



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NO. 4 OF 2020

IN THE MATTER OF SECTIONS 7, 12 & 17 OF THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

AND

IN THE MATTER OF AN APPLICATION DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF ENFORCEMENT OF RIGHTS TO MATRIMONIAL HOME AND MATRIMONIAL PROPERTY

BY

SJM.....APPLICANT

VERSUS

MK.....RESPONDENT

RULING

1. The Applicant and the Respondent got married sometime in 1972. They had eight children. The marriage ended in a divorce granted by the Kadhi's Court in Nakuru on 02/04/2009. It appears that the divorce was never challenged. I say "appears" because the Respondent brought this set of facts to the attention of the Court in reply to an Application by the Applicant, who has not responded one way or the other. Instead, the Applicant's lawyers, in their submissions, simply state that this is an issue to be "addressed in the appropriate forum."

2. On 05/03/2020, the Applicant took out an Originating Summons seeking for declarations that some three properties which are registered in the names of the Respondent are matrimonial properties belonging to both the Applicant and the Respondent in equal shares. The three properties are: Nakuru Municipality Block [...]; LR No. [...] Njoro; and LR No. [...] Kabarnet (collectively the "Subject Properties"). The Originating Summons is brought under the Matrimonial Property Act.

3. Contemporaneously with the Originating Summons, the Applicant filed a Notice of Motion dated 05/03/2020 seeking the following prayers:

1. Spent.

2. That pending the hearing and determination of this Application this Honourable Court be pleased to reconstitute the Applicant to her matrimonial home at NAKURU MUNICIPALITY BLOCK [...] LR. [...] NJORO and L.R. NO. [...] KABARNET.

3. THAT this Honourable Court do grant a temporary Injunction to restrain the Respondent from selling, leasing, mortgaging, charging, transferring and property in paragraph 2 above and/or evicting the Applicant from any of the portions of land namely NAKURU MUNICIPALITY BLOCK [...]. LR/ [...]

NJORO and L.R NO. [...] KABARNET pending the hearing of this Application.

4. That this Honourable Court do grant a temporary Injunction to restrain the Respondent from selling, leasing, mortgaging, charging, transferring any property in paragraph 2 above and/or evicting the Applicant from any of the portions of land namely

NAKURU MUNICIPALITY BLOCK [...], L.R [...] NJORO and L.R. NO. [...] KABARNET pending the hearing of this Application.

5. That this Honourable Court do grant a temporary Injunction to restrain the Respondent from selling, leasing, mortgaging, charging, transferring any property in paragraph 2 above and/or evicting the Applicant from any of the portions of land namely NAKURU MUNICIPALITY BLOCK [...]. L.R [...] NJORO and L.R. NO. [...] KABARNET pending the hearing of the summons.

6. An order directing the Respondent to surrender half of the rental income of Ksh 350,000/- (Kenya shillings Three Hundred and Fifty Thousand) from NAKURU MUNICIPALITY BLOCK [...].

7. That the costs of the Application be provided for.

4. This is the Application which is coming up for determination.

5. The Respondent has filed a Replying Affidavit deponed on 19/06/2020 opposing the Application.

6. The question for determination is whether the Applicant has made out a case for the grant of the interlocutory reliefs she seeks. Being an interlocutory application, by definition, I can only make very provisional conclusions on the merits of the case or even disputed legal positions. The main purpose of a preliminary injunction is to protect a deserving plaintiff from irreparable injury and to preserve the power of the Court to ultimately render a meaningful decision on the merits. The Court must be careful, in considering applications for interlocutory injunctions, not to determine any disputed right with finality. The aim is to prevent a threatened wrong or the doing, by one of the parties to a litigation, an act which might threaten or endanger the rights of the party moving for an injunction.

