



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MATRIMONIAL CAUSE NO. 1 OF 2017

M D.....APPLICANT

VERSUS

S L.....RESPONDENT

RULING

(Notice of Motion application dated 7th March, 2017)

1. On 7th March 2017, the Applicant herein M D filed an Originating Summons seeking among other orders a declaration that the **“properties known as [particulars withheld] 1pt located in [.....] Residence on the Ground Floor and Garage Number 10 situated on Land Portion No. [...](Original Number [...]) Malindi together with the fitting, furniture and fixtures; [particulars withheld] 1pp/[particulars withheld] 1ppll located in [.....] Residence on the First and Second Floor and Garage Number 19 situated on Land Portion Number [...] (Original Number [...]) Malindi together with fitting, furniture and fixtures; Motor Vehicle Registration Number KAR [...] and are in the name of the Respondent and which were acquired during the subsistence of the marriage are owned equally and that the same should be sold and proceeds shared equally or as the court may deem fit.”**

2. At the same time, the Applicant filed the instant Notice of Motion brought under Order 40 rules 1(a) & (b) and 3, Order 2 Rule 14, and Order 51 of the Civil Procedure Rules, 2010; sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act; sections 2, 6, 7, 14 and 17 of the Matrimonial Property Act; Article 45(3) of the Constitution; and all other enabling provisions of the laws of Kenya. In the application the Applicant seeks the protection of the two apartments which are the subject of the Originating Summons. His application is supported by an affidavit he swore on 7th March, 2017 and the attachments thereto. When the Applicant first came to court, he succeeded at the *ex-parte* stage in obtaining orders to preserve the properties in question.

3. The Respondent, S L opposed the application through her affidavit sworn on 14th April, 2017 and the documents annexed thereto.

4. A perusal of the affidavits sworn by the Applicant and the Respondent disclose that they got married to each other on 3rd September, 2005 at the District Commissioner’s Office at Malindi. The two stopped living as husband and wife in 2011 after the Respondent vacated the matrimonial home. Their marriage was dissolved on 27th February, 2017 vide Malindi High Court Divorce Cause No. [...] of 2016 at the instance of the Applicant.

5. It is also not disputed that the two apartments which are the subject of these proceedings were acquired in 2013 and registered in the name of the Respondent.
6. The parties are also in agreement that the Respondent was in the process of selling one of the apartments when the Applicant moved to court and obtained a temporary order stopping the disposal of the property by the Respondent.
7. The Applicant's case is that he is the one who acquired all the properties, whether jointly, in his name or in the Respondent's name, during the subsistence of the marriage. He listed the properties, the dates of acquisition and the proprietorship of each one of them. His case is that the three properties registered in the name of the Respondent are held in trust for him as the Respondent does not have exclusive rights of ownership to the same. He therefore urges the court to bar the Respondent from disposing the apartments pending the hearing and determination of his Originating Summons.
8. The basis of the Respondent's opposition to the application is that she is the sole proprietor of the two apartments as the Applicant never contributed to their purchase. She avers that she purchased the two apartments in 2013 after separating from the Applicant in 2011. The Respondent discloses that she claims a beneficial right in the properties registered in the name of the Applicant.
9. The Respondent accuses the Applicant of being dishonest and dismisses his application for being an abuse of the court process.
10. The advocates for the parties agreed to dispose of the application by way of written submissions.
11. Through the written submissions dated 25th July, 2017, the Applicant submits that he has met the conditions for the grant of an injunction as enunciated in **Giella v Cassman Brown & Company Ltd [1973] E.A. 358**.
12. As to whether he has established a *prima facie* case, the Applicant points out that the Respondent has conceded that the properties in question were acquired during the marriage thus constituting matrimonial property. According to him, disposing the property to third parties without his consent would infringe his legal rights and beneficial interests. Further, that any orders issued will not be in vain as he has demonstrated that he has a *prima facie* case.
13. The Applicant contends that failure to issue the orders sought will lead to irreparable loss on his part. According to him the loss he will suffer if the properties are sold by the Respondent is not capable of being compensated by way of damages. He cites the decision in **J. M. Gichanga v Co-operative Bank of Kenya Ltd [2005] eKLR** and proposes that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. He therefore urges the court to find that he has established that he will suffer irreparable loss if the Respondent is allowed to proceed with the disposal of the properties.
14. Turning to the question as to whether the balance of convenience should tilt in his favour, the Applicant contends that the balance of convenience should indeed tilt in his favour. In his view, he has demonstrated that he will suffer greater loss than the Respondent if the injunction is not issued. He therefore urges the court to allow his application.
15. Citing section 14 of the Matrimonial Property Act, the Applicant asserts that property acquired in the name of one spouse during the marriage is presumed to be held in trust for the other spouse. He points to the concession by the Respondent that he paid a service charge of Kshs. 228,000 in respect to one of the apartments as evidence of his substantial contribution to the acquisition of the property.
16. The Applicant cites Benjamin, J in **Yeboah v Yeboah [1974] 2GLR 114HC, Hayton** for the proposition that substantial contribution by a spouse to the acquisition of property during the subsistence of a marriage would entitle that spouse to an interest in the property.

