



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

**CIVIL APPEAL NO. 316 OF 2010**

**KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF/DECREE HOLDER**

**VERSUS**

**DR. DAVY KIPROTICH KOECH.....DEFENDANT/JUDGMENT DEBTOR**

**AND**

**NANCY CHEROTICH KOECH.....OBJECTOR/APPLICANT**

**RULING**

1. This court, Rawal j, (as she then was) on 13<sup>th</sup> April, 2011 entered summary judgment in the sum of KShs. 18,500,000/= against the defendant in favour of the plaintiff. The plaintiff has attached TITLE NO. KERICHO/KIPCHIMCHIM/3005, KERICHO/KIPCHIMCHIM/3006, KERICHO/KAPSUSER/1962, KERICHO/SOLIAT/495, NAKURU/PIAVE/1048, KERICHO/MUNICIPALITY BLOCK 4/2, KERICHO/MUNICIPALITY BLOCK4/3 and KERICHO/MUNICIPALITY BLOCK 4/4 and is in the process of executing the decree.

2. The objector who is the defendant's wife claims that the aforesaid are matrimonial properties including their matrimonial home. She has filed the Notice of Motion dated 31<sup>st</sup> March, 2014 to safeguard her interest and that of her children in the properties. She seeks the following orders:

“

i. *Spent*

ii. *That pending the hearing and determination of this application inter partes, this honourable court do issue temporary order of stay of execution of judgment delivered on 13<sup>th</sup> April, 2011 by this honourable court and consequential proceedings in the interest of justice.*

iii. *That this honourable court do issue a preservation order against the plaintiff/respondent them from disposing, auctioning, registering instruments, sub-dividing and/or in any way dealing with sale of TITLE NO. KERICHO/KIPCHIMCHIM/3005, KERICHO/KIPCHIMCHIM/3006, KERICHO/KAPSUSER/1962, KERICHO/SOLIAT/495, NAKURU/PIAVE/1048, KERICHO/MUNICIPALITY BLOCK 4/2, KERICHO/MUNICIPALITY BLOCK4/3, KERICHO/MUNICIPALITY BLOCK 4/4 pending the hearing and determination of this application.*

iv. ***That the consent order of 6<sup>th</sup> February, 2013 for the sale of TITLE NO. KERICHO/KIPCHIMCHIM/3005, KERICHO/KIPCHIMCHIM/3006, KERICHO/KAPSUSER/1962, KERICHO/SOLIAT/495, NAKURU/PIAVE/1048, KERICHO/MUNICIPALITY BLOCK 4/2, KERICHO/MUNICIPALITY BLOCK4/3, KERICHO/MUNICIPALITY BLOCK 4/4 entered against the defendant be set aside, reviewed, varied and/or vacated pending the hearing and determination of this application.***

v. ***That the plaintiff be directed to submit valuation reports in court in respect of TITLE NO. KERICHO/KIPCHIMCHIM/3005, KERICHO/KIPCHIMCHIM/3006, KERICHO/KAPSUSER/1962, KERICHO/SOLIAT/495, NAKURU/PIAVE/1048, KERICHO/MUNICIPALITY BLOCK 4/2, KERICHO/MUNICIPALITY BLOCK4/3, KERICHO/MUNICIPALITY BLOCK 4/4 within seven (7) days.***

vi. ***That in the alternative, there be temporary stay of sale of TITLE NO. KERICHO/KIPCHIMCHIM/3005, KERICHO/KIPCHIMCHIM/3006, KERICHO/KAPSUSER/1962, KERICHO/SOLIAT/495, NAKURU/PIAVE/1048, KERICHO/MUNICIPALITY BLOCK 4/2, KERICHO/MUNICIPALITY BLOCK4/3, KERICHO/MUNICIPALITY BLOCK 4/4 pending the hearing and determination of this application.***

3. The application is premised on the grounds set out on the face of the application and the averments in the supporting affidavit and the further supporting affidavit of the objector sworn on 30<sup>th</sup> March, 2014 and 8<sup>th</sup> May, 2014 respectively. She deponed that her consent was not sought and she never participated in the hearing prior to registration of prohibitory and inhibitory orders issued against the suit properties. Her gravamen is that she and her children shall be rendered destitute in the event the properties are disposed of.

The objector submitted that she has a right to the defendant's properties by virtue of their marriage. To assert her right she relied on Section 2 of the Matrimonial Property Act which defines contribution to entail both monetary and non-monetary contribution; Section 14 of the Matrimonial Property Act which provides that if property acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust of the other spouse and in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal; further reliance was placed in the cases of *Njoroge v. Ngari (1985) KLR 480* and *Karanja v. Karanja (1976) KLR 307* among others. As to whether matrimonial property can be attached without a spouses' consent, the objector submitted that her right to property is protected under Article 40 of the Constitution as was demonstrated in *Green Hill Investments Ltd v. China National Complete Plant Export Corporation (2002) 1 KLR 384*. She further submitted that spousal rights have been recognised as overriding interests in land in Section 28 and 93(1) of the Land Registered Act and consent ought to be sought before disposition.

