



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO. 7 OF 2020

JAO.....PLAINTIFF /APPLICANT

VERSES

NA.....DEFENDANT RESPONDENT

RULING

1. The Applicant and the Respondent were husband and wife who have since separated judicially and are staying apart. By the time of their separation they had been placed with five issues who are all adults now. There are properties which they acquired while their marriage subsisted and pursuant to this they have each filed separate application seeking to have each other enjoined from the same pending the determination of the suit. The respondent contemporaneously with filing his defence has equally filed a counterclaim claiming that the properties were solely acquired by him and not the Plaintiff.

2. This court gave directions that the two applications shall be heard and settled simultaneously and the counsels on record have filed separate submissions in support and in opposition of the same. Suffice to state that this court at this juncture shall not delve into the substantive issues raised in the plaint and the counterclaim as that would be a preserve of the trial court which shall have sufficient time to allow the parties adduce oral evidence.

3. The first application by the Plaintiff is dated **25th June 2020** in which she has prayed for orders of injunction to restrain the Defendant pending the hearing of the suit from selling, leasing or interfering with the following properties namely, **KITALE MUNICIPALITY BLOCK xx/BIDII/xx, KITALE MUNICIPALITY BLOCK xx/BIDII/xxx, EBUSIKHALE/xxx AND, KSHS 12,600,000 IN ACCOUNT NUMBER 6xxx-xxx/** held at **HOUSING FINANCE** being the proceeds from the sale of **LR NO xxx/xx/x**.

4. The above application is supported by the Plaintiff's affidavit dated the same date. She has attached copies of the supporting documents indicating how the properties were acquired. She further said that the Nairobi property was sold by the Defendant without her knowledge as per the transfer documents she has attached. She thus prays that the Defendant be stopped from utilising the said money.

5. The Defendant in his replying affidavit dated **16th July 2020** has deponed that the plaintiff has denied him access to the matrimonial home situate at parcel number **KITALE MUNICIPALITY BLOCK xx/BIDII/xx** after evicting him vide a decree obtained vide **DIVORCE CAUSE NO. 8 OF 2006 AT KITALE**. He said that he has been unable to utilise any of the matrimonial properties including land parcel number **KITALE MUNICIPLAITY BLOCK 19/BIDII/xxx**.

6. The Defendant went on to state that he has been left to vent for the children after being evicted and all the properties have been cautioned by the Plaintiff. As a result of the frustrations he suffered a stroke and he has struggled to have resources for his medication. He prayed for the application to be dismissed.

7. The Defendant's application on the other hand dated **20th July 2020** prays that the Plaintiff be enjoined from utilising land parcels numbers **KITALE MUNICIPALITY BLOCK xx BIDII /xx** as well as **KITALE MUNICIPALITY BLOCK xx/BIDII/xxx** pending the determination of this suit. In his supporting affidavit he says that he has not been able to utilise the above properties since 2010.

8. He went on to aver that all the other properties are registered under his name except Plot number 32 which is in the name of the Plaintiff albeit through his consent. He stated that before the eviction he had started many projects including poultry, dairy unit, fish pond and other developments at the matrimonial home.

9. As a result of the eviction order, the defendant further stated that he has no place to stay and has been unwell and admitted at Aga Khan hospital as per the hospital bills attached to his application.

10. The parties as stated above did file their written submissions which the court has perused. Essentially both submissions are gravitating towards the issue of this court granting each of them the interim orders of injunction. The Plaintiff submits that the Defendant should not be allowed to dispose or sale the assets which she considers matrimonial pending the determination of the application and the suit. On the same

vein she submits that the cash which is held at the bank should not be dispersed as it was as a result of the Defendant selling the Nairobi property.

11. The Defendant has also submitted that the Plaintiff should be enjoined from utilising the matrimonial properties pending the determination of the case and that he should be allowed use and access to the same.

ANALYSIS AND DETERMINATION

12. Having perused the plaint, the defence and the counterclaim herein, the applications and the supporting and replying affidavits, this court finds that the issue germane in the two applications is whether interim orders of injunction can be issued against each of the parties pending the determination of the suit. The single ruling herein shall for all intent and purposes dispose the two applications.

13. What is not in dispute at this juncture is that whichever way and whatever has taken place subsequent to this suit, the mentioned properties seemed to have been acquired during the subsistence of their marriage. The decree of their acquisition is something to be determined in a full trial where they shall each adduced their evidence.

