



**REPUBLIC OF KENYA**

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

**MATRIMONIAL CAUSE NUMBER 12 OF 2017**

**JWG.....APPLICANT**

**VERSUS**

**GGW.....RESPONDENT**

**RULING**

1. The application before Court is dated 28/9/2017. The prayers sought are;

1. Spent

2. Spent

3. **THAT** pending hearing and determination of the Originating Summons, the Defendant/Respondent be restrained by way of an injunction by himself, his agents and or servants from selling, disposing off and/or in any other way adversely dealing with:-

a) PLOT NO. xx of L.R NO. xxxx/x, NAKURU MUNICIPALITY.

b) PLOT NO. SUBUKIA/SUBUKIA BLOCK/x/xxx(TETU).

c) 1/3 share of NO. AGUTHI/MUNUGURU/xxx.

d) 1/3 share of L.R. NO. xxxx/xxx at Free Area in Nakuru County.

e) 1/3 share of NAKURU/LANGALANGA/xxx.

4. **THAT** cost of this application be provided for.

2. JWG (applicant) has sworn an affidavit in support of the application. The same is also premised on the following grounds;

(a) **THAT** the Plaintiff/Applicant was a wife of the Defendant since 1983 to 2005.

(b) **THAT** during the course of coverture the Plaintiff and Defendant acquired PLOT NO. xx OF L.R. NO. xxxxx/x NAKURU MUNICIPALITY.

(c) **THAT** the plaintiff contributed Kshs. 180,000 and carried out all the developments on the aforesaid plot No. xx while the Defendant contributed only Kshs. 20,000.

(d) **THAT** during the course of coverture the Plaintiff and the Defendant inherited the following properties on 29<sup>th</sup> July, 1993 from the Plaintiff's father-in-law (Deceased):-

(a) PLOT NO. SUBUKIA/SUBUKIA BLOCK/x/xxx(TETU)

(b) 1/3 share of PLOT NO. AGUTHI/MUNUGURU/xxx.

(c) 1/3 share of L.R. NO. 12250/xxx, at Free Area in Nakuru County.

(d) 1/3 share of NAKURU/LANGALANGA/xxx.

(e) **THAT** during the course of coverture the Plaintiff acquired single handedly L.R. NO. NAKURU/MUNICIPALITY BLOCK xx/UN2, KIPKELION ROAD.

(f) **THAT** the plaintiff and defendant are divorced vide DIVORCE CAUSE NO. 7 OF 2004 before the Chief Magistrate's Court, Nakuru.

(g) **THAT** the plaintiff is in exclusive possession of PLOT NO. xx in L.R. NO. xxxx/x, NAKURU MUNICIPALITY however the defendant transacted as the purchaser of the aforesaid plot in the sale agreement in trust for the plaintiff and her family but he now wants to be registered as the absolute owner.

(h) **THAT** the plaintiff paid a substantial amount of the purchase price of PLOT NO. XX of L.R. NO. xxxx/x, NAKURU MUNICIPALITY and single handedly carried all the developments.

(i) **THAT** the defendant is in exclusive use, control and possession of Plot No. SUBUKIA/SUBUKIA/BLOCK/x/xxx(TETU), 1/3 share of plot no. AGUTHI/MUNUGURU/xxx, 1/3 share of L.R. NO. xxxx/xxx at Free Area in Nakuru County and 1/3 share of plot no. NAKURU LANGALANGA/xxx.

(j) **THAT** unless the orders sought are granted, the defendant may dispose of and/or deal adversely with the said parcels of land to the detriment of the plaintiff.

(k) **THAT** the plaintiff has a prima facie case with high chances of success.

(l) **THAT** no prejudice would be suffered as the orders sought would merely preserve the property herein until the real issues in the originating summons are heard and determined.

3. In a nutshell, the applicant's case is that she got married to the defendant on 3/9/1983 at St. Andrews Church Nairobi. They were blessed with four (4) children;-

i) EN

ii) DW

iii) TW

iv) SW (minor)

4. The two have since divorced and a decree absolute was issued on 19/7/2005.

5. The applicant avers that she single handedly acquired L.R. NO. NAKURU/MUNICIPALITY BLOCK xx/UN2 and together with the defendant they acquired PLOT NO. xx of L.R. NO. xxxx/x, NAKURU MUNICIPALITY. She also lists properties inherited by the defendant from his father during coverture.

6. It is the plaintiff's case that she contributed directly and indirectly to the acquisition of the matrimonial properties listed.

