



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 14 OF 2019**

**NAPHTALY EDGAR SHIANYISA MUYONGA.....PLAINTIFF**

**VERSUS**

**DINAH INDASI MWANGALE MUYONGA.....DEFENDANT**

**RULING**

1. On the 31<sup>st</sup> October, 2019, this court issued interim orders in terms of prayer 2 and 3 of the notice of motion dated the same date wherein it issued a temporary injunction restraining the respondent from withdrawing money held in her account No. [.....], Cooperative Bank Ltd. Kakamega Branch and further that treasury bonds and securities currently held at Central Bank of Kenya, Kisumu be deposited in a suspense account where the respondent cannot access it until further orders of this court.
2. The court also made interim orders directing the firm of Namada & Co. Advocates not to release any outstanding balance of moneys to the respondent until further orders of this court.
3. The matter came up for inter-partes hearing on 4<sup>th</sup> October, 2019. The pending issue is whether the interim orders granted on 31/10/2019 should be confirmed in terms of prayer 4 that:-

**Pending inter partes hearing of the main suit herein an order of temporary injunction do issue restraining the Defendant/Respondent from further wasting, misappropriating and/or withdrawing moneys from bank account number [.....] held with Cooperative Bank Ltd Kakamega Branch where the said moneys is currently banked and/or transfer the said moneys to any other bank account AND FURTHER that the treasury bonds and securities currently at Central Bank of Kenya (CBK) – KISUMU be deposited in a suspense account where the Defendant/Respondent should not access the same until further orders by this court and or until the parties mutually agree on how to utilize the said money for development.**

**(a) That pending hearing and determination of the main suit the law firm of Namada & CO. Advocates be directed not to release the outstanding balance of any moneys to the defendant until further orders are made by this honourable court.**

**(b) That this Honourable court be pleased to order Cooperative Bank Ltd Kakamega Branch to release to the applicant the Defendant/Respondent's bank Statement from her bank account Number [.....] as from January, 2019 to date.**

4. The application was based on the grounds on the face of the application and supported by the affidavit of the applicant sworn on 31/10/2019 and further affidavit sworn on 3/12/2019.
5. The applicant was represented by Mr. Osango advocate while the respondent was represented by Mr. Wasuna advocate. Both advocates made oral submissions in court.
6. The applicant and the respondent are man and wife. The matter in dispute between them is Kshs.31 million which are proceeds of sale of land parcel No. 19746 situate at Maanzoni, Machakos Municipality. The land originally belonged to the applicant but he transferred it to the respondent on the basis of love and affection. The applicant contends that he transferred the land to the respondent on condition that the land remained family property as evidenced in an agreement dated 14/12/2008 marked NESM-1. That during the sale of the property his spousal content was sought which he gave. Therefore that the respondent was holding the title in trust for the entire family.
7. The applicant contends that the proceeds of the sale belong to the family. That after selling the land, the family decided that the money be deposited into the respondent's bank account. That the family decided to invest the money by developing a hotel along river Yala near Igulu along Kakamega – Kisumu road. That upon being paid the money the respondent has become hostile to the applicant and has failed to account for the money. That she is now wasting the money and diverting it to her own benefit without the applicant's consent. Therefore that the temporary orders of injunction should be confirmed pending the hearing and determination of the main suit. That if the orders are not granted the respondent will waste the money and he will suffer irreparable loss.

8. The respondent on the other hand argues that though the subject property initially belonged to the applicant he voluntarily transferred it to her on the basis of love and affection. That upon doing so the applicant ceased to have any legal or equitable interest in the property which became her absolute property.

9. That sometimes this year she sold the property for Kshs.65,000,000/=. That the proceeds of sale is her money as the hitherto sole proprietor of the sold property. That the family decided to use part of the money to develop a hotel in Kakamega County and for her to use the balance to put up a block of apartments in Rongai.

That the applicant volunteered to supervise the construction of the hotel. That she has advanced him a total of kshs. 17,000,000/= in bank transfers and cash payments. That the respondent squandered the money without developing the hotel facility. He bought himself a car Toyota Prado Land Cruiser registration No. KCT 974C. He has not accounted for the rest of the money that she gave him.

10. The respondent contends that the applicant has no legal or equitable right in her money that is her bank. Further that the applicant obtained the exparte orders by use of documents that misrepresented ownership of the property. That the orders should therefore be vacated.

