



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MATRIMONIAL CAUSE NO. 7 OF 2020

EGK.....PETITIONER/APPLICANT

VERSUS

JMM.....RESPONDENT

RULING

A. Introduction

1. The applicant herein filed a Motion dated 7/07/2020 seeking several orders to wit: -

- 1) *That the Honourable Court be pleased to hear and order the Registrar of Motor vehicles and National Transport and safety Authority to restrict any transactions relating to Motor Vehicles Registration numbers KCS [...] Toyota Succeed and KCM [...] Toyota Voxy pending the hearing and determination of the suit herein.*
- 2) *That the Honourable Court be pleased to order that the applicant be granted or continue having possession of Motor Vehicle Registration number KCM [...] Toyota Voxy pending the hearing and determination of the suit herein.*
- 3) *That the Honourable Court be pleased to issue an order of inhibition against LR MBEERE/ MBITA/ [...], LR GATURI/ GITHIMU/[...], LR NKUENI/ TAITA/ [...], LR GATURI/ WERU/[...] and LR MBETI/ GACHOKA/ [...] restricting all transactions in relation thereto until the hearing and determining of the suit*
- 4) *That the Honourable Court be pleased to issue such further and/ or better reliefs as it may deem fit and just to.*

2. The grounds upon which the application was based were contained on the face of the application and further supported by the affidavit of the applicant. In a nutshell, it was the applicant's case that she got married with the Respondent under Kiambu customary law in September 2016 and has since cohabited and lived as a married couple and established their matrimonial home at Embu Town. That despite the Applicant having had two issues from the previous relationship, they got another issue LK on 29.01.2018. Further that during the subsistence of their marriage they acquired motor vehicles registration numbers KCS [...] Toyota Succeed and KCM [...] Toyota Voxy and which were registered in the name of the Respondent as the head of the family but however it was agreed that the Applicant be using motor vehicle KCM [...] Toyota Voxy for her business and for her use while the respondent was to have possession and use of Motor vehicles registration number KCS [...] Toyota Succeed.

3. The applicant further deposes that on 1/05/2020, the respondent requested the use of applicant's motor vehicle KCM [...] Toyota Voxy but after the said vehicle was involved in an accident he took the same to the garage and subsequently deserted the matrimonial home and efforts to collect the said motor vehicle have been futile as the respondent gave instructions that the same should not be collected by her. It was her grounds that this had led to suffering both by herself and her children and that her business has been adversely affected due to lack of a motor vehicle. It was her deposition further that at the time of their marriage, she was a successful business lady and as such she contributed to the purchase of various properties which were registered in the names of the respondent and that the respondent did not contribute independently for the purchase of the said properties.

4. The application was opposed by the respondent vide a replying affidavit sworn by the respondent herein and where he basically denied the depositions of the applicant. He deposed that he was not married to the applicant but that he had a romantic affair with her between January to March 2017 and which relationship resulted in the conception and birth of one issue. Further that he was married to one PN and that he did have a matrimonial home with the applicant but had his separate house which he paid rent for and that he never took parental responsibility of the children from the applicant's previous marriages. Further that he was the lawful owner of the subject motor vehicles and the applicant had never used any of the subject motor vehicles. The respondent denied the fact that the applicant had successful businesses before they met and further that he was not managing any of the applicant's businesses and the fact that the applicant injected capital into the

said businesses. Further that the applicant irregularly acquired the bank accounts herein and the same did not show any transaction where the applicant deposited money in the said accounts or to his Mpesa money account. He thus prayed that the application be dismissed. With the leave of the court, the applicant filed a further affidavit and where he reiterated the contents of his petition.

5. The application was disposed of by way of written submissions and wherein each party filed its submissions in support of its position in the pleadings herein.

B. Issues for determination

6. I have considered the application herein, the reply by the Respondent and the rival submissions filed herein and it is my opinion that the main issue for determination is whether the applicant has satisfied this court as to the grant of the interlocutory orders.

