



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 65 OF 2014**  
**IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT NO.2013 AND**  
**M M .....APPLICANT**

-VS-

**J K M ..... RESPONDENT**

**RULING**

1. The applicant's application is dated 16<sup>th</sup> April 2015, it is brought under Section 3, 3A of the Civil Procedure Act and Order 40 of the Civil Procedure Rules. The applicant seeks orders that;

i. That pending the hearing and determination of the suit, the Court be pleased to prevent withdrawal or, transfer of funds or any dealings whatsoever relating to the following Bank Account held by the Respondent;

- a) Equity Bank Account Number *[particulars withheld]*, Kimathi street
- b) Equity Bank Account Number *[particulars withheld]*, Kimathi street
- c) Equity Bank Account Number *[particulars withheld]*, Kimathi Street.
- d) Barclays Bank Account Number *[particulars withheld]*, Haile Selassie Avenue Branch

ii. That pending the hearing and determination of this application, this Honourable court be pleased to order the bank statements in respect of the following bank accounts held by the respondent;

- a) Equity Bank Account Number *[particulars withheld]*, Kimathi street
- b) Equity Bank Account Number, *[particulars withheld]* Kimathi street
- c) Equity Bank Account Number *[particulars withheld]*, Kimathi Street.
- d) Barclays Bank Account Number *[particulars withheld]*, Haile Selassie Avenue Branch.

ii. That pending the hearing and determination of this suit, an injunction do issue restraining the applicant from alienating, disposing, wasting or otherwise dealing with the remaining portions of the matrimonial property namely L.R. No. *[particulars withheld]*, L.R. *[particulars withheld]*, L.R. No. *[particulars withheld]*, L.R. *[particulars withheld]* L.R. *[particulars withheld]* and L.R.

***[particulars withheld]***.

2. The application is grounded on the grounds that the respondent sold the matrimonial property for a sum of Kshs. 275 million while misleading the court that the same was sold for Kshs.150 million. That the said sums of money were paid to him through the respondent's bank accounts namely Equity Bank Account Number ***[particulars withheld]***, Equity Bank Account Number***[particulars withheld]***, Equity Bank Account Number ***[particulars withheld]*** and Barclays Bank Limited Account Number***[particulars withheld]***. That the sale of the said portion of L.R. No. ***[particulars withheld]***and remainder of the same constitutes the substratum of this suit. That the matter is set for hearing on 15<sup>th</sup> May 2015 and it is imperative in the meantime that the court secures and protects the proceeds of sale that the respondent has concealed from the court as the respondent is guilty of material non- disclosure.

3. The application is supported by the sworn affidavit of M M the applicant ; she depones that on 10<sup>th</sup> November the respondent adduced in court an agreement for sale dated 9<sup>th</sup> September 2014 in which he allegedly sold the property for a sum of Kshs. 150 million and that he had received a 10% deposit of Kshs. 15 million. However on 1/11/2014 the respondent had a balance of Kshs. 22,900,878.90 in his Barclays Bank Account No. ***[particulars withheld]*** from where he transferred Kshs. 20 million to Equity Bank account No. ***[particulars withheld]*** and it is established that he had sold the same for 275 million with Kshs. 112.5 million being paid to him on 16/12/2014, Kshs. 31.5 million paid on 6<sup>th</sup> January 2015 and Kshs.103,625/- was released into the joint account on 24<sup>th</sup> March 2015. That the respondent was misleading the court when he said he owed them Kshs. 31,371,496.50 as no such payments were made. That she doubted the veracity of the sale agreement produced by the respondent and sometimes in January 2015 she caused the said portion of land to be valued and the valuer gave an estimated cost of Kshs. 230 million confirming that the said parcel of land was sold for much more than declared by the respondent adding that the respondent is in the process of altering the sizes and title numbers of the remaining parcel of land namely; L.R. NO. ***[particulars withheld]***, ***[particulars withheld]***, / ***[particulars withheld]***/***[particulars withheld]***, ***[particulars withheld]*** and ***[particulars withheld]*** and seeks conservatory orders to protect the said remaining portions and the money received by the respondent is holding from the sale until the matter is heard and determined as he is the one in control of the bulk of the sale proceeds which he may transfer, dispose or alienate to her detriment; that it is clear that the respondent misled the court.

