



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL SUIT NO. 10 OF 2019 (OS)

IN THE MATTER OF THE SECTION 2, 6, 7, AND 17(1) OF

THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2003

WRK.....APPLICANT

VERSUS

FM.....RESPONDENT

RULING

1. The principles for granting a mandatory interlocutory injunction are known. In **Kenya Breweries Ltd & Another –v- Washington O. Okeyo [2002]eKLR**, the Court of Appeal stated as follows:-

“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4th Edition Paragraph 948 which reads:-

‘A mandatory injunction can be granted on an interlocutory application as well as at hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided on once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs.....a mandatory injunction will be granted on an interlocutory application.’ ”

2. In **East African Fine Spinners Ltd and 3 Others –v- Bedi Investment Ltd, Civil Application Nairobi No. 72 of 1994**, the Court of Appeal discussed the difference between mandatory and prohibitory injunctions. It was stated that prohibitory injunctions are meant to prevent for the future continuous or the repetition of the conduct of which the plaintiff complains and it does not attempt to deal with what has happened in the past; that is left for the trial, it be dealt with by damages or otherwise. Mandatory injunctions on the other hand are often a means of undoing what has already been done so far as that is possible. Prohibitory injunction merely requires abstention from duty while mandatory injunction requires the dismantling or destruction of something already erected or constructed and therefore the case has to be unusually strong before the court can grant a mandatory injunction. Interlocutory mandatory injunctions should be granted with reluctance and in very special circumstances. Mandatory injunctions have the effect of resolving all the matters in dispute, and that is why they are not easily granted at interlocutory stage (**Agip (K) Ltd –v- Mahesh Chandra Himatlal Vora & 2 Others, Civil Appal No. 213 of 1999**).

3. The applicant WRK filed this cause on 20th February 2019 seeking a declaration that there is no union of marriage between her and the respondent FM; a declaration that the property known as Kiambu/Mun. Block [particulars withheld] together with the developments thereon are not matrimonial property; a mandatory injunction do issue to compel the respondent to vacate this property; a permanent injunction against the respondent, his agents, servants or any person claiming through him, restraining them from entering into or being in close proximity to the property or any other property that she owns; a permanent injunction restraining him from staking a claim to or taking possession or any property belonging to her; and an order for the respondent to surrender the remote control keys for the gate or the main door to the property.

4. With the summons was a chamber application that sought the same orders.

5. Her case was that on 9th February 1996 she got married to a Congolese national called NM. They got a son IM on 10th April 1997. She had had a daughter JAN born on 18th January 1988 from a previous marriage. In 2001 her husband had an immigration status problem and

that meant he goes back to Congo. They did not divorce. In 2003 she met the respondent. They began a relationship which led to the birth of a son SM on 23rd December 2018. The respondent knew about her marital status. He also told her he was married to one MMK with whom he resided at Plainsview South B Estate from time to time, and they had two children P.M. and SW. It became clear while the applicant and the respondent were staying together that the later was high-handed, very temperamental and physically abusive, she said. It was clear to her that she could not marry him. She works as head of private banking at [particulars withheld], Kenya. She solely takes care of her family. The respondent does not assist, except once in 2013 when he helped pay fees for SMM. Otherwise, he pays fees at his whim. In 2012 she took a loan of Kshs.16 million and bought half of an acre comprised in above title. She began developing it single-handedly without any assistance from the respondent. Before this, in 2009, and owing to his aggression and physical cruelty, she had stopped having an intimate relationship with him. On 2nd January 2018 she completed building her house on the plot. The respondent forced himself in it. He was asked to leave but did not. In November 2018 she changed locks but used police officers to break in. He begun claiming this was matrimonial property. In the house, he is verbally abusive, even in the presence of children and workers. He has threatened to kill or hurt her. She has reported the threats to police. She has stage IV breast cancer and she is on treatment. He does not assist to pay her medical bills. She is drained financially and emotionally. These are the reasons why she filed the suit and application.

