to challenge the applicant's averments or state any prejudice that he is likely to suffer in the event that restraining order is granted.

15. It is my considered view that there is need to preserve the property listed by the applicant pending hearing and determination of this matter.

16. FINAL ORDERS

1. The preliminary objection dated 24th June 2020 is hereby dismissed.

2. The respondent is hereby restrained from selling, alienating or disposing properties listed in paragraph 3 of the application pending hearing and determination of this matter.

3. Costs of this application in the cause.

Ruling dated, signed and delivered via zoom at Nakuru This 29th day of October 2020

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Mr. Mongere for the Applicant/plaintiff

Mr. Karanja Mbugua for Defendant/Respondent.