4. The respondent/applicant filed a replying affidavit on 22<sup>nd</sup> April 2015. In it he denies the averments in the applicant's application stating that the same was made in bad faith to serve collateral purpose of vacating the claimant's hearing. He objects to the applicant obtaining his banking information without his consent which he claims she did illegally adding that her said application was made for purposes of forum shopping. Further that the applicant acquired a valuation of the said property, which is registered in his name without his consent. He claims that he was surprised when he was served with the ex-parte orders issued by Hon. Justice Achode on 17th April 2015 and that the same were issued to harm him financially as there was no basis for granting the said orders. He avers that his privacy and proprietary rights over L.R. ***[particulars withheld]*** have been infringed and informed that he would file a Preliminary Objection to expunge the valuation report submitted by Petrum Valuers dated 28th January 2015. Further he avers that the said valuation was in violation of the cardinal principles of fairness as neither he nor his advocates were informed of the same. That the adverse orders of 17<sup>th</sup> April 2015 were in violation of his rights as provided under Article 31(c) and (d) of the Constitution and that he only got to learn of the said orders on 21st April 2015. He avers that the applicant/respondent lied that she obtained the bank statements from the post office while in real sense she obtained the statement through unorthodox means noting that he is the sole holder of the said account. He avers that the applicant is disentitled from opening any sealed envelope sent to her Postal address. He states that due to the said order he has been unable to access his money to pay for his basic needs something he claims is harsh and oppressive as he was never accorded a hearing before the court issued the said orders. He added that he is in the verge of being black listed by the Credit Reference Bureau for defaulting in meeting his financial obligations. That the specific bank accounts that are meant to be bound by confidentiality as between the Banks and himself and the claimant only obtained the bank details through unorthodox means. He further added that there is Kshs. 103 million in the joint account held by both counsels. He urges the court to stay the said orders pending

the main hearing of the suit. He denied having received Kshs.275 million as sale sum for the said property.

5. In application dated 21/4/2015 the respondent /applicant sought a stay against the orders issued by this court on 17<sup>th</sup> April 2015 and sought an inter-partes hearing date for the said application. The application is grounded on grounds that the said account are solely in the names of the respondent and the orders as issued constituted a violation of the respondent's Constitutional rights to privacy, to his property and to a dignified life. That he was never accorded a hearing before the making of the drastic and mandatory orders were issued. That the open ended orders obtained crippled his day to day financial commitments. That no authority has been accorded to the claimant to obtain his specific bank accounts as they are bound in confidentiality as between the banks and applicant.

6. The respondent/applicant filed a replying affidavit dated 22nd Aril 2015 denying the allegations raised in the application filed on 21st April 2015. She denies any intentions of trying to cripple the respondent financially or injure his reputation as alleged adding that the applicant/respondent ought to have been honest to the court on the true value of the property he sold and the alleged Kshs. 31 million that was being demanded by the contractors. She avers that it is shocking that he would be seeking the lifting of the said orders. That it is normal practice for the court to issue freezing orders ex-parte. That the said orders were obtained via a certificate of urgency which was heard before Justice Achode the duty judge then and that she did not go forum shopping. That on 13th November 2014 the applicant made an application seeking Lady Justice R.E. Ougo to recuse herself from this matter which she argues is delaying tactics by the applicant/respondent. Further that she was seeking temporary orders to secure the other matrimonial properties whose L.R Numbers were altered after amalgamation of the said properties.

7. The matter came for hearing on 23/4/2015. The applicant in her oral submissions stated that the property in issue was sold for Kshs. 275 million and not Kshs 150 million as alleged by the respondent. That a sum of Kshs. 27.5 million was paid to the respondent's Barclays account on 10/9/2014 and a further Kshs.112.5 million was paid to the respondent Equity Bank Account on 16<sup>th</sup> December 2014 and finally Kshs. 31.5 million was paid into the joint account held by the two counsels. From the foregoing the applicant claims that the respondent has mislead the court and had 112 million when he claimed that he needed money to pay the contractors as no contractors were there is no evidence of the said payment and the respondent has also not given this court any statement as ordered by the court and this has led the applicant to doubt the valuation of the property leading her to obtain a valuation report on the said property leading her to come to court and obtain freezing orders as the said funds in question come from the matrimonial property held by the parties.