6. The respondent filed a replying affidavit to the chamber application. He stated that he met the applicant in 2002. She told him that she had been cohabiting with the Congolese but that the affair had stopped. The man stays at [particulars withheld] and works as a football coach. He has never left the country. She left the man when she discovered he had a wife staying in Germany. The respondent took her to his parents in Nyahururu. They began cohabiting as husband and wife. They have lived together as such since, and have a son SM. He had married a lady customarily. He left her when he met the applicant. Subsequently, his parents and elders visited the applicant's family in Siakago in Embu. There was betrothal and payment of dowry. In 2017 the applicant's daughter got married. He was the one who received dowry as the father. During the girl's wedding she had done invitation cards in which the respondent and the applicant were referred to as "Mr & Mrs". At her place of work she took out a medical cover for him on showing he was a spouse. He stated that they have had a harmonious relationship, and he has faithfully helped maintain the family. He produced several receipts of school fees payments. He stated that they jointly bought that plot and developed it. It was out of love that he had it registered in her name. Prior to March 2019 they were living well. A few days to the filing of the suit, however, she changed and begun being abusive. She locked him out. He reported to police. She also reported to police. He has supported her during her illness. Lastly he has acquired a farm in Tigoni, Kiambu in which they had both heavily invested. His case was that the suit was based on falsehoods and misrepresentation. He sought the dismissal of the application.

7. The respondent further filed a notice of preliminary objection against both the summons and application. Referring to **sections 2, 6, 7 and 17** of the **Matrimonial Property Act**, he stated that the court had no jurisdiction to hear and determine the summons and application. Secondly, the application was defective because it had no supporting affidavit contrary to **Order 51 rule 4** of the **Civil Procedure Rules**. Thirdly, that the allegations in respect of domestic violence could only be handled under **sections 3 and 24** of the **Protection against Domestic Violence Act (No 2 of 2015)** and not in this court. Lastly, that the application was an abuse of the process of the court.

8. The court directed that the application and the objection be taken together, and asked counsel to file written submissions on the same, which they did. I have considered the affidavit evidence and the submissions.

9. I will deal with the substance of the application. I will proceed on the basis that the chamber summons was supported by the same affidavit that supported the originating summons.

10. Recalling the principles applicable in the grant of mandatory injunction, I begin with the question whether or not the applicant and respondent were married. This is because the applicant's case is that they were not. It is evident that the two have stayed together from about 2003, and have a child who was born in 2008. They have stayed together for about 16 years. The applicant was previously married to a Congolese with whom she got a son. She had had a daughter from a previous relationship. It would appear the marriage to the Congolese was a customary one. It would also appear that since 2003 the applicant has not been interacting with the Congolese whom she still regards as her husband. The respondent states that he and the applicant are husband and wife. They are in a customary marriage relationship; that his people went and paid dowry to the applicant's parents; that when the applicant's daughter was marrying dowry was paid to him, and the wedding cards were printed in such a way that he was referred to as the girl's father; and that the respondent has taken out a spouse's medical cover for him at her place of work. This information was contained in his replying affidavit, and the applicant did not swear a further affidavit to challenge the same.

11. All that I can say is that, at this stage, the applicant's evidence that she was not married to the respondent is neither overwhelming nor exceptional as to be the basis of the grant of an interlocutory mandatory injunction.

12. As to whether the property in question was matrimonial property, what is clear is that it was bought and developed when the two were living together. The question (whether or not this is matrimonial property) will be decided when the issue of marriage is finally settled, and that will happen when the cause is heard during which time all the evidence will be tested on cross-examination.

13. The result is that, in the circumstance of the chamber application, a case for the grant of interlocutory mandatory injunction has not been made.

14. In view of this finding, the question whether or not the chamber application was supported by an affidavit would merely be academic. But it suffices to say that, the chamber application was grounded on evidence. The evidence ought to have been contained in a supporting affidavit, and the affidavit was required to be served. This is what **Order 51 rule 4** of the **Civil Procedure Rules** requires. However, under **rule 10(2)** no application should be defeated on a technicality or on want of forum.

15. Lastly, on the issue raised about **sections 2, 7 and 17** of the **Matrimonial Property Act**, my view is that these can only become relevant when the question of marriage is determined. The result is that the objection is not sustained. It is dismissed, but I make no order as to costs.

16. The chamber application dated 26th February 2019 is dismissed with costs.

DATED and DELIVERED at NAIROBI this 23RD day of MAY 2019

A.O. MUCHELULE

JUDGE