17. It is the Applicant's case that the attempt by the Respondent to dispose the property without his consent contravenes Section 12 of the Matrimonial Property Act which provides that matrimonial property cannot be sold, leased or mortgaged during a monogamous marriage without the consent of both spouses. It is the Applicant's position that his application for apportionment of the matrimonial property seeks fairness in the distribution of the property which he acquired with the Respondent during their marriage.

18. The Respondent's position is that the Applicant has not approached the court with clean hands and is guilty of material non-disclosure. She accuses the Applicant for failing to disclose that he is a member of [Particulars Withheld] Residence from which she purchased the suit properties. The Respondent relies on the doctrine of equity that he who seeks equity must do equity. The Respondent cites the decision of Mary Kasango, J in **Jane Wanjiku Chege v Housing Finance Company of Kenya Limited [2005] eKLR** in support of her position that a litigant who fails to disclose material information should not be granted an injunction.

19. The Respondent agrees that the principles governing grant of injunctions are those enunciated in **Giella** (supra) but asserts that the Applicant has not met the conditions for the grant of an injunctive relief. Reliance is also placed on the decision of Olola, J in **Bahati Charo v Jackson Nzaro & others [2017] eKLR** in exposition of the principles underlying the grant of injunctions.

20. It is the Respondent's case that the Applicant has not demonstrated that he has an identifiable legal interest in the suit properties therefore failing to demonstrate a *prima facie* case. Her position is that the Applicant's case is so weak and without any likelihood of success. It is the Respondent's submission that for an injunction to issue, the court must be satisfied that there exists reasonable grounds for doubting the legality of the apprehended or continuing acts of a respondent. Further, that the acts of a respondent should be shown to constitute a violation of the applicant's legal and equitable rights.

21. It is the Respondent's case that the Applicant has not established a *prima facie* case as defined by the Court of Appeal in **Mrao Limited v First American Bank of Kenya Ltd & 2 others [2003] eKLR**. In that case the Court stated that:

“So what is a *prima facie* case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

22. As to whether the Applicant's loss, if any, cannot be adequately compensated by damages, the Respondent cited the decision of the Court of Appeal in **East African Development Bank v Hyundai Motors Kenya Limited [2006] eKLR** in support of the proposition that an applicant seeking an order of injunction should place material before the court which would tend to show how an award of damages would not adequately compensate the loss of the suit property in the event it is disposed of by the Respondent. It is the Respondent's case that apart from claiming that he will suffer irreparable loss if the properties are sold, he has not in any way shown what the irreparable loss would be. According to the Respondent, the Applicant has also not shown that the loss cannot be adequately compensated by damages.

23. It is the Respondent's case that the court can only consider issuing an injunction on a balance of convenience once an applicant has established a *prima facie* case and that he will suffer irreparable loss if an injunction is not granted. In support of the principle, the Respondent cited the decisions of the Court of Appeal in **East African Development Bank** (supra) and **Hassan Huri & another v Japhet Mwakala [2015] eKLR**.

24. Finally, the Respondent terms the Applicant's application incompetent stating that he has not undertaken to meet any damages she may sustain if an injunction issued in his favour would later be found not to have been deserved. In her view, the court should always opt for the lower rather than the higher risk of injustice and in this case the appropriate remedy is a dismissal of the Applicant's prayer.