8. The applicant seeks that the bank statements of account be produced. She added further that after amalgamation some of the property numbers changed. She sought to justify that she got the bank statements from the joint post office account they held together and objects to the claim by the respondent that the evidence was illegal adding that a preliminary objection can only be raised purely on a point of law. She relied on Article 31 (d) stating that there is no infringement on the respondent right of communication further that knowing what the respondent has in the account will enable the court to determine the value of the said property and therefore it cannot be un fair to disclose such information as the respondent would walk away with Kshs. 125 million. The applicant relied on the case of **Karuma Son of Kaniu –vs- Reginam** where *it was held in considering whether evidence is admissible that the test to be applied is whether it is relevant to the matter in issue , and, if it is relevant, the court is not concerned with the method by which it was obtained.*

9. In reply to the Notice of Motion dated 21/4/2015 they argued that prayer 2 & 3 seeking to set aside orders of a court granted ex-parte was baseless as the same did not set out any grounds as recognized in the authorities of this court and that the applicant is not guilty of any non-disclosure. That thought the respondent argues that he has not been able to access his account to pay his basic utilities but adds that this is no basis for him to set aside the said orders. That all the respondent needs to do is to disclose the proceeds of the sale since the accounts in question are in his names and he does not state how the funds got into his account. That the respondent claimed that he needed 30 million the deception and failure by the respondent to disclose that he had Kshs. 112 million in the account shows that there is contempt on

his end and the court should not set aside the said orders.

10. Mr. Kinyanjui for the respondent argued that in this matter one party is out to ruin the other. That the application dated 16/4/2014 is on bank statements that the claimant could have collected an open bank statement. Further that the said bank statements are addressed to the respondent and there is no authority from the respondent to access open or receive for purposes of consumption the said bank statements. He argued that the claimant in opening the envelopes containing the bank statements addressed to the respondent was in contravention of Article 31(d) of the Constitution. He further added that the case cited by the claimant of **Karuma Son of Kaniu (supra)** which held that no matter how the evidence is obtained had been overtaken by events.

11. He submitted that the claimant's claim that the property was sold the property at Kshs. 275 million has no sale agreement annexed to prove that and that the Land Act and Law of Contract dictates that there should be a sale agreement and the respondent had evidenced the sale agreement dated 9/9/2013 and the same states the sale price as Kshs. 150 million and there was no independent purchase showing that Kshs. 275 million as the purchase price and neither do the bank statements demonstrate that Kshs. 275million was the purchase price adding that the client being asked to give details of where he got the money is a violation of his privacy. He further submitted that the respondent was not contracted as a property owner by the valuer who carried out the valuation and Article 50(4) was violated and the court should take judicial notice of the same. That the respondent did not authorize inspection of his property and the procurement of such evidence is wrong and counsel should have sought the court to obtain the valuation of the said property and there is a consistent thread of bad faith by the plaintiff which operates to disentitle her of the prayers sought. That all the counsels should have done is to ask them the sale price and not for the applicant to take drastic action by obtaining a mandatory injunction as the respondent has shown in his affidavits the payments he has made and that the order of 17/4/2015 affects the rights and dignity of the respondent and urges the court to lift the said orders. That they have shown that the funds moved from purchaser to vendor adding that the money in the account of Kshs. 103 million is sufficient for the claimant. There was no emergency to issue the orders of 17/4/2015.

12. Mrs. Thongori in her further submissions argued that the said application was seeking special orders on freezing the accounts and production of accounts. That the respondent claims that he has no other regular sources of income yet on 21/10/2014 he had over 100 million and that he fears being sued. That it is the respondent has not come to court with unclean hands. That they finally made the money moved and the delay is due to his advocates. That he doesn't deny that her client had access to the said post office and she hasn't paid for the rent and the respondent hasn't shown that he agreed with the bank that he would collect the Bank statements. In response to the issue of the valuer accessing the property it was submitted that the applicant is a beneficial owner and the same is matrimonial property which the respondent is exclusively holding and seeks that the orders sought be allowed. She further added that the applicant had no intention of crippling the respondent adding that the applicant's objection pertains to money from the sale sum. That the sale agreement was signed on 9/9/2014 and a sum of Kshs. 27.5 million was deposited to the respondent's account on 10<sup>th</sup> September 2014.

13. The respondent/applicant in his preliminary objection filed in this court on 23<sup>rd</sup> April 2015 raises the following 2 grounds;

- i. That the claimant relied on respondent's Bank statements which were not addressed to her nor given to her by the respondent and she procured them in violation of Article 31(d) of the Constitution
- ii. That such evidence constitutes illegal evidence and is ousted by the operation of article 50(4) of the Constitution as it will render the trial unfair and is detrimental to the administration of justice.

