



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**MATRIMONIAL PROPERTY CASE NO. 1 OF 2019**

**CKS..... PLAINTIFF/APPLICANT**

**VERSUS**

**JSHS.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SOL.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

1. The applicant herein has filed an application dated 12<sup>th</sup> February, 2019 seeking for orders that:-

**1. Spent**

**2. That pending the hearing and determination of this application an order of temporary injunction be issued restraining the defendants either by themselves, agents, representatives, servants and/or employees or any other person claiming through them from interfering with, trespassing onto, evicting or in any other manner interfering with or restricting the plaintiff's rights, occupation and/or interest over her house No. 3 built on L.R. KAKAMEGA/TOWN BLOCK \*\*\*\*.**

**3. That costs of this application be provided for.**

The application is based on the grounds that:-

**(a) That the applicant is the legal wife of the 1<sup>st</sup> respondent and has spousal rights over L.R. KAKAMEGA/TOWN BLOCK/\*\*\*\*\* which is matrimonial property on which the applicant is residing after the 1<sup>st</sup> respondent barred her from accessing her matrimonial house built on L.R ISUKHA/SHIRERE/\*\*\*\*\*.**

**(b) That the applicant has come to learn that the 1<sup>st</sup> respondent secretly sold and transferred L.R KAKAMEGA/TOWN BLOCK \*\*\*\*\* (which is matrimonial property) to the 2<sup>nd</sup> respondent without first seeking and obtaining her spousal consent as required by law.**

**(c) That there is a great imminent danger of the 2<sup>nd</sup> respondent evicting the applicant from the house.**

**(d) It is in interest of justice and fairness that the application be heard urgently and the prayers granted as prayed.**

2. An order of temporary injunction was issued by the court against the respondents on the 14<sup>th</sup> February, 2014 pending the hearing of the application inter partes.

3. The application was supported by the affidavit of the applicant. She depones that she has been married to the 1<sup>st</sup> respondent for the last 23 years and that their marriage was solemnized in the year 2003. That she has three children with him. That as a family they own various matrimonial properties registered in the names of her family members who hold such property in trust of the family. That land parcel No. Kakamega/Town Block \*\*\*\*\* was purchased by the family and registered in the name of the 1<sup>st</sup> respondent. That they developed the property jointly. That in January, 2018 she learned that the 1<sup>st</sup> respondent had sold the property to the 2<sup>nd</sup> respondent. That the 1<sup>st</sup> respondent did not seek her consent before the sale.

4. The applicant produced a marriage certificate in proof of her marriage with the 1<sup>st</sup> respondent.

5. The application was opposed by the 1<sup>st</sup> respondent through his replying affidavit sworn on the 25<sup>th</sup> February, 2019 in which he deposes that he has no means of obeying the order dated 4<sup>th</sup> February, 2019 as he has sold land parcel L.R. KAKAMEGA/TOWN BLOCK \*\*\*\*\* to the 2<sup>nd</sup> respondent who took possession in the year 2018. That the applicant stays on the premises as a tenant as he pays rent to the 2<sup>nd</sup> respondent. That the applicant has never worked during the subsistence of their marriage and her contribution to Plot No. ISUKHA/SHITOTO/\*\*\*\*\* is negligible. That the applicant deserted him in 2008 and returned in August, 2017 when he accommodated her in one of the houses at Plot No. KAKAMEGA/TOWN BLOCK \*\*\*\*\*.

6. The 1<sup>st</sup> respondent further says that he had taken a mortgage from C.F.C Bank and secured the loan with land parcel No. KAKAMEGA/TOWN BLOCK \*\*\*\*\*. That he was in arrears and sold the property. He applied the money to repay the loan and used the surplus to purchase land parcel No. North/Wanga/Matungu/\*\*\*\*\* where he is constructing a home for the applicant.

7. The 1<sup>st</sup> respondent contends that the applicant is not in occupation of Kakamega/Town Block \*\*\*\*\* but stays in one of the houses as a tenant on the basis of a tenancy agreement between him and the 2<sup>nd</sup> respondent. That the said property is not matrimonial property. That the application is filed in bad faith to annoy him.

