



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MATRIMONIAL CAUSE NO. 53 OF 2014 (OS)

IN THE MATTER OF SECTIONS 7, 12, & 17 OF THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

AND

IN THE MATTER OF AN APPLICATION FOR DIVISION OF MATRIMONIAL PROPERTY

BETWEEN

F N K.....APPLICANT

VERSUS

P K N.....RESPONDENT

RULING

1. On the 14th of August 2014, the Applicant F N K filed an Originating Summons seeking declaratory orders on the properties listed in the Originating Summons. She states that the said properties were acquired and developed by their joint funds and efforts during their marriage and were registered in the name of the Respondent and are jointly owned by both of them in equal shares. She also seeks the following orders; a declaratory order that 50% of the said properties be held by the Respondent in trust and for her beneficial interest; an order that the properties be shared equally and if incapable of being shared that they be sold and the net proceeds be share equally between them; that the Respondent transfers at his own costs and expense proportions of the said properties to her.

2. Simultaneous with the Originating Summons the applicant filed notice of motion dated 14th August 2014; it is brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act, Section 12(3) of the Matrimonial Property Act No. 49 of 2013. The Applicant seeks a temporary injunction to restrain the Respondent from selling, leasing, mortgaging, charging, transferring any property and/or evicting the Applicant from any of the disputed portions of land being **GILGIL/KARUNGA BLOCK [particulars withheld]**, pending the hearing and determination of the suit.
 - *The Applicant also seeks an injunction to restrain the Respondent from selling and transferring motor vehicle Registration no. [particulars withheld] Toyota Town ace and Motor Vehicle registration No. [particulars withheld]-Toyota Hilux.*

- *Further the Applicant seeks that the Court direct that the rental proceeds of kshs.156,000/- derived from property known as Gilgil/Karunga Block **[particulars withheld]** be shared equally between the Applicant and the Respondent.*
3. On the 19th of September the Applicant filed another Notice of Motion under Order 40 Rule 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules seeking the following order;

That the Court grants a temporary injunction order restraining the Respondent by himself, his agents, servants or workmen from doing any of the following acts that is to say, demolishing, removing, bringing down, wasting, damaging or in any other manner whatsoever destroying any of the houses, buildings, fences and/or structures erected on any of the properties owned jointly by the Applicant and the Respondent, being the subject matters of this suit as well enumerated in the Originating summons dated 14th August 2014 pending the hearing and determination of this suit.
 4. In brief this is the Applicant's case; that she married the Respondent in 1963 under customary law and they have five children. They had a civil marriage conducted on the 9th October 2001 at the Registrar's office; that during the pendency of the said marriage they acquired the properties listed above at paragraph 2 jointly with the Respondent but the same were solely registered in his name for benefit of the family; that the Respondent is in the process of selling and disposing the said properties without her consultation and consent and has locked her out of any share of rent received from property Gilgil/Karunga **[particulars withheld]** which amounts to kshs.156,000/- per month which she is entitled to. She claims that she has been advised by her advocate that she is entitled to 50% of the matrimonial property by virtue of her being the Respondent's wife during their marriage having contributed financially in the acquisition of the said properties; that she disposed her property at Kakuzi to raise funds for the purchase of Gilgil Property. That she has been advised by her lawyer that the law bars a spouse from evicting another.
 5. The applicant states in her affidavit dated 19th September 2014 that; after the Court made an order on the 28th August 2014 restraining the Respondent from evicting her from their matrimonial home in Gilgil, the Respondent on the 18th of September 2014 armed with a group of 20 men wielding machetes stormed her home and started destroying her back fence leaving it open and that he also brought down two houses at the back side of the main house.
 6. The Respondent filed a Replying Affidavit on the 10th of September 2014 giving details how he met the Applicant. He claims that the he has a wife called I N K whom he married in 1969 and they were blessed with 8 children. That in the year 2006 they disposed of their house in Thogoto Kikuyu and used the proceeds to invest in the properties in Gilgil namely; Gilgil /Karunga block **[particulars withheld]**, **[particulars withheld]**, **[particulars withheld]** and **[particulars withheld]** and they also bought the two vehicles; that the Applicant's son one Henry without his permission took possession of Motor vehicle **[particulars withheld]**; that the remaining pieces of land mentioned by the applicant were purchased from his savings from earnings of his employment between 2001 and 2003; that at times he would send the Applicant's to take money to the vendor and it is then the she would cause the receipts to be issued in her name; that the flats in block **[particulars withheld]** which are occupied fetch a sum of 13,000/- per month.
 7. The Respondent avers further that he had a relationship with the applicant; that out of love for her he spent Kshs. 1,000,000/- to build her a residential house in a plot at Kasarani and she continues to live there. That on the 9th of October 2001 the Applicant convinced him to undergo a Civil Marriage ceremony under the Marriage Act (repealed) in Nairobi for the purposes of restoring her dignity as a woman maintaining that the said ceremony would not have any effect on their marriage with the said wife I N K and he participated in the said ceremony secretly without the knowledge of his wife and children; that throughout his association and relationship with the Applicant, he has never lived with her as husband and wife and neither did he provide her every basic needs and those of her children and he never participated in the upbringing of her children as their father; that the Applicant has never made any financial contribution to the property as she claims and lastly that the Applicant has not filed any petition against him for divorce or annulment