14. I have considered the parties' affidavits and oral submissions made by both counsel's on behalf of their clients. From affidavit evidence and oral submissions made by the counsels it is evident that there is great mistrust and suspicion between the parties. The applicant in her application seeks a temporary injunction to safeguard her interest in the properties said to constitute matrimonial property. On 17<sup>th</sup> April

2015 Lady Justice Achode issued interim orders preventing withdrawal or transfer of funds or any dealings whatsoever relating to Equity Account Number **[particulars withheld]**, Kimathi street, Equity Bank Account Number **[particulars withheld]**, Kimathi street, Equity Bank Account Number **[particulars withheld]**, Kimathi street, Barclays Bank Account Number **[particulars withheld]**, Haile Selassie Avenue Branch pending the hearing and determination of the application and of the suit. The court further ordered that pending the hearing and determination of the application the respondent produce in court the bank statements in respect of the aforementioned accounts. This order was issued on 20<sup>th</sup> April 2015 and the said order was served upon the Equity Bank Manager, Kimathi Street and Manager Barclays, Haile Selassie Avenue on 21<sup>st</sup> April 2015 at around 015 a.m. and 11.25 a.m. respectively.

15. However, on 23<sup>rd</sup> April 2015 the Equity Bank via their letter dated 22<sup>nd</sup> April 2015 wrote to the Deputy Registrar stating that they were served with the said court order at around 12.43 p.m. however at that time the respondent had on the same day at around 12.04 p.m. withdrawn Kshs. 108,500,000/- and Kshs. 200,000/- from account number **[particulars withheld]**. The letter further stated that the fixed account numbers **[particulars withheld]** and **[particulars withheld]** were closed on 26<sup>th</sup> January, 2015 and 20<sup>th</sup> March, 2015 respectively. In essence the effect of these actions by the respondent watered down the interim orders issued by this court. There is no proof that the respondent's actions same were planned to frustrate this court orders. The respondent has in essence withdrawn the funds held in the said accounts and has even closed other accounts as evidenced by the letter by Equity Bank. Equity bank in the said letter also annexed a copy of the bank statements for the said accounts as ordered by Justice Achode.

16. The preliminary objection by the respondent seeking the account statement to be expunged from the court record has been overtaken by events as Equity Bank has in compliance to the orders issued by this court tendered account statements in regards to the said accounts. The same will be considered in the final determination of this matter.

17. The application by the respondent dated 21/April/ 2015 seeking to stay the orders of this court issued on 17<sup>th</sup> April 2015 have been rendered irrelevant as the applicant had withdrawn all funds from the said account and closed some of the accounts as such there is no purpose that will be served by granting a stay at this point.

18. This now brings me back to the remaining orders being sought by the applicant. Prayer 5 the applicant seeks a temporary injunction pending the hearing and determination of the suit restraining the applicant from alienating, disposing, wasting or otherwise dealing with the remaining portions of matrimonial property namely L.R. No. **[particulars withheld]**, L.R. . **[particulars withheld]**, L.R. No. **[particulars withheld]**, L.R. **[particulars withheld]** and L.R. No. **[particulars withheld]**. The principles in granting an injunction are clearly spelt out in the case of **GIELLA -VS- CASSMAN BROWN (1973) EA. 358** which are, that the Applicant must demonstrate that;

*i. He has a prima facie case with a probability of success.*

*ii. He stands to suffer irreparable loss and harm unless the orders sought are granted.*

*iii. In the event of doubts, the court is to decide the matter on a balance of convenience.*

It should also be noted that the meaning of probability of success is only used to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage( See the case of **HABIB BANK AG ZURICH -VS- EUGENE MARION YAKUB CIVIL APPLICATION NO. NAIROBI 43 OF 1982 (Unreported.)**)

19. In my view the applicant has shown a prima facie case with probability of success, and there is great danger of interference with the said matrimonial property should the court not issue the temporary injunction orders sought. I find that the balance of convenience tilts in the applicant's favor and it is in the interest of justice to protect the said suit property pending hearing and determination of this matter. This

court therefore restrains the respondent from alienating, disposing, wasting or otherwise dealing with the remaining portions of the matrimonial property known as L.R. No. **[particulars withheld]**, L.R. **[particulars withheld]**, L.R. No. **[particulars withheld]**, L.R. **[particulars withheld]** and L.R. **[particulars withheld]** and L.R. No. **[particulars withheld]** pending the hearing and determination of this suit. I note this is a litigious matter and order the parties to refrain from making more applications in this matter but to endeavor to set this matter down for hearing as soon as possible. Costs in the cause. It is so ordered.

Dated, signed and delivered this **26<sup>th</sup>** day of **June** 2015.

**R. E. OUGO**

**JUDGE**

In the presence of:-

..... **For the Applicant**

..... **For the Respondent**

**Ms. Charity**.....**Court Clerk**