8. The application was also opposed by the 2<sup>nd</sup> respondent on the grounds that:-

*1. That the application is spent.*

*2. That the subject matter – LR Kakamega Block \*\*\*\*\* was not matrimonial property at the material time.*

*3. That in any event the applicant gave consent to the property being charged and her consent was not acquired at the material time.*

*4. That the application is an abuse of the court process merely calculated to prejudice and embarrass the 2<sup>nd</sup> respondent.*

*5. That the application lacks merit.*

9. The 2<sup>nd</sup> respondent contends that he purchased LR Kakamega/Town

Block \*\*\*\*\* on the 26/4/18 which property was charged to CFC Stanbic Bank. That the 1<sup>st</sup> respondent had defaulted in servicing the loan and the property was due for sale by the bank and the records indicate that the 1<sup>st</sup> respondent acquired the land long before his marriage to the applicant. That the property is therefore not matrimonial property. That the 1<sup>st</sup> respondent informed him that the applicant had given consent to the property being charged. That upon the property being charged and his purchase taking place when the charge was still in force, the property ceased to be matrimonial property. That he paid part of the purchase price to the bank to offset the loan. That upon payment of the loan the bank issued a discharge upon which he was duly registered as owner of the property and a certificate of lease issued on 12<sup>th</sup> October, 2018. That upon acquiring the property the applicant requested to be a tenant. She pays rent. That the application lacks merit and is calculated to embarrass him. That the applicant is out to unjustly enrich herself from him. That the application should be struck out and dismissed with costs.

10. The 2<sup>nd</sup> respondent did attach the following documents in opposition to the application – sale agreement of the property between him and the 1<sup>st</sup> respondent, copy of register showing that the property was charged to CFC Stanbic Bank, default letter by the bank to the 1<sup>st</sup> respondent, notice by the bank to the 1<sup>st</sup> respondent to settle the arrears, application for funds transfer, discharge of charge form and a lease certificate issued to the 2<sup>nd</sup> respondent upon purchase of the property.

## **Submissions**

11. The advocates for the applicant, **Miss Khadenyi**, submitted that the applicant has established that she is a wife to the 1<sup>st</sup> respondent who is the registered owner of the property. That she has established that the property was acquired during the subsistence of their marriage and hence that the property is matrimonial property. That her consent ought to have been sought in respect of any dealings over the property. That the sale agreement executed on 26<sup>th</sup> April, 2018 between the respondents is voidable and invalid for offending Section 12 (1) of the Matrimonial Property Act which is couched in mandatory terms. Therefore that the applicant has established a prima facie case. That it is in the interest of justice to preserve the matrimonial property by an order of temporary injunction pending determination of the suit.

12. The advocate for the 1<sup>st</sup> respondent, **Mr. Momanyi**, submitted that the property does not fall within the meaning of matrimonial property as defined in section 2 of the Matrimonial Properties Act. That the property is registered in the name of the 2<sup>nd</sup> respondent. Therefore that this court has no jurisdiction to determine the matter. That the applicant should have moved to the Environment and Land Court to enforce her rights there.

13. The advocate submitted that the applicant stays on the property as a tenant. The rent payable can be ascertained. Therefore that she cannot suffer any loss as she can be compensated by way of general damages. If the court finds that she was entitled to the suit land she can be compensated in monetary terms.

14. Further that the applicant has not stated how she contributed to the acquisition of the property.

15. That the application is seeking for orders pending the hearing and determination of the application. That there is no application to extend the orders beyond the determination of the application. That the application should therefore be dismissed.

16. The advocate for the 2<sup>nd</sup> respondent **Mr. Fwaya** supported the submissions made by the advocate for the 1<sup>st</sup> respondent. In addition he stated that when the suit was filed the property was registered in the name of the 2<sup>nd</sup> respondent. That the registration can only be challenged in the land court. That it is only after that that the applicant could move to this court if the land court declared the property to be matrimonial property. That the court is not being asked to cancel the title so that the property can be shared by the couple. Therefore that the court has no jurisdiction to determine the matter.

17. The advocate submitted that the property was mortgaged in 2003 and 2010. That the issue of consent should have been raised that time when the land was charged. That technically the property ceased to become matrimonial property upon being charged and became the property of the bank. In default of payment of loan the bank could sell the property to anybody. That is how the 2<sup>nd</sup> respondent acquired the property. He should therefore not be dragged into the matter between the applicant and the 1<sup>st</sup> respondent. The advocate urged the court to strike out the application against the 2<sup>nd</sup> respondent.

18. In reply **Miss Khadenyi** stated that the court has inherent powers to extend the orders as it thinks just. That the property changed ownership without following the law. That there is no evidence that the applicant gave her consent to the charging of the property to the bank. That the fact that the property has changed ownership does not extinguish the right of the applicant. That the matter involves land and other property acquired during subsistence of marriage. Therefore that the court sitting as a matrimonial court has jurisdiction to hear the matter.

