



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MATRIMONIAL CAUSE NUMBER 43 OF 2017**

**P I O.....PLAINTIFF/APPLICANT**

**VERSUS**

**B O.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is in respect of the application dated 10/11/2017 vide this application, P I O (Applicant) seeks orders:

**(a) Spent**

**(b) Spent**

**(c) 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 three (3) plots namely:-**

**(I) L.R. NO. NAKURU/MUNICIPALITY BLOCK 26/[Particulars Withheld] measuring 0.1040 Ha.**

**(II) L.R. NO. NAKURU/MUNICIPALITY BLOCK 26/[particulars withheld] measuring 0.0450 Ha.**

**(III) MITI MINGI/MBARUK BLOCK 1/[Particulars Withheld] (NDEGE)**

**(IV) DUNDORI/MIRORENI BLOCK 2/[Particulars Withheld] (NDIMU)**

**(d) THAT costs of this application be provided for.**

2. The application is supported by the sworn affidavit of the applicant and on grounds;

1. **THAT** the Plaintiff got married to the Defendant on 23<sup>rd</sup> May, 1999 under the African Christian marriage and Divorce Act (Cap 15).

2. **THAT** during the course of coverture, the Plaintiff and the Defendant jointly acquired several properties to wit;

i. **L.R. NO. NAKURU/MUNICIPALITY BLOCK 26/[Particulars Withheld]** registered in the Defendant's name measuring 0.1040 Ha.

ii. **L.R. NO. NAKURU/MUNICIPALITY BLOCK 26/[Particulars Withheld]** registered in the Defendant's name measuring 0.0450 Ha.

iii. **MITI MINGI/MBARUK BLOCK 1/[Particulars Withheld] (NDEGE)** registered in the name of the defendant.

iv. **DDUNDORI/MIRORENI BLOCK 2/[Particulars Withheld] (NDIMU)**

v. **NAKURU MUNICIPALITY PLOT NO. "E /[Particulars Withheld]" NAKURU WEST KAPTEMBWO** measuring

50 x120 feet.

vi. Motor vehicle registration number **KCF /[Particulars Withheld]** registered in the defendant's name.

3. **THAT** the plaintiff directly contributed towards acquisition of the matrimonial properties by managing and operating the family business to wit stall number [Particulars Withheld] located within Nakuru County.

4. **THAT** the plaintiff too contributed to the establishment of the family matrimonial home and also the properties by taking care of the Defendant as husband and the three (3) issues of the marriage.

5. **THAT** the plaintiff too contributed to the development of the matrimonial home by acquiring household and personal effects for the Defendant and the issues of the marriage during coverture.

6. **THAT** the plaintiff and the defendant are since separated.

7. **THAT** the plaintiff seeks for division of matrimonial properties.

8. **THAT** I thus pray that presevatory orders does issue in favour of the assets herein.

3. It is the applicant's case that she got married to the defendant on 23/5/1999. She had cohabited with the defendant from about 1992.

4. At the time of such cohabitation, the defendant had no asset of his own.

5. Both joined hands and worked in the family business known as Rainbow Bar situate at [Particulars Withheld] Estate within Nakuru County.

6. The applicant avers that she ran and managed the said bar from the year 1990 to 1995. At the time, the defendant was an employee of [Particulars Withheld] Company based in Kabarnet District.

7. The two were blessed with three (3) issues namely;

1. J O

2. A M

3. M I.

It is the plaintiff who took care of these issues when the defendant was away at his employment.

8. The plaintiff avers that it is during coverture that she and the defendant were able to acquire properties viz;

(a) **L.R. NO. NAKURU/MUNICIPALITY BLOCK 26/[Particulars Withheld]** registered in the Defendant's name measuring 0.1040 Ha.

(b) **L.R. NO. NAKURU/MUNICIPALITY BLOCK 26/[Particulars Withheld]** registered in the Defendant's name measuring 0.0450 Ha.

(c) **MITI MINGI/MBARUK BLOCK 1/[Particulars Withheld] (NDEGE)** registered in the name of the defendant.

(d) **NAKURU MUNICIPALITY PLOT NO. "E /[Particulars Withheld]" NAKURU WEST KAPTEMBWO** measuring 50x120 feet.

(e) **DUNDORI/MIRORENI BLOCK 2/[Particulars Withheld] (NDIMU)** registered in the name of the defendant

(f) Motor vehicle registration number **KCF /[Particulars Withheld]** registered in the defendant's name.

9. The plaintiff also contributed to the development of the matrimonial home through taking care of the defendant as a husband and taking care of their three children. She also acquired household and personal effects for the defendant and the children.

10. The application is opposed. The defendant has sworn a replying affidavit in which he depones, inter alia, that he had assets before he solemnized his marriage.