of the marriage.

8. The Respondent filed a notice of preliminary objection dated the 2nd of October 2014. He states in the said objection that; the prayers are untenable, unsustainable, misconceived and cannot lie in view of the fact that the applicant has not filed any petition against the Respondent under any law relating to matrimonial causes; that the prayers are an abuse of the process of this court as the Applicant ought to know that the court lacks jurisdiction to entertain the same in the circumstances.
9. At the hearing of the application Counsels reiterated what is deponed in the affidavits in addition the following was submitted; Mr. Gachie argued that the Applicant's case falls within the Matrimonial Property Act, that they are seeking to protect the property which was acquired during the marriage; that under section 17 (2) (c) of the Matrimonial Property Act it is stipulated that a person may apply to the court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person notwithstanding that a petition has not been filed under any law relating to matrimonial causes; that if the interim orders that were granted are set aside justice will not be served and that the balance of convenience tilts in favor of the applicant. Mr. Ochieng argued that applicant has not met the threshold of granting an injunction; that the Applicant has not deposed that the properties mentioned in her application are matrimonial properties; that under section 9 of the Act a spouse who has contributed to the purchase of property can only claim a beneficial interest, thus she can only claim a beneficial interest; that the provisions of section 17 (2) allows one to seek a share but not subdivision of the property; that the law on subdivision of the property has been set out at section 7 of the Act that one has to seek a divorce before claiming any interest in a property; that the applicant has no case and will suffer no loss which cannot be met by an award in damages and that no prejudice will be caused to her; that the balance of convenience tilts in favor of the Respondent; the interim orders granted should not be confirmed and that the Respondent should be left to manage the 22 properties;
10. The applicant seeks injunctive orders it is now settled in law that an applicant has to establish that he has a prima facie case with a probability of success; that if the orders sought are not granted he will suffer irreparable loss which would not be adequately compensated by an award of damages and if the court is in doubt it will decide the case on balance of convenience (**see Geilla vs. Cassman Brown Ltd E. A 1973 pg. 358**). The Respondent does not deny registering his marriage with the applicant, so prima facie the applicant has shown that she is the wife of the Respondent.
11. An objection has been raised that the Applicant is not entitled to the orders because she has not filed for a divorce this has been countered by the applicant by arguing that her case falls under section 17 (2) (c) of the Matrimonial Properties Act. Under the said section a person can come to court and seek an order of declaration of rights to any property notwithstanding that a petition has been filed, in my view the law allows the applicant to come to court to seek a declaration of her rights to any property. It is her claim that she contributed to the purchase of the said properties, this issue in my view cannot be determined at this interlocutory stage I also note that it is one of the orders she seeks in the Originating Summons. She claims that the Respondent is in the process of selling, disposing the said properties; evidence to support this has not been tendered by the applicant. The respondent claims that the properties she has mentioned are not matrimonial property again it is my view that this can only be resolved at the hearing of the Originating Summons. Likewise the issue of directing the Respondent to share the rental proceeds from Gilgil/Karunga/Block [*particulars withheld*] can only be determined at the hearing. Having considered all that has been deposed I hold the view that the parties should fix the Originating Summons for directions so that the matter is heard and determined. Under Order 40 of the civil Procedure Rule the court can make such orders for the purposes of preventing waste, damage, alienation, sale, removal or disposition of the property. In the interest of justice I make the following orders; each party shall desist from interfering with the home of the other, where they are currently residing; the Respondent shall manage the 22 properties and he shall undertake to inform the applicant of any intention to sell any of the properties except the properties where the applicant resides. Parties

to endeavor to fix the Originating Summons for directions at the earliest opportunity available.
Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this **26th** Day of **November** 2014.

R. E OUGO

JUDGE

In the presence of:

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

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

.....**Court Clerk**