



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 17 OF 2018 (O.S.)

IN THE MATTER OF:

MATRIMONIAL PROPERTY ACT 2013

ARTICLE 45 (3) OF THE CONSTITUTION OF KENYA

ORDER 37 OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

DRL.....PLAINTIFF

AND

AMN.....DEFENDANT

RULING

1. By the origination summons dated 9th May 2018 the Plaintiff claims an equitable share in the matrimonial properties i.e. Land Measuring 0.40 ha, Bar, Home ground, Hotel, [particulars withheld] Insurance Agency, monies in Barclays Account. He subsequently filed the application dated 9th May 2018 seeking inter alia: (a) an injunction to restrain the Defendant/ Respondent, her servants and/or agents from interfering with his occupation of **L.R. No. Ontulili/Ontulili/ Block I Katheri/[particulars withheld]**; and (b) an Order of inhibition to stop registration of any dealing in L.R. No. Ontulili/Ontulili/ Block I Katheri/[particulars withheld] until this suit is heard and determined.

2. The application was supported by the sworn affidavit of the applicant and on the grounds that the Defendant and the Plaintiff divorced in Nyanyuki CMCC Divorce No. 8 of 2015. The defendant intends to return to the plaintiff's home and she is threatening to chase away the plaintiff. The defendant has been disposing off secretly and fraudulently matrimonial properties which she was holding in trust for the plaintiff while he was away on a peace keeping mission in Burundi. The plaintiff claims that he will be left destitute if the defendant continues to dispose of the matrimonial properties and forcefully take the property owned and occupied by the plaintiff.

3. The Defendant/respondent opposed the application vide Replying affidavit dated 17th September 2019. She averred that the application is incompetent as it is not supported by any affidavit. She stated further that the land, house and other developments in lard parcel No. Ontulili/Ontulili Block 1 Katheri/[particulars withheld] are her properties and the applicant never contributed to their acquisition. That the applicant has chased them away from the matrimonial properties and does not have regard to his children welfare who are now living in rental houses. That upon finalization of Nyanyuki Chief Magistrate Divorce Cause No. 8 of 2015 the applicant agreed to vacate the house but has been giving endless stories and now want to use this court process to extend his stay into the house.

4. On 29th November 2018 the court directed parties to file written submission to the application. Both parties have filed their relevant submissions which I have duly considered.

Lack of Supporting Affidavit

5. **Order 51 Rule 4 of the Civil Procedure Rules, 2010** provides as follows:

“Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

6. In **Skair Associates Architects vs. The Evangelical Lutheran Church of Kenya & 4 others** the court held that no affidavit evidence is required where an application has raised points of Law, but it is to be included where the motion is to be supported by evidence. In **Isaac**

Aluoch Polo Aluochier v National Alliance and 542 others [2016] eKLR, the effect of lack of a supporting affidavit in a constitutional Petition for enforcement of rights and fundamental freedoms was considered and the court held as follows:

It is conceivable that a petition which challenges, for example, constitutionality of a particular legislative text may not require an affidavit. Where however, a petition relies on matters of evidential fact, this must be proved by affidavit or oral testimony as the court may direct.”

So where, as here, it is sought to rely on matters of fact a suitable affidavit with documentary annexures ought to be filed in discharging the burden of proof of a plaintiff in terms of section 107, 108 and 109 of the Evidence Act....”

7. The present application was premised on the grounds set out on the face of the application. In so far as the Plaintiff is relying on points of law there will be no need of a supporting affidavit. However, the plaintiff is seeking injunctive remedies which ordinarily would call for evaluation of some factual basis or evidence through an affidavit. Nonetheless, I do note that the application was filed together with the Originating summons which has a supporting affidavit that speaks to grounds relevant to the Originating Summons and the application. That notwithstanding, and I stated this earlier a notice of motion stands complete even without a supporting affidavit and may be determined on the basis of the grounds set out in the motion. The objection herein takes me back to the Constitution: it ushered in a new era; not to place undue emphasis on form and technicality but rather to serve substantive justice. See article 159(2) (d) of the Constitution. I will proceed on that basis and determine the application before me on merit.

Prima facie Case

8. In considering an application for temporary injunction, and, as the court asks the traditional questions, to wit: (1) has the applicant established a prima facie case?; (2) will the applicant suffer irreparable damage?; and (3) where does the balance of convenience lie?; it must also take into account the wider sense of justice demanded by the case as well as all the relevant circumstances of the case. The trial court in **Nyanyuki Divorce Cause No. 8 of 2015 AMN versus DRL** made orders to the effect that the L.r. No. Ontulili/Ontulili Block 1 Katheri [particulars withheld] be subdivided into two equal portions. Once subdivision is complete, David Rasto Leanarato will vacate the family home for occupation by AMN. The portion on which the family house stands be registered in the name of the petitioner and the remaining portion be registered in the name of the Respondent. In the alternative, the parties can agree to sell the land and share the proceeds equally.

9. These determinations are quite relevant to the application before me. Yet, the applicant did not bring them to the attention of this honourable Court. And as injunctive relief is a creature of equity, the applicant ought to have made full disclosure of all facts material to the case. Needless to state that non-disclosure is significant consideration in such applications, for it portends bad faith: and bad faith routs everything. Equity will not aid such suitor who does not adhere to the maxim that *he who comes to equity must come with clean hands*. I therefore fold my hands back and refuse to grant any injunction in this matter.

10. The upshot of this analysis is that; the Plaintiff’s/Applicant application dated 9th May 2019 lacks merit and is dismissed with costs to the Respondent. It is so ordered.

Dated, Signed and delivered in open court this 23rd day of July 2019

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F. GIKONYO

JUDGE

IN PRESENCE OF

Nyenyire for Applicant

H.Gitonga for Gichunge for respondent

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F. GIKONYO

JUDGE