



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MATRIMONIAL NO.1 OF 2018

DCK.....PLAINTIFF

V E R S U S

GKM.....DEFENDANT

RNM.....INTERESTED PARTY

RULING

The plaintiff **DCK** filed an Originating Summons dated 13/4/2018 under Section 17 of the Matrimonial Property Act, 2013 in which she seeks to have the matrimonial properties acquired between her and **GKM**, the defendant, during the sub-existence of their marriage to be subdivided and shared between them equally.

Filed along with the Originating Summons is the Notice of Motion dated 13/4/2018 in which she seeks *inter alia*:

1. Spent;

2. Spent;

3. That pending the hearing and determination of this suit, there be a temporary injunction restraining the defendant and the interested party by themselves, their relatives, employees, servants or land agents from selling, transferring, charging leasing or in any other way, adversely interfering with the obtaining state and character of the No.Laikipia/XX and XX;

4. That pending the hearing and determination of this suit the Hon. Court do appoint M/S Providence Auctioneers to sell motor vehicle registration No.XX XX Toyota Station Wagon and the proceeds thereof be used to settle a loan facility advanced to the plaintiff by M/S Tower Sacco Society Ltd;

5. That the costs of the application to be in the cause.

The applicant swore an affidavit in support of the application to the effect that she got married to the defendant in 2014 under Kalenjin customary law and were blessed with one child in June, 2015; that during the subsistence of the marriage, they acquired several properties namely: Laikipia/Marmanet South Rumuruti Block XX – 0.04 HA and Block.XX – 0.04 HA; Motor vehicle XX Station Wagon and Kagemu Agrovet; that the two plots are still in the names of the vendor, Ruth Nduta Muriuki (interested party) as evidenced by search certificates annexed as (DCK 1(a)); that on 26/2/2015, the applicant took a loan of Kshs.51,000/= from Tower Savings Credit Society Ltd and another on 11/3/2016, of Kshs.100,000/= which she used to stock the Agrovet as evidenced by bank statements (DCK2); that on 19/7/2016, she took Kshs.130,000/= from Kagemu Agrovet with which she purchased the 2 plots Block.XX and XX; that she paid the balance of the plots of Kshs.70,000/= through Mpesa; that on 2/2/2017, she applied for another loan of Kshs.230,000/= from Tower Sacco which she used to construct a permanent house for the family on Block.XX; that another loan of Kshs.300,000/= was obtained on 4/8/2017 for the purchase of the family car XX. She attached a Bank Statement (DCK.5); that she left the defendant/respondent due to disagreements; that the loan repayment is in arrears to the tune of Kshs.254,723/= as of 28/2/2018. She fears that the properties may be disposed of or wasted by the respondent if the interim orders are not granted.

Mr. Chege, counsel for the applicant submitted that they seek attachment before judgment in respect of the motor vehicle XX and that the proceeds of sale be used to settle the outstanding loan with Tower Sacco Ltd which was used to purchase the said vehicle. Counsel urged that the applicant and defendant are spouses and all that a party is required to prove is that the property was acquired during the subsistence of the said relationship.

Counsel relied on the decision of *Nderitu v Nderitu (1998) Family Digest* where the court held that the property in issue must have been acquired during the marriage and directly or indirectly contributed to by the applicant.

In Grace Wanjiru Wainaina v Benson Wainaina Kiburi HCC.205/2008, the court added that such application can be brought by either party during the marriage or even after the divorce.

Though served with the Notice of Motion and Originating Summons, neither the defendant nor the interested party appeared or filed any response to this application.

This being an application for interim orders, the applicant only needs to demonstrate that she has an arguable case.

An arguable case is one which on the material available to the court and even without delving into the matter in depth, could succeed.

For an application under Section 17 of the Matrimonial Property Act, 2013 to succeed, the wife only needs to show that she is married to the husband; that the property was acquired during their marriage and she contributed to it directly or indirectly (See Nderitu v Nderitu (1998)).

The applicant has alleged that she was the wife of the respondent and that their marriage was celebrated under Kalenjin customary law. However, there are no documents on record to show that she was a wife of the respondent or that any marriage was celebrated between the two. The 1st respondent having been served and having ignored to appear and file a reply to the said allegations, the court will take it to be an admission that there was a marriage.

I have seen the documents annexed to the affidavit by the applicant. She has annexed a statement from Tower Sacco which show that she obtained loans in 2015 and 2016 and that the monies were used to purchase land Laikipia/Marmanet/South Rumuruti Block XX & XX, registered in the name of Ruth Nduta Mwaniki, the interested party herein; that she took another loan in 2017 to purchase the motor vehicle XX also registered in the respondent's name. There being no response from the respondents, the court is satisfied that the applicant has demonstrated that she has an interest in the properties named in the application and that she may have contributed to their acquisition.

I therefore grant prayer 2 of the application to restrain the respondent and Interested Party from selling or transferring or in any way interfering with title Laikipia/Marmanet South Rumuruti Block.XX & XX, and motor vehicle XX Toyota Station Wagon, pending the hearing and determination of the Originating Summons.

The court will not grant prayer 4 because the applicant did not invoke this court's jurisdiction under Order 39 Civil Procedure Rules for attachment before judgment. That prayer will have to await the hearing of the Originating Summons.

Costs will be in the cause.

Dated, Signed and Delivered at NYAHURURU this 31st day of October, 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mrs. Wamithi holding brief for Mr. Chege

Soi - Court Assistant