



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MALINDI**  
**DIVORCE CAUSE NO. 11 OF 2013**

**I L. ....PETITIONER**

**VERSUS**

**J M A. ....RESPONDENT**

**RULING**

1. The petitioner/applicant filed three Notices of Motion. The first was filed on 12<sup>th</sup> May, 2014 and the second on 23<sup>rd</sup> May, 2014. Finally on 3<sup>rd</sup> June, 2014 she filed the third application which her counsel withdrew on 11<sup>th</sup> June, 2014 after the respondent raised an objection. Before me therefore are the two initial applications. Both are expressed to be brought, principally under Order 40 rule 1 of the Civil Procedure Rules. Prayer 2 of the Notice of Motion filed on 12<sup>th</sup> May, 2014 seeks a temporary injunction to restrain the respondent from disposing of, transferring, gifting and or wasting the matrimonial properties described as plot Number *[particulars withheld]* Watamu, Plot No. *[particulars withheld]* Watamu, *[particulars withheld]* and *[particulars withheld]*, Timboni *[particulars withheld]*, Timboni *[particulars withheld]* and Timboni *[particulars withheld]* and motor vehicles registration numbers KAV *[particulars withheld]*, KAT *[particulars withheld]*, KAE *[particulars withheld]*, KAJ *[particulars withheld]*, KAK *[particulars withheld]* and KAD *[particulars withheld]*.

2. The main ground upon which the said application is premised is that the said properties are matrimonial properties acquired jointly by the parties in the course of the marriage and that the petitioner will be prejudiced if the respondent, who has evinced such intentions, disposes of the properties before the Divorce Petition is heard and determined. That is the gist of the supporting affidavit sworn by the petitioner, I. L. on 22<sup>nd</sup> April, 2014. The petition for divorce was filed on 10<sup>th</sup> October 2013. Interim ex parte orders were granted pursuant to this application but lapsed for want of service within three days.

3. The petitioner's second application is seeking two key prayers as follows;

**“2. That pending the hearing and determination of this application inter partes, and the divorce cause herein, a temporary injunction be issued restraining the respondent and/or agents from using and/or residing in the shared home in Timboni, Watamu where the applicant lives with the issues of the marriage and the respondent be compelled to move out and use any of the other homes within Watamu and Malindi jointly acquired with the applicant.**

**3. THAT pending the hearing and determination of this application inter partes, and the divorce cause herein, a temporary injunction be issued restraining the respondent from interfering with the management of affairs, day to day running of *[particulars withheld]* Academy and/or collecting and transferring any moneys belonging to *[particulars withheld]* Academy, Watamu to himself or any personal bank accounts.”**

4. Prayers 4 and 5 in my considered view are effectively spent at this stage of the proceedings. From the grounds on the face of the applications and the affidavit of the petitioner the key grounds upon which the applications are based are that the petitioner has previously suffered physical and verbal assault at the hands of the respondent who is described as “prone to violent mood swings” and that the petitioner is living in constant anxiety and mental anguish. Secondly, that due to the respondent’s conduct and handling of monies generated at the family business known as *[particulars withheld]* Academy, the business is at risk of collapsing. Further that the respondent is intending to dispose of the matrimonial properties listed to the petitioner’s detriment.

5. In response, the respondent filed a lengthy affidavit denying all the petitioner’s claims. He asserts inter alia that he has not made any attempts to dispose of any property and that in any event he acquired all the property without any contribution from the petitioner. In particular, he depones that he is the proprietor of the school *[particulars withheld]* Academy and that being a foreigner who holds no work permit, the petitioner cannot operate the school, which he is currently operating with difficulty due to the interference by the petitioner. He accuses her of misappropriating large sums of monies from the school till and concealing original title documents in respect of the disputed property in order to file caveats. He denies harassing or assaulting the petitioner but asserts that he is the victim of abuse and harassment from the petitioner. He also claims that the petitioner has turned the children of the marriage against him.

6. During the oral hearing of the two applications, both counsels canvassed the material contained in the parties’ respective affidavits. I have considered the affidavits and submissions in light of the applications before me. In a word, the petitioner’s prayers are to restrain the respondent’s dealings and limit his access in respect of what she claims to be matrimonial property (vehicles and land parcels), matrimonial home (Timboni home) and matrimonial business (*[particulars withheld]* Academy) pending the determination of the suit. Order 40 rule 1(a) of the Civil Procedure Rules is in the following terms:

**“1. Where in any suit it is proved by affidavit or otherwise**

**(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree; or**

**(b) ...**

**the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”**

7. With regard to the alleged matrimonial properties, the parties have made contrasting depositions. The petitioner asserts that the property was acquired by the couple during their marriage, but the respondent denies this. As regards the business, the petitioner claims to have played key role in setting it up and operating it. Ditto the respondent. Concerning the matrimonial home, it is not disputed that although the couple is still residing in the same home, they occupy different rooms therein.

8. Such contention is typical in cases of this nature where couples are estranged and engaged in litigation. The question whether the property in dispute was jointly acquired can only be determined on the basis of evidence adduced at the hearing. The mere fact that some of it is registered in the name of the respondent is neither here nor there. The germane question at this point is whether the said property is “in danger of being wasted, damaged, or alienated by any party to the suit.”