7. In our jurisprudence, this legal position is now enshrined in a tripartite legal criterion for granting interlocutory injunctions. This criterion, setting out the legal principles for granting interlocutory injunctions, is set out in the celebrated case of **Giella vs Cassman Brown** in the words of Spry V.P.:

First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

8. Hence, the Court's first task is to determine if the Plaintiff has established a *prima facie* case with a probability of success once the full case is ventilated. I must be careful to reiterate that this *first Giella factor* does not suggest that the Applicant must establish with certainty that she will succeed on the merits; only that she raises an arguable case with a probability of success (see, for example, **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125**).

9. Does the Applicant in the instant Application raise a *prima facie* case with a probability of success? In order to come to a reasoned conclusion on that question, I will briefly consider the Applicant's argument and the objections raised by the Respondent.

10. In short, the Applicant says that the Subject Properties are matrimonial properties. She says that although the three properties were in actual fact properties which the Respondent inherited from his father through a Succession Cause, the properties became matrimonial properties because she helped develop them. She relies on **M.A.A. v A.R. [2018] eKLR** for the proposition that a property which was once a gift or bequest to one of the parties to a marriage can, thereafter, become matrimonial property.

11. The Respondent scoffs at the claims by the Applicant as laughable. He says that two of the properties in question were properties he acquired through transmission from his father *vide Nakuru High Court Succession Cause No. 500 of 1997*. The Respondent argues that judgment at the Court of Appeal in the matter which paved way for the Confirmation of Grant of Representation on 31/07/2017 did not come until 13/02/2015 – long after he had divorced the Applicant. The Respondent has annexed both the judgment of the Court of Appeal as well as the Certificate of Confirmation of Grant with respect to his father's estate. He has also attached a Certificate of Grant with respect to his sister, Mary Komen, which bequeathed to him the third parcel of land. The Rectified Certificate of Confirmation of that Grant was only issued on 29/09/2017. All these, says the Respondent, happened long after his marriage to the Applicant ended in divorce in 2007. Since the properties were not acquired jointly and were not utilized as a matrimonial home, the Respondent argues, they cannot form part of matrimonial property.

12. Moreover, argues the Respondent, it would be impossible for the Applicant to demonstrate a *prima facie* case since the marriage is already irrevocably dissolved. The Respondent argues that by dint of section 40 of the Matrimonial Causes Act a party to an irrevocably dissolved marriage can no longer bring an action for distribution of matrimonial property.

13. As I have stated above, I have to be careful not to reach anything more than provisional findings in order not to prejudice or embarrass the main suit. Even with this in mind, I must find that

I am not persuaded that the Applicant has, on the basis of what has been placed before the Court at this time, that she has a *prima facie* case sufficient to warrant the grant of interlocutory reliefs. First, there is evidence, which the Applicant has not contested, that the marriage ended in 2009. It was, therefore, incumbent upon her to demonstrate that any property she claims was acquired or became matrimonial property before then. Second, while the Respondent has placed before the Court evidence to demonstrate that the properties in question became his property through transmission after the dissolution of the marriage, the Applicant has not rebutted this claim and neither has she placed any evidence to demonstrate that the three properties or any of them were utilized as matrimonial home before the dissolution of the marriage. On this score alone, and without more, I would hold that the Applicant has failed to establish a *prima facie* case for purposes of grant of an interlocutory injunction.

14. If I were to reach the second and third *Giella* factors, they, too, would go against the Applicant. There is no showing that she would suffer irreparable damage if the injunctive relief she seeks is not granted. Indeed, she has not been in possession of any of the three properties at least since 2009; and neither does she make any claim that should she succeed in the suit the Respondent would be unable to pay her for her share. Finally, since the Respondent has been in exclusive possession at least since 2009, equities lie in his favour to keep such possession during the pendency of the suit.

15. At this point in the trial, the less that is said the better. The upshot is that the Application dated 05/03/2020 is without merit and it is hereby dismissed. Costs will be in the cause.

16. Orders accordingly.

Dated and delivered at Nakuru this 16th day of December, 2020.

.....

JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.