



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL CASE (O.S.) NO. 1 OF 2018

AMK.....APPLICANT

-VERSUS-

FKK.....RESPONDENT

RULING

Introduction:

1. By a notice of motion dated **09/11/2018**, the Applicant seeks the Orders.

1) **Spent**

2) **THAT** a temporary order of injunction do issue restraining the Respondent from receiving, utilizing, accessing or in any other manner benefiting from any further payments in respect of the compulsorily acquisition of land parcels MAVINDINI/MAVINDINI/[particulars withheld] and MAVINDINI/MAVINDINI/[particulars withheld] for the purposes of the Thwake Multipurpose dam pending hearing and determination of this application.

3) **THAT** a temporary order of injunction do issue restraining the respondent from receiving, utilizing accessing or in any other manner benefiting from any further payments in respect of the compulsorily acquisition of land parcels MAVINDINI/MAVINDINI/[particulars withheld] and MAVINDINI/MAVINDINI/[particulars withheld] for the purposes of the Thwake Multipurpose Dam pending the hearing and determination of the main suit.

4) **THAT** the National Land Commission to ensure compliance with this Order.

5) **THAT** costs be in the cause.

2. It is supported by grounds on the face of the notice of motion and the affidavit of Agnes Mwikali Kioko sworn on 9/11/2018.

3. The application is opposed by way of replying affidavit sworn by FKK on 14/1/2019 and the applicant has filed a further affidavit she swore on 14/02/2019.

4. Parties agreed to canvass application by way of the submissions which they filed and exchanged.

ISSUES:

5. After going through the materials before the court and parties submissions, I find the issues are;

i. Whether the threshold for grant of temporary injunction has been met?

ii. What is the order as to costs?

6. **Kenleb Cons Ltd. –vs- New Gatitu Service Station Ltd. & Another 2**, Justice Bosire thus remarked:

“To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to

the just determination of the application but must also show he has a right, legal or equitable, which requires protection by injunction.

7. The learned judge expressed the same principle in ***Njenga –vs- Njenga [1991] KLR 401***, when he remarked that ***“an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles”***; and such benchmarks had been foreshadowed in the earlier landmark case, ***Giella –vs- Cassman Brown & Co. Ltd [1973] EA 358*** which set out conditions attendant for grant of the relief namely;

“(a) the applicant must establish a prima facie case with a probability of success; (b) the applicant must demonstrate that he stands to suffer irreparable loss or damage that cannot be compensated for by an award of damages, if an injunction is not granted; and (c) where the court is in doubt, the application may be determined on consideration of the balance of convenience”

8. The Applicant’s contention which is not disputed by the Respondent is that she was married to the Respondent from the year 2008 until the year 2015 when the Respondent chased away her.

9. Further that the subject property was gifted to them during the subsistence of the union by the late KNM and that she substantially contributed to the developments hence entitled to half share of the award arising from compulsory acquisition of the subject property.

10. Section 3(2) of the Marriage Act, 2015 provides that parties to a marriage have equal rights and obligations at the time of marriage, during the marriage and at the dissolution of the marriage notwithstanding the system of marriage, that is whether the marriage is contracted under Islamic law, customary law or any other.

11. Section 7 of the Matrimonial Property Act, 2013 provides: -

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

12. Article 45(3) of the Constitution of Kenya 2010 provides: -

“Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage.”

Sub-Article 4(a) of the foregoing Article provides that:

“Parliament shall enact legislation that recognises any tradition or system of religious, personal or family law to the extent that any such marriages or systems of law are consistent with this constitution.”

13. The main issue for determination is whether land parcels MAVINDINI/MAVINDINI/[particulars withheld] and MAVIDINI/MAVIDINI/[particulars withheld] falls under the category of matrimonial property?

14. Matrimonial property had been defined under Section 6(1) of the Matrimonial Property Act, 2013 to include: -

a) The matrimonial home or houses;

b) Household goods and effects in the matrimonial home or homes; or

c) Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”

15. The Black’s Law Dictionary defines matrimonial property as;

“... the property that is acquired from the time when the marriage begins until one spouse files for divorce.”

16. It is the Plaintiff’s contention that the subject property became matrimonial property owing to the fact that it was gifted during the subsistence of the union in addition to her contribution towards development thus placing the National Land Commission with the obligation of compensating for the developments as well.

17. In determining the status of the subject property, the Plaintiff submits that this honourable court can be guided by the case of ***Muthembwa –vs- Muthembwa*** where the Court of Appeal held that:-

“... property inherited and gifted to one spouse before the marriage, and the property exists in the same condition as it was gifted or inherited, no problems arise. The spouse to whom it was gifted should be allowed to retain it. Problems however arise where improvements are made using matrimonial sources and then the property ceases to be in its original form and increases in value”

18. Section 9 of the Matrimonial Property Act, 2013 provides: -

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.

19. This foregoing provision could be interpreted to mean that a party may acquire beneficial interest in property by contribution towards the improvement of the property equal to the contribution. The question one begs to ask is ***“what is the description of the term contribution”***

20. Section 2 of the Matrimonial Property Act, 2013 defines contribution as: -

“Contribution means monetary and non-monetary contribution and includes: -

a) Domestic work and management of the matrimonial home;

b) Child care;

c) Companionship;

d) Management of family business or property

e) Farm work.”

21. However it is a principle of law that he who alleges a fact must prove it. Section 107(1) of the Evidence Act provides: -

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist, when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

22. As submitted by the respondent, the Applicant has a burden to prove that she contributed to the improvement of the parcels of land being **LAND PARCELS MAVINDINI/MAVINDINI/[particulars withheld] & /[particulars withheld]**.

23. The question now remains do **LAND PARCELS MAVINDINI/MAVINDINI/[particulars withheld] & /[particulars withheld]** form part of the matrimonial properties?

24. Section 6(1) and 10 of the Matrimonial Property Act of 2013 state that matrimonial property is property acquired during the subsistence of the marriage.

25. Further, the Respondent submits that the Applicant has attached an agreement dated 27/10/2017 showing that she and the plaintiff/Respondent separated or parted ways in September, 2015.

26. The confirmation of grant attached to the Respondent’s replying affidavit dated 14/01/2019 attached as annexure “FK5” shows that the Respondent acquired by way of inheritance from his late father via succession on 31/03/2013.

27. This is 2 years after the plaintiff/respondent had separated from the Applicant. Further to date the properties are still in the names of the Respondent’s deceased father as the transfer has not been effected to the Respondent.

28. The aforesaid analysis demonstrates that the first two limbs for grant of interim injunction are not available. However the parties being still husband and wife and taking to account that they are yet to divorce I would give the applicant a chance to prove her case in normal hearing of the matter by granting some half measure orders.

29. That is since her claim is based on 50% claim of the proceeds of compensation subject herein,I will order same 50% to be deposited in court and the balance to be paid to the respondent pending hearing and determination of the suit herein.

30. This is because there is no guarantee that in event she is successful in the suit the amount will be available if respondent gets same thus she will be inconvenienced in pursuit of same from the respondent. No prejudice will be occasioned on the respondent side in granting the orders herein.

31. Thus the court makes the following orders;

1. 50% of amount subject of dispute to be deposited in court and the balance to be paid to the respondent herein pending hearing and determination of the instant suit.

2. The costs to be in the main cause.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31ST DAY OF MAY, 2019.

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C. KARIUKI

JUDGE