### **Analysis and Determination**

19. The questions for determination are:-

1. Whether the applicant has established a prima facie case and
2. Whether the orders sought can be granted.

20. The applicant is seeking for orders of temporary injunction. The principles for granting of injunctions are well settled in Kenyan law. These are as was stated in **Giella –Vs- Cassman Brown & Co. Ltd (1973) EA 358** that:-

*“The Conditions for the grant of an interlocutory injunction are well settled in East Africa. 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 adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”*

21. The court is at this stage required to satisfy itself that there is a prima facie case established. In **Silvester Momanyi Marube –Vs- Guizar Ahmed Motari & Another (2012) eKLR**, Odunga J. held that:-

*“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the court cannot find conclusively who is to be believed or not, the court is not excluded from expressing a prima facie view of the matter and the court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.”*

22. The Court of appeal in **Mrao Ltd –Vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** considered what constitutes a prima facie case and held that:

*“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.*

*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.”*

23. The applicant’s case is hinged on the fact that the property in question is matrimonial property and that the same was sold without her consent. Section 2 of the Matrimonial Act defines matrimonial home as follows:-

**“ “Matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”**

24. Further in Section 6 of the Matrimonial Act the meaning of matrimonial home is given as:

**“(a) the matrimonial home or homes;**

**(b) household goods and effects in the matrimonial home or home;**

**(c) or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.**

25. Section 7 of the said Act provides the manner of dividing of matrimonial property. The section states that states that:-

**“Subject to section 6 (3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”**

26. Additional protection to the matrimonial home is provided under section 12(1) thus;

**“an estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.”**

27. The applicant has produced a marriage certificate that proves that she is a wife to the 1<sup>st</sup> respondent. The applicant is staying on the suit property. She says in her pleadings that she has been staying on the property for more than 10 years. She says that her consent was neither sought when the property was charged nor when it was sold to the 2<sup>nd</sup> respondent.

28. The 1<sup>st</sup> respondent says that the applicant started staying on the property in 2017. He said that he had sought the consent of the applicant when he charged the property.

29. The 1<sup>st</sup> respondent deposed in his replying affidavit that he started staying with the applicant as husband and wife in 1996 when they started a family. That they formalized the marriage by a church wedding in 2003. That in 2008 the applicant abandoned their matrimonial home and went elsewhere. That when he married the applicant she was unemployed and had no known source of income. That he was by then an established businessman and the sole breadwinner to the family.

30. The title to the land filed herein, Kakamega/Town Block \*\*\*\*\*, shows that the land was charged on 16/9/2003. During that time the 1<sup>st</sup> respondent admits that he was in a marriage relationship with the respondent. The marriage certificate filed herein indicates that their marriage was solemnized on 6/12/2003. There is then prima facie evidence that the property was acquired during the subsistence of the marriage between the applicant and the 1<sup>st</sup> respondent. The same was charged to a bank and thereafter sold without the consent of the applicant.

31. There is conflicting evidence from the applicant and the 1<sup>st</sup> respondent on whether the applicant had been on continuous occupation of the house on Block \*\*\*\*\*. This will have to be proved during the hearing. It is not in dispute that the applicant is currently in occupation of the house. The applicant therefore has protectable interest in the house so as to avoid eviction by the respondents before the case is heard and determined. The applicant stands to suffer irreparable loss if the orders sought are not granted.

32. It should however be noted that the property herein has changed hands and now belongs to the 2<sup>nd</sup> respondent. A determination as to whether the same was matrimonial property and as to whether the sale and transfer was proper has to be made at the hearing.

33. It is my considered view that in the circumstances of this case the court should make orders for the preservation of the property pending the hearing and determination of the suit. The 1<sup>st</sup> respondent should also be ordered to continue paying rent for the house occupied by the applicant pending the determination of the suit.

34. In the foregoing the applicant has established a prima facie case against the respondents. She has also established that she will suffer irreparable loss if the prayer sought is not granted. Prayer 2 of the notice of motion dated 12<sup>th</sup> February, 2019 is granted against the respondents pending the hearing and determination of the suit herein. In addition and for the interest of justice the court makes the following orders:-

(1) That the 2<sup>nd</sup> respondent is hereby restrained from selling, charging or in any other way interfering with the title to the property known as LR. Kakamega/Town Block \*\*\*\*\* pending the hearing and determination of the suit.

(2) That the 1<sup>st</sup> respondent be and is hereby ordered to keep paying the applicant's rent at the premises known as Kakamega/Town Block II/299 pending the hearing and determination of this suit.

34. Orders accordingly. Costs shall be in the cause.

**Delivered, dated and signed in open court at Kakamega this 25<sup>th</sup> day of April, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

Miss Khadenyi for applicant

No appearance for respondents

Parties:

Applicant - absent

1<sup>st</sup> respondent - absent

2<sup>nd</sup> respondent - absent

Court Assistant - George