



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 49 OF 2007(O.S)**

**JKN.....APPLICANT**

**VERSUS**

**RGN.....RESPONDENT**

**RULING**

1. In the application dated 8<sup>th</sup> October, 2019, brought by way of Notice of Motion under Article 159(2) (d) of the Constitution, the Matrimonial Property Act, 2014 and Section 24(a) and 93(2) of the Land Registration Act, the Applicant seeks an order of prohibition, stopping the Respondent from alienating, selling, charging, subdividing or transferring the suit properties in favour of third parties. The properties in issue were identified as L.R No. [.....], L.R No. [.....], Kajiado Kaputei-North [.....], L.R No. [.....] Maragua, Nginda Samar/Block [.....], L.R No. [.....], Kajiado Kaputei [.....], Kajiado Kaputei North [.....], L.R No. [.....] Green Park Naivasha and a farm in Nyahururu (igwa-miti areas) measuring approximately 100 acres.

2. The application was supported by the affidavit of the applicant dated 8<sup>th</sup> October, 2019 and the grounds on the face thereof. She deponed that on 19<sup>th</sup> September, 2019 she had noticed a newspaper advertisement in the Daily Nation Newspaper where one of her husband's properties was being advertised for sale by public auction. She averred that the property in issue was matrimonial property which should not be sold without her consent. She asserted that despite attempts to inquire from the respondent to render reasonable explanation for his actions, her efforts had been fruitless. She asked the court to grant the prayers sought to protect her interest in the matrimonial property.

3. In response, the Respondent filed grounds of opposition dated 29<sup>th</sup> October, 2019. He claimed that the application lacked merit for seeking orders that would adversely affect third parties not enjoined in the suit. Another ground pleaded was that the applicant was on a fishing expedition as the allegations raised were not supported by evidence. The third ground was that the properties included in the application were not included in the originating summons thus not associated to this suit. The respondent also denied ownership of the properties listed in the application.

4. On 31<sup>st</sup> October, 2019, Counsels for the parties made oral submissions in support of their positions. Mr. Gatheru for the applicant submitted that the properties in which they sought injunctive relief were in the originating summons which was yet to be determined. He asserted that the attempt by the respondent to dispose of matrimonial property was enough evidence for the court to grant the orders sought. He insisted that the property in Naivasha was part of matrimonial property which is subject to these proceedings.

5. Mr. Oweya, counsel for the respondent submitted that the property in Naivasha was not listed in the originating summons as alleged by the applicant asserting that if the orders sought were granted they would have adverse effects on 3<sup>rd</sup> parties who advertised the sale and were not enjoined in this suit. He further stated that it was the chargee who was selling the property and if prevented from realizing the security, the respondent would be exposed to increments in interests and penalties. He denied that the respondent intended to sell the other properties stated by the applicant.

6. I have considered the application herein, the affidavit in support, grounds of opposition and oral submissions by both counsels. It is however worthy noting that none of the learned counsels made reference to any authorities in support of their submissions. Nevertheless, the issue that renders itself for determination whether there is a prima facie case established to grant the orders of Injunction and preservation of property.

7. In the celebrated case of **Giella vs Cassman Brown (1973)EACA at pg 358-360**, an injunction order can only issue upon proof of a prima facie case with a probability or likelihood of success, proof of irreparable damage that cannot be compensated in monetary terms and, assessment on a balance of convenience on which side justice tilts in favour of.

In **Nguruman Ltd vs Jan Bonde Nielsen and 2 others CA No. 77/2012 and Kenya Commercial Finance Co. Ltd vs Afraha Education Society (2001) Vol 1 EA 86**, the court held that all the three conditions and stages must be applied as separate, distinct and logical hurdles which must be surmounted sequentially.

8. However, I am alive to the fact that the exercise of such powers is a matter of judicial discretion which must be executed judiciously and in a manner that promotes the integrity of the court bearing in mind that judicial power is donated by the people of Kenya through the Constitution. The court of appeal alluded to the application of discretionary powers by the courts while issuing injunctive orders in the case of **Abel Salim & 4 others vs SF Okong'o & 2 others (1976)eKLR**

9. The applicant alleged that the Respondent intended to dispose of matrimonial property before the originating summons can be heard and determined. The respondent disputed this claim, stating that he did not own some of the properties listed in the application. He also denied ownership of the property in Naivasha which was advertised for sale by Valley Auctioneers. The advertisement for public auction identified the property as L.R No. [...] Green Park Naivasha which the applicant is claiming to be matrimonial property. No further evidence was adduced as to the ownership of the property.

10. At this stage the court is called upon to only decide on the request for preservation of the matrimonial property without compromising the suit. From the pleadings the court is not able to ascertain the current status of L.R No. [...] Green Park Naivasha. Parties are bound by their pleadings and this property was not specifically pleaded in the originating summons nor was it captured in the witness statement filed by the applicant but was mentioned by the applicant during the hearing of this suit but there was no request to bring it in by a supplementary affidavit. The sentiments by the respondent that he would adversely be affected if the sale is stopped points to the conclusion that he has an interest in the property even though he denied owning it. However, the burden was on the Applicant to prove that her case meets the threshold for the granting of an injunction on the claim of matrimonial property.

11. The aim of protecting matrimonial properties is to give effect to the rights in article 45(3) in the Constitution. At this stage, I will not dwell on the parties' interest in the properties in issue. What is up for determination is whether there is imminent danger that the respondent may dispose of matrimonial property to the detriment of the applicant. The Court has been told that the respondent is in possession of these properties and the eventuality of their disposal will irreparably affect the interest of the Applicant. As such, I find that an order of injunction against the Respondent is merited.

12. The upshot of the above analysis is that these properties need to be preserved to avoid one of the parties becoming a holder of a barren result. Accordingly, I allow the application dated 8<sup>th</sup> October, 2019 in terms of prayer 2.

**SIGNED DATED AND DELIVERED IN OPEN COURT THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of .....Advocate for the Applicant**

**In the presence of .....Advocate for the Respondent**