14. Secondly, it is apparent that there have been other suits involving the parties for example Divorce Cause no. 8 of 2006 which effectively evicted the defendant from parcel number Kitale Municipality Block xx/Bidii /xx. There is no evidence as rightfully submitted by the plaintiff that the defendant filed any appeal nor applied to set it aside the said orders.

15. It is also not disputed that the sum of money now lying at HFCK bank is proceeds from the sale of the Nairobi property. It is also admitted that the Plaintiff has already cautioned all the properties prior to the filing of this suit.

16. At the same time, it is not disputed that the defendant has been staying away in Bunyore and he has been ailing as a result of a stroke that he suffered which according to him was due to the frustration he has gone through.

17. Taking the above issues, can this court issue an injunction as prayed for by the parties? The Counsels on record have submitted several authorities which support the principles of granting an injunction. All of them are gravitating around the now famous case of **GIELLA V. CASSMAN BROWN AND CO. LTD 1973 E. A .358** in which the court opined that for one to deserve the orders, prima facie case ought to be proved which has a probability of success and that in the event that it is not granted irreparable damage shall be suffered. The court can also issue the same based on the balance of convenience.

18. Since it is admitted that the plaintiff has already cautioned the properties, and no evidence was tendered to demonstrate that the Defendant attempted to have them removed this court does not find any difficulty in issuing an injunction to stop them from selling or charging the same pending the determination of the suit.

19. The court however finds it difficult to permit the Defendant entering again Land Parcel number Kitale Municipality Block xx/Bidii/xx for the simple reason that the court as far as 14th October 2011 ordered for his eviction. That order as stated earlier has never been set aside or challenged. The only thing this court can order is to have the same preserved by means of an injunction pending the determination of this suit.

20. As regards land parcel number Kitale Municipality block xx/Bidii/xxx, there is no evidence of any precipitate order stopping the Defendant or the Plaintiff from utilising the same. In the premises, the parties may be at liberty to utilise the same but none should sale, charge or adversely deal with it pending the determination of the suit.

21. With respect to the cash at the bank, it is apparent that the same was obtained pursuant to the sale of the Nairobi property which was registered in the name of the defendant. Its acquisition is also a question which shall be determined in a full trial. Taking into consideration however the circumstances surrounding the defendant's health as evidenced by the hospital bills I find that on a balance of convenience, he should be allowed to access part of that money. This consideration is taken into account considering that even if the court shall find that the plaintiff *per adventure* had a stake in its acquisition, there shall be other avenues to compensate her since the other properties are intact for now.

22. The defendant shall however be allowed limited access to the said amount and hopefully the parties shall proceed to list this matter for full hearing as a matter of priority. In the premises, this court finds it appropriate to have the defendant access **Ksh.3 million** only for his medical treatment and any other bills arising therefrom. The balance of **Kshs. 9,600,000** shall await the outcome of the suit.

23. In the premises, this court allows the two applications as follows.

(a) An interim orders of injunction is hereby issued against both the plaintiff and the defendant their servants and or agents from selling, disposing, charging or in any other way parting with Land Parcels numbers Kitale Municipality Block xx/Bidii/xx and Kitale Municipality Block xx/Bidii/xxx, Ebusikhale /xxxx pending the hearing and determination of this suit.

(b) Both the Plaintiff and the defendant be at liberty to use and or occupy land parcel number Kitale Municipality Block xx/Bidii/xxx and Ebusikhale /xxxx pending the determination of this suit.

(c) Pursuant to order (b) above the parties herein in the event of any disagreement may proceed to share the utilisation of the same equally pending the determination of the main suit.

(d) The Defendant is hereby allowed to withdraw the sum of kshs.3 million only from account number xxx-xxx/xxx at

Housing Finance Bank pending the determination of this suit and the balance of KShs. 9,600,000 shall await the outcome of the main suit.

(e) Each party shall meet its own costs.

Dated, Signed and delivered at Kitale this 21st day of October, 2020.

H. K. CHEMITEI

JUDGE

21/10/2020

In the presence of:-

Ms Munialo for the Plaintiff

Mr Wanyonyi for Defendant/Respondent

Court Assistant – Kirong

Ruling read in open court.