



**REPUBLIC OF KENYA**

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

**DIVORCE CAUSE NO.254 OF 2013**

**C K.....PETITIONER**

**VERSUS**

**A R C A.....RESPONDENT**

**R U L I N G**

Before me is a Notice of Motion filed by the Respondent pursuant to the provisions of **Article 159(2)(d)** of the **Constitution**, **Sections 68, 69** and **70** of the **Land Registration Act 2012** and **Sections 3, 28** and **29** of the **Matrimonial Causes Act** seeking orders of injunction to restrain the Petitioner by herself or through her agents from transferring, charging, subdividing, selling, disposing or taking any action that may prejudicially affect the Respondent's rights and interest in the properties known as LR.Nos.Kajiado/Loodariak/*[particulars withheld]* and *[particulars withheld]*, and Kajiado/Ntashart/*[particulars withheld]* pending the hearing and determination of suit. He further prayed for the court to restrain the Petitioner from transferring or dealing adversely with motor vehicle registration No.Toyota Prado *[particulars withheld]*. He further prayed that the Petitioner be compelled to produce and surrender to court the documents of title in respect of the suit properties for safe keeping pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the Respondent. He swore an affidavit in further support of the application. He also swore an affidavit of means. The application is opposed. The Petitioner swore an affidavit in opposition to the application.

At the hearing of the application, this court heard oral rival submission made by Mr. Gatheru for the Respondent and Mr. Khasiani for the Petitioner. According to Mr. Gatheru, the Respondent was a British National who briefly worked in Kenya before he retired. In 2010, he got married to the Petitioner. They have no children. He submitted that the marriage was not to be a happy one because the Petitioner left the matrimonial home on 10<sup>th</sup> December 2013. During the subsistence of the marriage, four (4) properties which are the suit properties were purchased. They were registered in the name of the Petitioner. It is the Respondent's case that although the suit properties are registered in the name of the Petitioner, he solely contributed the purchase consideration. It was his case that the suit properties were registered in the name of the Petitioner, to hold in trust for him pending the regularization of his immigration status. Mr. Gatheru submitted that all along it was understood that the suit properties would be transferred to the Respondent upon the Respondent acquiring Kenyan citizenship. He reiterated that the properties were purchased during cohabitation and did not therefore constitute part of matrimonial property. Learned counsel further submitted that the Petitioner had made no contribution towards the purchase of the suit properties. In the premises therefore, he urged the court to allow the application.

In response, Mr. Khasiani for the Petitioner submitted that the Respondent had not established a suitable case for this court to grant the orders of injunction sought in accordance with the parameters set in the case of **Giella –Vs- Cassman Brown**. He submitted that the Petitioner had the constitutional right to own the property in Kenya. It was the Petitioner's case that the properties in question were not matrimonial properties but rather the Petitioner's properties. The Respondent had not established the existence of any trust. The Respondent had further not produced any documents that such trust exists. The Petitioner conceded that indeed the Respondent purchased the suit properties. However, it is her case that the suit properties were given to her as outright gifts. He urged the court to find that the Respondent had failed to establish a case for the existence of a trust. He was not therefore entitled to the order sought in the application.

This court has carefully considered the rival submission made by the parties to this application. The Respondent essentially seeks an order of injunction to restrain the Respondent from adversely dealing with the suit properties pending the hearing and determination of the suit. The issue for determination by this court is whether the Respondent establish such a case as to entitle this court to grant the orders that he has sought in the application. The principles to be considered by this court in determining such applications are well established. In **Giella –Vs- Cassman Brown [1973] EA 358** it was held that an order of injunction can only be issued where the applicant establishes that he has a *prima facie* case. A *prima facie* case in this case means that the applicant has a case that on the balance of probabilities is likely to succeed during the hearing of the substantive suit. The applicant must also establish that he would suffer irreparable loss that will not likely be compensated by damages if the order is not issued. In the event that the court shall be in doubt, it shall determine the case on a balance of convenience.

The facts of this application are more or less not in dispute. The Respondent purchased the suit properties and had them registered in the name of the Petitioner. What is in dispute is whether the Respondent purchased the said suit properties as a gift to the Petitioner or whether he intended that the Respondent holds the said properties in his trust. It is the Respondent's case that the reason why he had the suit properties registered in the name of the Petitioner was because of his immigration status. He submits that he was led to believe that a foreigner was not permitted to own land in Kenya. It was on that basis that he registered the suit properties in the name of the Petitioner while waiting the regularization of his immigration status. On her part, it was the Petitioner's case that the Respondent had no claim over the suit properties. In essence, it is her case that the suit properties were registered in her name precisely because the Respondent gifted the same to her. This court has anxiously considered these rival arguments. It will be not possible for this court to reach a definitive determination one way or the other without hearing the evidence that will be adduced by the parties during the substantive full hearing of the case. However, what is clear is that the suit properties must be preserved so that its character is not changed to the detriment of either party pending the hearing and determination of the suit. This court is of the view that the Respondent established a *prima facie* case that he indeed purchased the suit properties and is therefore entitled to the preservation of the same pending the hearing and determination of the suit. If the suit properties are adversely dealt with, the Respondent will be prejudiced and the suit will be rendered nugatory.

In the premises therefore, the court holds that the Respondent established a *prima facie* case to entitle this court grant the order of injunction that has been craved for. This court will grant the orders in terms of Prayers 3, 4 and 5 of the application pending the hearing and determination of the suit. The Petitioner will be required to surrender for safe keeping of the title documents in respect of the suit properties to the court within seven (7) days of today's date for safe keeping. Costs shall be in the cause.

**DATED IN NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH, 2014**

**L. KIMARU**

**JUDGE**