C. Applicable law and determination of the issues

7. The instant application was brought under the provisions of Order 40 Rule (1) (a) and 4(1) of the Civil Procedure Rules 2010 and sought for interim orders.

8. The conditions for the grant of an interlocutory injunction are now well settled as stated in Giella –vs- Cassman Brown and Co Ltd 1973 E.A 360, Mrao v First American Bank of Kenya Ltd and 2 others 2003 Klr 125, and American Cynamid co –vs- Ethicon Ltd 1975 1All E.R. The principles are: (a) an applicant must show a *prima facie* case with a probability of success (b) the applicant must show that unless injunctive orders are granted he will suffer irreparable harm which would not be adequately compensated for by damages (c) and if in doubt in any of the above conditions the court will decide then on a balance of convenience.

9. However, from the face of the application, the prayers sought are not prohibitory injunctions but mandatory injunctions. In Kenya Breweries Ltd & Another vs Washington O. Okeya [2002] eKLR the Court of Appeal in differentiating between prohibitory and mandatory injunctions held that the two are different in the sense that while an in prohibitory injunction the applicant must establish the existence of the conditions in as set out in Giella vs Cassman Brown & Co. Ltd (supra) an applicant in a mandatory injunction must, in addition, establish the existence of special circumstances. Furthermore, an applicant for mandatory injunction must prove his case on a standard higher than the standard in prohibitory injunctions. The Court proceeded to hold as follows: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

10. In the case of Nation Media Group & 2 Others vs John HarunMwau [2014] eKLR, the court of appeal said: -

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

11. Thus it is clear from the above authorities that the in an application for mandatory injunction the applicant must establish the existence of special and exceptional circumstances that warrant the granting of orders of mandatory injunction. The issue which needs to be determined therefore is whether the applicant has met the above conditions.

12. As to the existence of a *prima facie* case with a likelihood of success, the court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 defined “*prima facie* case” in the following terms: -

“In civil cases, a prima facie 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 prima facie 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.”

13. In the instant application, the applicant’s basis for the said application was the fact that (as deposed) she was married to the respondent and in the course of the said marriage they jointly accumulated the properties subject of the mandatory injunctions and/or contributed in the acquisition of the same. However, this was strongly refuted by the respondent who deposed to the effect that he was never married to the applicant but that he was in another union with another woman. A certificate of marriage was annexed to the replying affidavit. He further deposed that he solely accumulated the properties in dispute and without any assistance from the respondent and neither did they stay in one matrimonial home as he had his own house.

14. The Court of Appeal in Nguruman Ltd v Jan Bonde Nielsen and 2 Others [2014] eKLR in adopting the definition of “*prima facie* case” in Mrao’s case (supra) and explaining the said definition held as thus: -

“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. 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 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."

15. The question is whether the applicant has established that she had a right which had been threatened with violation. To establish this in my opinion, the applicant was supposed to establish that she was married to the respondent. Once that is established, then a rebuttable presumption would arise to the effect that all the properties acquired during the subsistence of the said marriage was matrimonial property and thus she is entitled to a share. The burden to prove the existence of the marriage is on the applicant.

16. The applicant prays for interlocutory orders to preserve the properties listed including motor vehicles. At this stage, I do not wish to delve into issues that will be decided during the hearing of the main suit. These issues include whether the applicant and the respondent were married or whether a marriage may be presumed from their cohabitation. If the court was to interrogate this subject at this stage, it would pre-empt the hearing of the main suit.

17. The Court of Appeal in **Nguruman Ltd –vs- Jan Bonde Nielsen and 2 Others (supra)** held that the three conditions for grant of interim orders of injunctions 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.

18. The applicant's averments on the existence of a marriage in the supporting affidavit were vehemently opposed by the respondent in his replying affidavit. I have perused the attachments to the application too. All considered, I am of the considered view that the applicant has failed to satisfy the principles laid down in the case of **Giella Vs Cassman** (supra) and in **Mrao American Bank** and as such I find this application lacking merit.

19. The application is accordingly dismissed.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF NOVEMBER, 2020.

F. MUCHEMI

JUDGE