9. Having scoured the petitioner’s affidavits, I cannot find any direct evidence that the respondent has taken any action from which a conclusion can be drawn that he intends to alienate the property. However, it would seem that the petitioner is convinced that he might do so, otherwise she would not have filed caveats in respect of suit property (see annexure **JNA 2** to the respondent’s affidavit). Secondly, apart from title documents in respect of portion No. *[particulars withheld]* (original *[particulars withheld]*) Malindi and No. *[particulars withheld]* (original *[particulars withheld]*) Malindi

and sale agreement for plot No. [particulars withheld], no title documents for the other cited properties have been tendered.

10. I note too that some of the motor vehicles log books tendered by the petitioner in respect of KAV [particulars withheld], KAE [particulars withheld], KAJ [particulars withheld], KAK [particulars withheld] and KAD [particulars withheld] are in the names of third parties and not the respondent. Only vehicle KAT [particulars withheld] is in the respondent's name. No document was tendered in respect of the vehicle KAE [particulars withheld]. It may well be, as the petitioner has stated, that the respondent is yet to transfer these properties into his name. The respondent's affidavit does not shed light on this aspect. As regards the school business, annexure IL1 to the affidavit in support of the second application shows that the business is registered in joint names of the parties herein, and that it carries on business on plot No. [particulars withheld] Timboni Watamu (one of the disputed properties).

11. The principles applicable in considering the grant of interlocutory injunction were set out in **Giella vs Cassman Brown (1973) EA 358** and a prima facie described in **Mrao Ltd Vs First American Bank of Kenya & 20 others (2003) KLR 123** as follows:

***“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 or 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 letter.”***

12. There is no doubt that the parties herein have lived as man and wife for over 27 years and have two adult children and the third a minor now aged 10 years. As day follows night, if the divorce petition is allowed, the question of distribution of the matrimonial property will have to be gone into. This no doubt will comprise a listing of all the property acquired in the duration of the marriage and a determination of what property either party is entitled to. For that reason alone, I can appreciate the petitioner's fears that hers may be a pyrrhic victory if having succeeded in her petition, she is confronted with a situation where all assets have dissipated. Such an eventuality would amount to significant loss to her, and possibly the children of the marriage. This is all conjecture for now and must be taken in context. To secure the ends of justice, I would grant an order to the effect that an interim injunction does issue to restrain the respondent from alienating or in any way wasting the properties listed in the first application whether registered in his name or beneficially owned by him.

13. Turning to the second application, although the prayer 2 is couched as a prohibitory injunction, it is effectively a prayer for a temporary mandatory injunction requiring the petitioner to move from the matrimonial home so that the petitioner continues to reside there with the minor issue of the marriage. In the case of **Kenya Breweries Ltd Vs W. Okeyo; Civil Appeal No. 332 of 2000** the Court of Appeal set out the principles to be considered before the granting of an interim mandatory injunction as follows:

***“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once, or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff...”***

14. In the present case, the petitioner alleges that the respondent has severally assaulted her verbally and physically. It is a pity that the children of the marriage and a worker in the household have apparently entered the fray involving the spouses. No P3 form or other independent evidence of the alleged “numerous physical assaults” has been annexed to the petitioner's affidavit. The alleged reports to the police station have not been firmed up with copies of the cited OBs. All the statements annexed to her affidavit were recorded on the same day, 8<sup>th</sup> May, 2014 by all the alleged witnesses. Like the petitioner's affidavit, they are generalized and lacking in particulars of the alleged “numerous assaults”.

15. The fact that the respondent admittedly let himself (or broke) into the petitioner's room early in May 2014 and took away certain documents may have contributed to a sense of insecurity on the part of the petitioner. However, she has continued to reside in her corner of the home, largely unharmed, at least

physically. In the circumstances of this case, it is not unexpected that if the spouses continue living in the same premises there is likely to be repeated episodes of flare-ups. The respondent is agreeable to the petitioner occupying another family home which is separate from the matrimonial home.

16. This offer in my view is sensible because the court cannot, without compelling reasons, evict a spouse from his own home. The petitioner has a choice to reside in the portion of the matrimonial home where she is currently residing or in the alternative premises now being offered by the respondent as she clearly does not wish to share the same house with the respondent. I do therefore decline prayer 2 of the Notice of Motion. I would like to add that whatever option the petitioner takes, I would, for the sake of peace order the respondent not to interfere with her in any way.

17. Regarding prayer 3 of the Notice of Motion, it would seem that the couple have hitherto been involved in the family business styled *[particulars withheld]* Academy from inception and its operations albeit in different roles. Each party now accuses the other of embezzling the earnings from the business and of interference. The respondent has emphasized the fact that the petitioner cannot lawfully run the business as she has no work permit on account of being a foreigner. That is not denied by the petitioner. Who will operate the apparently large school if the respondent is restrained? Likely, the business will collapse and the couple and their children will ultimately lose a lifetime investment.

18. In the circumstances, the balance of convenience seems to tilt in the respondent's favor. However, the respondent will be required to keep proper books of accounts and bank all proceeds into a new bank account to be opened in the name of the school within 7 days of today's date from which all the school's financial transaction will be performed. Additionally, he is to file accounts prepared by a certified accountant into this court in respect of every academic term until the case is finalized.

Costs will be in the cause.

Delivered and signed at Malindi this **20<sup>th</sup>** day of **June, 2014** in the presence of Mr. Obaga holding brief for Miss Murithi for the Petitioner, Mr. Mouko for the Respondent.

Court clerk - George

**C. W. Meoli**

**JUDGE**