



REPUBLIC OF KENYA

High Court at Mombasa

Originating Summons 10 of 2012

IN THE MATTER OF: SECTION 17 OF THE MARRIED WOMEN AND PROPERTY ACT 1882

IN THE MATTER OF: QUESTIONS ARISING BETWEEN PURITY WANGAI GITUMA AND
CHARLES RICHARD OKUKU CONCERNING OWNERSHIP AND DIVISION OF LAND,
HOUSEHOLD GOODS AND ACCOUNTS ACQUIRED DURING MARRIAGE

PURITY KANGAI GITUMA.....APPLICANT

VERSUS

CHARLES RICHARD OKUKU.....RESPONDENT

RULING

Before court is the Notice of Motion dated 19th July, 2012 by which the applicant sought *inter alia*, the following orders:

“2. **THAT** a temporary injunction do issue restraining the respondent, his authorized agents, servants and/or any other person acting in his authority from selling, transferring, disposing, alienating, wasting, damaging and/or otherwise interfering with two (2) plots measuring 42”x55” situate at Aldina Jomvu Majengo Mapya pending the hearing and determination of this application and cause.

3. **THAT** a temporary injunction do issue restraining the respondent, his authorized agents, servants and/or any other person acting in his authority from transferring funds held in a joint account at National Bank and other respondent’s bank accounts at Equity bank, Kenya Post Bank and National Bank pending the hearing and determination of this application and cause.

4. **THAT** the respondent be ordered to forthwith release the applicant’s school leaving certificate and computer college certificates and/or any other applicant’s documents that are in the respondent’s possession.

5. **THAT** the court be pleased to order the

respondent to pay Kshs. 20,000/= to the applicant as interim maintenance pending hearing and determination of this application and suit.

6. **THAT further and in the alternative and in the event that the title and ownership in the above properties has already been transferred in favour of any third parties herein, then a temporary injunction be issued by this Honourable court restraining the said third party and the Registrar of Titles from further transferring or registering any such further transfers relating to:**

- (a) A plot measuring 42"x55" at Aldina Jomvu Majengo Mapya.
- (b) A plot measuring 42"x55" at Aldina Jomvu Majengo Mapya.

7. **THAT the court be pleased to order that the respondent to disclose all the properties and joint bank accounts held and acquired during marriage.**

8. **THAT costs of this application be provided for."**

The application was opposed by the respondent, who filed his replying affidavit on 2nd February, 2012.

The background to this application is that the applicant and the respondent are a married couple who solemnized their union on 11th November, 2000 under the Marriage Act Cap 150, Laws of Kenya. The couple bore no children together. The applicant alleges that sometime in the year 2010 the respondent threw her out of the matrimonial home due to her inability to bear children. A divorce petition filed by the respondent seeking to dissolve their union is pending before the High Court in Mombasa.

On 12th July, 2012 the applicant filed an originating summons seeking a declaration of trust, joint ownership of property and division of property which property she claims includes plots of land, cash in various bank accounts, and household goods all of which the applicant claims were acquired through the joint efforts of the parties. Later on 19th July, 2012 the applicant filed this Notice of Motion seeking various interlocutory orders.

At the outset I note that the couple ceased to cohabit in the year 2010 yet it is not until 2012 almost two (2) years later that the applicant filed this motion for various orders including maintenance. If the applicant was genuinely hard-pressed or aggrieved as she alleges then my own view is that she would have sought these orders much sooner.

Be that as it may I will proceed to consider each of the various prayers made by the applicant. In doing so I have given due consideration to the written submissions filed by counsel in respect of this matter.

The applicant has submitted that the two plots are matrimonial property having been acquired during the subsistence of her marriage to the respondent. On his part the respondent submits that the two plots do not belong to him having been sold off to third parties (a fact of which the applicant was apparently unaware). The question of whether or not the two plots constitute matrimonial property can only be determined upon a full hearing with each side adducing evidence in support of their stand. The principles upon which interlocutory injunction may be granted are contained in the celebrated case of **GIELLA –VS – CASMAN BROWN [1973] E.A. 358**. These prerequisites are:

- (1) That the applicant shows a *prima facie* case with a probability of success.
- (2) That the applicant is liable to suffer irreparable harm if the orders sought are not granted and
- (3) That damages will not provide adequate compensation for any harm so suffered.

If the court is in any doubt then it is obliged to determine the matter on a balance of convenience. This is a case where the applicant claims to be entitled to the two plots and seeks to prevent any form of sale, interference and/or transfer of the same. However, in the same breath the applicant in her affidavit

indicates a willingness to (if the plots have been sold) be compensated through a portion of the sale price. It is quite clear here that damages would suffice as adequate compensation. The applicant does not currently reside on any of the plots and has not had possession for the past two (2) years. I fail to see what irreparable harm may result from failure to grant the orders sought.

With regard to bank accounts the applicant claims a share of money held in certain bank accounts held jointly with the respondent. No tangible evidence has been adduced regarding the applicant's contribution to said bank accounts. Once again I feel that such evidence would only properly be adduced at the hearing of the main suit. Once again since money is involved I am of the view that monetary compensation would suffice be adequate compensation.

The applicant made a prayer for a return of her certificates and personal documents. Again it is curious that such a demand is coming up two (2) years **after** she left the home. In any event as pointed out in the respondent's submissions, Hon. Justice Nzioka did on 27th July, 2012 record a consent between the parties allowing the applicant access to the respondent's house in order to look for her documents. No feedback was given to the court on whether any such attempt to search for the documents was conducted. This court would need to know whether the respondent denied the applicant access in contravention of the consent order or whether the applicant simply did not bother to go to the house. Without such information the prayers in this regard sought are warranted.

On the prayer for maintenance, again I note that this has come rather late in the day. How has the applicant been surviving these past two (2) years? The respondent alleges that she runs a café an allegation which the applicant denies. This prayer is clearly an afterthought and evidence would have to be tabled on the respondent's earning before such orders could properly be made.

The remaining prayers seeking orders against an un-named third party and the Registrar of Titles as well as orders seeking to compel the respondent to disclose all properties acquired during the marriage and the sums held in joint accounts are in my view unmerited. This is information which the applicant should know or should have sought to ascertain prior to filing her application.

On the whole I find no merit in this present application and the same is hereby dismissed in its entirety. Each party to bear their own costs.

Dated and delivered in Mombasa this 19th day of February, 2013.

M. ODERO

JUDGE

In the presence of:

Ms. Kipsang for Applicant

Mr. Odhiambo for Respondent

Court Clerk Mutisya