7. The application is opposed and in a replying affidavit GGW (respondent) has stated that the only matrimonial properties acquired during coverture are L.R. NO. NAKURU MUNICIPALITY BLOCK xx/UN2 and PLOT NO. XX of L.R. NO. xxxx/x NAKURU MUNICIPALITY. All other properties listed were inherited by the respondent from his father's estate.

8. The respondent adds that he used to run a business in the name [Particulars Withheld] CAFÉ (Acronym for G and J).

9. The respondent concludes by stating that he has no intentions whatsoever of selling any of his properties now or anytime in the near future to warrant the injunction orders sought.

10. The application was disposed off by way of written submissions.

11. I have had occasion to consider the application, the supporting affidavit and grounds as well as the replying affidavit. I have had due regard to the submissions on record.

12. Of determination is whether the applicant has achieved the legal threshold for the issuance of an injunction restraining the respondent by himself, his agents and or servants from selling, disposing off and/or in any manner dealing with the listed properties.

13. The principles for the granting of an injunction are well set out in the **Giella Vs. Cassman Brown Case**. I summarise them as hereunder;

1. Is there a prima facie case established?

2. Does the applicant stand to suffer irreparable harm?

3. On which side does the balance of convenience lie?

14. However, these principles are not cast in stone and the courts have also accepted that in dealing with an application for an interlocutory injunction, the court is not necessary bound by the three principles set out in **Giella –Vs- Cassman Brown Case**. The court may look at the circumstances of the case generally and the overriding objective of the law.

15. In the case of Suleiman –Vs- Amboseli Resort Ltd [2004] KLR 589, Ojwang Ag J (as he then was) stated;

**“counsel for the defendant urged that the shape of the Law governing the grant of injunctive relief was long ago, in Giella – v- Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief [1986] 3 ALL ER 772 at 780 – 781:- A fundamental principle of ...that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’... Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella –v- Cassman Brown, the court has to consider the following questions before granting injunctive relief:**

**i. Is there a prima facie case...**

**ii. Does the applicant stand to suffer irreparable harm...**

**iii. On which side does the balance of convenience lie...**

**Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief should always opt the lower rather than the higher risk of injustice... if granting the applicant’s prayers will support the motion towards full hearing, then should grant those prayers. I am unable to say at this point in time that the Applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly there would be a much larger risk of injustice if I found in favour of the Defendant than if I determined this application in favour of the applicant.”**

16. At this stage, it is not my duty to delve into the whole merits or demerits of the entire case. That is the task better left to the trial court.

17. From the evidence on record, it is clear that properties L.R. NO. NAKURU MUNICIPALITY BLOCK xx/UN2 and PLOT NO. xx of L.R. NO. xxxx/x NAKURU MUNICIPALITY were acquired during coverture between the applicant and the respondent. The manner of acquisition and level of contribution is under contest.

18. The applicant has established a prima facie case with a probability of success in so far as the properties L.R. NO. NAKURU MUNICIPALITY BLOCK XX/UN2 and PLOT NO. XX of L.R. NO. xxxx/x NAKURU MUNICIPALITY are concerned.

19. By the very nature of the properties, they being real properties, should any dealings adverse to the interests of the applicant be undertaken on these properties, the applicant is likely to suffer irreparable harm. An injunction to preserve the subject matter pending the hearing and disposal of the originating summons herein is in my considered view appropriate.

20. As regards properties;

(a) PLOT NO. SUBUKIA/SUBUKIA BLOCK/x/xxx(TETU)

(b) 1/3 share of NO. AGUTHI/MUNUGURU/xxx.

(c) 1/3 share of L.R. NO. xxxx/xxx at Free Area in Nakuru County.

(d) 1/3 share of NAKURU/LANGALANGA/xxx.

there is no dispute that the said properties were inherited by the respondent from the estate of his father.

Other than listing the properties and stating that they were acquired during coverture and explaining that only the respondent enjoys the said properties to the exclusion of the applicant, no evidence is forthcoming in support of the applicant’s entitlement to these properties.

21. It is contradictory and even self serving for the applicant to state that she acquired single handedly L.R. NO. NAKURU MUNICIPALITY BLOCK XX/UN2 KIPKELION ROAD yet at the same time lay a claim on properties acquired by the respondent through inheritance from the estate of the respondent’s father. Without showing any evidence of development or improvement of these later properties, isn’t the applicant employing double standards whereby what she acquires single handedly (and this awaits determination at trial) is hers but what the respondent inherits “single handedly”, it is theirs?