11. In his arguments before the court, Mr. Osango for the applicant argued that the dispute before the court is about money and not registration of title. That the applicant is seeking for the preservation of the money in dispute of kshs.31 million pending the determination of the suit. He submitted that the court has jurisdiction to determine the matter.

12. Counsel submitted that the agreement between the parties of 14/10/2008 states that the property belonged to the family. That the applicant gave spousal consent during the sale of the property. That it is evident that the respondent has been transferring money to the applicant. That the applicant has established that there is money in dispute. Therefore that the applicant has established that the land belonged to the family. That a prima facie case has been established. That the case is likely to succeed. That if the orders are not granted the money is likely to be wasted and the applicant will suffer irreparable loss.

13. Mr. Wasuna for the respondent on the other hand argued that there is no prima facie case established. That the respondent has annexed a title to show that she was the absolute owner of the land. Therefore that the applicant has no equitable claim to the proceeds of the property. That there is no prima facie case with a probability of success established.

14. That if the applicant argues that the property is family property, the applicant should have moved the court in its family division. That if he claims the money because it is proceeds of land then the dispute is on land and should have been filed with the Environment and Land Court. Therefore that the court has no jurisdiction to entertain the matter.

15. Further that the respondent's bank documents show that the applicant has received more than 12 million from the respondent. That he has not accounted for the 12 million that he received from the respondent.

16. Counsel submitted that the treasury bonds are not annexed. That the court is being asked to make orders on them when they are not annexed.

17. Counsel submitted that the exparte orders are hurting the respondent. That they were obtained by concealment of material facts. That since the applicant has not shown that he has equitable right to the money he cannot suffer irreparable loss.

18. Mr. Osango in reply stated that this court has jurisdiction to handle matrimonial matters.

19. The dispute herein is whether the applicant is entitled to money that is being held in his wife's bank account. The issue of land is only relevant as to show the source of the money. The predominant issue is therefore money and not land. It is the High Court that has jurisdiction over the matter and not the Environment and Land Court. This court has jurisdiction in both civil and matrimonial disputes.

20. The principles under which injunctive orders can issue are well settled see *Giella – vs – Cassman Brown and Co. Ltd (1973) EA 358*. An applicant is required to establish that-

(a) He has a prima facie case with a probability of success.

(b) That if the orders sought are not granted he will suffer irreparable loss that cannot be compensated by way of damages.

(c) That if the court is in doubt to determine the issue in a balance of probability.

21. I have considered the application, the arguments by the counsels for the parties and the pleadings placed before the court. The appellant claims the proceedings of sale of the land on the basis that the respondent was holding the land in her name as a trustee for the family. The respondent on the other hand argues that the fact of registration of the land in her name made her the absolute proprietor of the land and extinguished the applicant's legal or equitable right to the land or proceeds of sale of the land.

22. The agreement dated 14th October, 2008 between the applicant and the respondent stated in paragraph (5) that-

*“The property or parcel of land reference No. 19746 belongs to the family, (transferor and transferee)”.*

23. Section 28 of the Land Registration Act provides that-

***Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—***

***(a) spousal rights over matrimonial property;***

***(b) trusts including customary trusts.***

24. The agreement dated 14/10/2008 stated that the land belonged to both the applicant and the respondent. The question then is whether the land though registered in the name of the respondent remained matrimonial property. The subsequent question is whether the respondent holds the money which are proceeds of sale of the said land as trustee for the applicant. The court is not required to answer these questions at this stage. The applicant is only required to establish a prima face case with a probability of success that he has a stake over the money as a spouse to the respondent.

25. Upon evaluation of the pleadings and arguments placed before the court, I find that the applicant has established a prima facie case with a probability of success that he has legal or equitable claim on the money being held in the respondent's bank account. If the orders sought herein are not granted, there is likelihood for the respondent to put the money out of the reach of the court in which case the applicant will suffer irreparable loss as there will be no money to litigate about. The orders sought are therefore merited.

26. The upshot is that the orders sought in prayers 4 of the notice of motion dated 31<sup>st</sup> October, 2019 are granted as prayed pending the hearing and determination of the main suit herein.

**Delivered, dated and signed in open court at Kakamega this 19th day of December , 2019.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Osango for applicant/plaintiff

Mr. Nyikuli holding brief for Wasuna..for respondent/defendant

Applicant:- ...Present.....

Respondent.....Present.....

Court Assistant:- Polycap

30 days right of appeal.