4. The plaintiff opposed the application vide the replying affidavit of Ignatius Wekesa sworn on 25<sup>th</sup> April, 2014. The deponent stated that the sale has not commenced and the parties are yet to have the issue of terms and conditions of sale determined before court. It was contended that this suit is not a matrimonial cause and the alleged marriage between the objector and defendant does not arise in this suit. Further to this it was contended that matrimonial property is not exempted by law from attachment to satisfy a decree.

5. In its submissions, the plaintiff contended that this court's jurisdiction to declare the attached property as matrimonial property has not been properly invoked through the objective proceedings. It was argued that the prohibition against the properties was issued before the Matrimonial Properties Act, 2013 came into force and can therefore not be applied retrospectively. It is the plaintiff's position that the statute provided substantive as well as procedural law for determination of disputes over interest in properties acquired during marriage. That trust property is excluded from matrimonial property while recognition is given to prenuptial agreements. It is also its position that the overriding

interest envisaged under section 28 of the Land Registration Act is one that has been determined through a legal process whether or not it has been noted by the register.

6. To illustrate that the objector cannot bar execution proceedings against the suit property, the plaintiff relied in *Lucy Muthoni Njihia v. Barclays Bank Limited and 3 Others* where Emukule J, held that ***“whereas all that may be so [wife’s contribution towards acquisition of the property] the issue in this suit and in this application in particular is not contribution by the applicant towards the purchase of the suit property or indeed who is the rightful owner or what her proportion of ownership should be. All those questions are irrelevant. In an application for injunction against third party whose interest as a lender is secured loan, the dispute ceases to be between the husband and wife but between the registered proprietor of the land or suit property and the third party, the lender whose security is being assailed.”***

7. The plaintiff submitted that matrimonial property is not privileged from execution of a decree. That in the instant case difficulty arises since the property is titled to one spouse and the other claims interest by virtue of contribution but the interest is yet to be defined and ascertained thereby the objection proceedings lack a proper foundation in law and in fact.

8. As to consent of the objector, it is the plaintiff’s submissions that spousal consent envisaged under Section 12 (1) of the Matrimonial Property Act is limited to monogamous marriages which is not the case here and that spousal consent is not supported by Section 93 of the Land Registration Act.

9. I have considered the depositions and submissions of the parties. The decree holder took issue with the fact that the objector’s prayer are termed pending hearing and determination of the application. It is my considered view that the same is a typographical error and should not be visited in view of Article 159 (2) (d) of the Constitution. The essential issue however is whether or not the matrimonial property can be attached. On this issue I share the same opinion as my brother M.J. Anyara Emukule J and reiterate his pronouncement in *Kipsigis Farm Enterprises v. Stephen Ngerechi & 2 Others (2014) e KLR* as follows:

***“ 9.02. The Constitution recognises the family as the natural and fundamental unit of the society and the necessary basis of social order, and that the same shall be accorded recognition and protection of the state. It further provides that both spouses shall have equal rights at the time of, during and at the dissolution of the marriage. This is in recognition of the fact that a spouse may have acquired an interest over matrimonial property even though she is not the registered owner thereof and her interest ought to be secured. Indeed Section 79 of the Land Act provides that where a charge is taken upon a matrimonial home, the consent of both spouses must be obtained for the transaction to be deemed valid.***

***9.03. Section 79 cited above, is intended to protect a spouse from dealings by the other involving the matrimonial home without her knowledge or consent. In the instant case, it was not disputed that the applicant was the registered owner of the suit premises and there was no other interest that had been registered against the title. In attaching this land they were acting in pursuance of a court decree, and with the leave of the court and therefore did not require the consent of the applicant as the owner of the land. In my view, if the applicant’s spouse had any overriding interest over the suit land which ought to have been recognised she should have presented her case to enable the court make a determination on her rights. The court cannot presume their existence and make an adjudication on the applicant’s spouse where she is not a party to this suit.***

***9.04. Consequently, I find and hold that there is no law that bars a decree-holder from attaching a matrimonial home in execution of a decree and further he need not obtain the consent of a spouse where such interest has not been registered or declared by the court.”***

10. Consequently, I dismiss this application. The objector should address the issue of her right to

the matrimonial property before the right forum. Costs to the plaintiff.

Dated, Signed and Delivered in open court this 18<sup>th</sup> day of December, 2014.

J. K. SERGON

**JUDGE**

In the presence of:

.....for  
the Plaintiff

.....for  
the Objector