22. Counsel for the applicant has relied on the decision of *Musyoka J* in **ENK vs JNK [2015] eKLR** where the learned Judge stated;

“There was quite some dispute covering the parcel of land that was inherited from the respondent’s father. The respondent argues that it cannot possibly form part of matrimonial property, while the applicant takes the position that the same was indeed matrimonial property for she has improved it. Regrettably, she places no evidence before me of the alleged improvements done by her on the said property.

To buttress his case, the respondent cited *Muthembwa vs Muthembwa* (2002) 1 EA 186, where it was held that no spouse can acquire an interest in any property inherited by the other spouse from his or her parent unless the property has been improved with finances provided by the other spouse. In *Muthembwa vs Muthembwa* (*supra*) still the law following the coming into force of the Matrimonial Property Act I think not. From the language of the said Act, there is no provision which excluded inherited property from the definition of matrimonial property. Indeed, Section 5 of the Act impliedly includes it in the definition. According to Section 5, the only time such property would not form part of matrimonial property where the inheritance was before the marriage. In this case, the asset in question was inherited during the matrimony and therefore it forms part of matrimonial property.”

23. I am of a different opinion from my brother *Musyoka J.* I hold *Muthembwa vs Muthembwa* as still good law even with the advent of the **Matrimonial Property Act**. **Matrimonial Property** is defined under **Section 6** of the **Act** as

“**S6. (1) For the purposes of this Act, matrimonial property means—**

(a) the matrimonial home or homes;

(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.

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.”

24. **Section 7** of the **Matrimonial Property Act** provides how ownership of **Matrimonial Property** is acquired;

“**S7. 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.**”

25. Under **Section 2** of the **Matrimonial Property Act** contribution is defined as monetary and non-monetary contribution.

26. My considered view is that even where property is acquired through inheritance by one spouse during coverture, the other spouse is bound to prove within the meaning of **Section 7** of the act ownership according to his or her contribution. That contribution need not necessarily be monetary.

27. My reading of **Section 9** of the **Matrimonial Property Act** lays it bare that a spouse can acquire a beneficial interest from property inherited by the other spouse subject to the spouse making a contribution towards improvement of the property. **Section 9** provides;

“**S.9 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.**”

28. The evidence before me does not show a contribution towards improvements by the applicant of the property inherited by the respondent herein.

29. The running thread in Sections 2, 6, 7 and 9 of the **Matrimonial Property Act** in that no property is available to a spouse from the other spouse merely on the basis of being a wife or a husband. There must be contribution as defined under **Section 2** of the **Act** and in the case of property acquired through inheritance by one spouse, certainly there must be acquisition of interest in the property by the other spouse as provided for under **Section 9** of the **Act**.

30. The view expressed by **Kiage J.A** in his dissenting judgement in **PNN –Vs- ZWN [2017]** eKLR elucidates the legal position further. The Judge stated;

“ I think that it would be surreal to suppose that the Constitution somehow converts the state of coverture into some sort of laissez-passer, a passport to fifty percent wealth regardless of what one does in that marriage. I cannot think of a more

pernicious doctrine designed to convert otherwise honest people into gold-digging, sponsor-seeking, pleasure-loving and divorce-hoping brides and, alas, grooms. Industry, economy, effort, frugality, investment and all those principles that lead spouses to work together to improve the family fortunes stand in peril of abandonment were we to say the Constitution gives automatic half-share to a spouse whether or not he or she earns it. I do not think that getting married gives a spouse a free to cash cheque bearing the words “50 per cent.”

Thus it is that the Constitution, thankfully, does not say equal rights “including half of the property.” And it is no accident that when Parliament enacted the Matrimonial Property Act, 20XX, it knew better than to simply declare that property shall be shared on a 50:50 basis. Rather, it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition.

Section 7 of the Act states;

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

31. On the material before me, I am not persuaded that the applicant has established a prima facie case in so far as properties;

- (a) PLOT NO. SUBUKIA/SUBUKIA BLOCK/x/xx(TETU)
- (b) 1/3 share of NO. AGUTHI/MUNUGURU/xxx
- (c) 1/3 share of L.R. NO. xxxx/xxx at Free Area in Nakuru County
- (d) 1/3 share of NAKURU/LANGALANGA/xxx

are concerned.

32. The upshot is that the application dated 28/9/2017 is partially successful. I partially allow it and make the following orders;

**1. An injunction is to issue restraining the defendant by himself, his agents and or servants from selling, disposing off and/or in any other way adversely dealing with plot no. XX of LR. NO. xxxx/x.**

**2. Each party to bear its own costs.**

**Dated and Signed at Nakuru this 29<sup>th</sup> day of May, 2019.**

**A. K. NDUNG'U**

**JUDGE**