11. He avers that he never worked or owned a business known as Rainbow bar. He has been in formal employment at [Particulars Withheld] Company at Kabarnet District and he single handedly managed to acquire the following properties;

- (a) L.R. NO. NAKURU/MUNICIPALITY BLOCK 26/[Particulars Withheld]
- (b) L.R. NO. NAKURU/MUNICIPALITY BLOCK 26/[Particulars Withheld]
- (c) MITI MINGI/MBARUK BLOCK 1/[Particulars Withheld] (NDEGE), our matrimonial home
- (d) NAKURU/MUNICIPALITY PLOT NO. "E /[Particulars Withheld]" NAKURU WEST KAPTEMBWO (50x120 ft)
- (e) DUNDORI/MIRORENI BLOCK 2/[Particulars Withheld] (NDIMU)

He asserts that he holds property (e) in trust for his siblings as the same was brought through contributions by them.

12. He denies that motor vehicle registration number KCF [Particulars Withheld] belongs to him. He annexes a motor vehicle sale agreement showing that the buyer of the motor vehicle was one T N N. He annexes a copy of log book showing that the original owners of the motor vehicle were Ms Bell Motors (K) Limited. A copy of insurance also shows the insured as T N N.

13. He avers that he has no intention whatsoever to any adverse dealings with the subject properties.

14. It is urged that the defendant lives with his children on property Miti Mingi/Mbaruk Block 1/[Particulars Withheld] and as such he can have no adverse dealing with this property.

15. In a further affidavit, the plaintiff denies averments in the replying affidavit. She maintains the defendant had no assets at the time of marriage and she maintains that they both ran Rainbow Bar.

16. It is denied that the defendant holds LR. No. Dundori/Miroreni Block 2/[Particulars Withheld] (Ndimu) in trust for his siblings as the defendant is the sole registered proprietor of the title.

17. The plaintiff maintains that motor vehicle KCF [Particulars Withheld] was acquired jointly but is currently registered in the names of T N N with whom the defendant has an illicit relationship.

18. It is denied that the defendant resides at Ndege since he deserted home in 2013. There are indeed orders of Court restraining him from accessing this home.

19. The application was canvassed by way of written submissions.

20. I have painstakingly considered the application, the supporting grounds and affidavit, the reply thereto and learned submissions by counsel.

21. Of determination is whether the plaintiff has met the threshold for the issuance of an injunction. I am also to determine the issue of costs.

22. 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. Whether the applicant has a prima facie case.
2. Whether the applicant would suffer irreparable loss.
3. Where in doubt, the court is to consider the balance of convenience.

23. Before me, are 2 wrangling parties who are husband and wife. The fight is over properties acquired during the subsistence of the marriage.

24. 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.

25. On the evidence before me, I am persuaded that the following properties exist and are registered in the names of the defendant.

**(I) L.R. NO. NAKURU/MUNICIPALITY BLOCK 26/[Particulars Withheld]** measuring 0.1040 Ha.

**(II) L.R. NO. NAKURU/MUNICIPALITY BLOCK 26/[Particulars Withheld]** measuring 0.0450 Ha.

**(III) MITI MINGI/MBARUK BLOCK 1/[Particulars Withheld] (NDEGE)**

**(IV) DUNDORI/MIRORENI BLOCK 2/[Particulars Withheld] (NDIMU)**

**(V) Motor Vehicle registration number KCF [Particulars Withheld]**

26. The plaintiff asserts that same were acquired during coverture. Whereas her affidavit evidence may not sufficiently establish a prima facie case, I note from the replying affidavit that the defendant at paragraph 7 indicates that he has no intention whatsoever to any adverse dealings with the properties in question.

27. That is a clear indication that the defendant is not averse to having the properties preserved pending the hearing and determination of the petition herein.

28. Apparently, counsel for the defendant misapprehended the immediate matter before the court and he proceeded to ventilate on the merits and demerits of the case. The defendant will certainly have his day in court to articulate his case.

29. In these circumstances therefore and noting that the defendant intimates that he has no intention to adversely deal with the properties (i) to (iv) above, I am inclined to allow an order for preservation.

30. There will be an exception though. The evidence on record shows motor vehicle KCF [Particulars Withheld] as belonging to one T N N. It would amount to an injustice of untold proportions to injure a property registered in the name of a party who has not had the opportunity to be heard in this matter.

31. Consequently, the plaintiff's application dated 10/11/2017 is partially successful.

32. I allow the same in terms of prayer (c) save that motor vehicle registration number KCF [Particulars Withheld] is not to be affected by this order.

33. Each party to bear its own costs.

**Dated and Signed at Nakuru this 27th day of September, 2018.**

**A. K. NDUNG'U**

**JUDGE**