25. The issue for the determination of this court in this matter is whether the Applicant has met the conditions for the grant of an injunctive relief.

26. The **Giella** case (supra) established the principles guiding the grant of an injunction to an applicant as the existence of a *prima facie* case, the demonstration of irreparable loss and where the court is in doubt it decides the application on a balance of convenience.

27. The principles are distinct and ought to be considered one after the other before a court can conclude whether the conditions for granting an injunction have been met.

28. Where an applicant fails to establish a *prima facie* case, the court needs not consider the other conditions. The Court of Appeal in **Hassan Huri** (supra) expressed itself on this point thus:

“Although it has been stated before that the three principles in Giella must be approached and applied sequentially, so that the second and third conditions must not be considered once the first condition is not established, the courts have traditionally considered all the conditions, one after the other. For instance a court will have a finding on the existence of a *prima facie* case, then proceed to determine whether damages will be adequate compensation in lieu of injunction and finally the balance of convenience. We reiterate this Court’s recent decision in Nguruman Ltd v Jan Bonde Nelson & 2 others, Civil Appeal No. 21 of 2014 (UR)

“It is established that all the above three stages and conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd v Afraha Education Society (2001) Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is adequate remedy and the respondent is capable of paying, no injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit “leap- frogging” by the applicant to injunction directly without hurdles in between.”

In the matter before us, although the learned Judge’s attention was drawn to the triple requirements before the grant of an injunction not only did he fail to cite in his terse ruling the very well-known authority but completely ignored the sequence of consideration and took the easier option by deciding the application only on the balance of convenience.”

29. In light of the decision by the Court of Appeal, I will start by considering whether the Applicant has established a *prima facie* case. From the evidence placed before court, it is clear that the properties in question were acquired after the parties herein had stopped living together. The separation was however not a consequence of a legal process. The marriage was dissolved in 2017. The properties registered in the name of the Respondent were therefore acquired during the marriage. The Applicant has laid claim to the properties. There is need for clarification before a decision can be made as to whether the two apartments are matrimonial property. The Applicant paid Kshs. 228, 000 as service charges. He is also a member of [Particulars Withheld] Residence Limited which transferred the suit properties to the Respondent. This information tends to create a nexus between the Applicant and the suit properties. There is therefore need for an enquiry through a trial as to whether the Applicant contributed to the purchase of the suit properties. On a balance of probabilities I conclude that the Applicant has established a *prima facie* case.

30. The next question is whether the Applicant will suffer irreparable loss which cannot be compensated by damages should the Respondent go ahead to sell the suit properties. It is important to note that matrimonial property can only be disposed of with the consent of both spouses. That would require that the husband and wife agree on the terms and conditions for disposing the property. Where one spouse goes ahead to sell, mortgage or lease out a property without the consent of the other spouse, the spouse in

the dark will suffer loss. Such a loss is irreparable as he/she is not involved in determining the price of the property. In the case at hand, there is no evidence that the Respondent has any other property of her own apart from the suit property. One cannot confidently therefore state that she can easily meet any damages that may be awarded to the Applicant should his Originating Summons succeed. I therefore find that the Applicant will most likely suffer irreparable damage which the Respondent may not be in a position to meet.

31. Where does the balance of convenience tilt? Considering that the Applicant has established that he has a *prima facie* case and may suffer irreparable damage if relief is not granted, this court finds that the balance of convenience tilts in his favour.

32. The end result is that the Applicant's application succeeds and an injunction shall issue stopping the Respondent from disposing of the two apartments identified in the application. For avoidance of doubt, this order does not extend to motor vehicle registration number KAR [...] registered in the name of the Respondent as the same is not specifically mentioned in the application.

33. I note that this order may put the Respondent in some difficulty as she has already entered a sale agreement with a third party and for this reason the parties are directed to prepare the main claim for hearing and determination on priority basis.

34. This being a matter between two parties who were once husband and wife, I direct each party to meet own costs of the application.

Dated, signed and delivered at Malindi this 28th day of Sept., 2017.

W. KORIR,

JUDGE OF THE HIGH COURT