



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL SUIT NO. 5 OF 2013(O.S)

GRACE CHEPKEMOI TOO..... PLAINTIFF

VERSUS

PHILIP KOECH DEFENDANT

RULING

The substantive matter in these proceedings is the Originating Summons dated 22nd April, 2013, taken out by **Grace Chepkemoi Too**, hereinafter referred to as the Applicant, in which she sought for the following orders:

1. That a declaration be and is hereby issued declaring that the applicant is entitled to half share (or such other share as the court may award) of the properties(movable and immovable) acquired by the applicant and the respondent during the subsistence of their marriage and that the respondent holds title, interest, ownership and possession of the said properties in trust for himself and the applicant in their respective shares as the legal owner and *cestui que trust* respectively, namely:
 - a. *The parcel of land Kericho/Nyamanga/594 located in Cheboin Location Cheptentendiet Roret near Cheborge acquired during the marriage of the parties herein.*
 - b. *The matrimonial home at Ngesumin Location and all household goods therein.*
2. That a declaration be and is hereby issued declaring that the applicant is entitled to half share (or such other share as the court may award) of the portion of net proceeds of sale of the land parcel number Kericho/Nyamanga/594 Plot in Ongata Rongai and the parcel of land in Olenguruone measuring 5 acres and 2 plots in Litein and pursuant to the said declaration the respondent do pay the applicant the said share of the net proceeds forthwith plus interest from the dates sold.
3. That an order be and is hereby issued directing that the above mentioned parcels of land be subdivided into two equal portions or be subdivided in any other ratio as the court may deem just and two separate titles deeds be issued for each of the new portions, one in the name of the applicant and the other in the name of the respondent as the respective Registered proprietors.
4. An order be and is hereby issued directing that the above mentioned properties both movable and immovable be shared between the applicant and the respondent equally or in any other ratio as the court may deem just.
5. In the alternative to 3 and 4 above an order be and is hereby issued directing that a

valuation by a reputable valuer and or valuers acceptable to both parties or appointed by the court be carried out on each of the above mentioned properties and upon such valuation the respondent do pay the applicant half (or such other share as the court may order) of the value of the said properties.

6. Upon grant of any of the foregoing prayers a permanent injunction be and is hereby issued restraining the respondent by himself, servants, agents and employees from interfering with the applicant's lawful enjoyment and quiet possession of the properties awarded to her.
7. Such other orders be granted as the court may deem fair, just and fit in the circumstances.
8. Costs be awarded to the applicant.

The subject matter of this ruling is the Notice of Motion dated 22nd April, 2013 in which the Applicant prayed to be given the following orders:

1. That this application be certified as of utmost urgency and the service of the same be dispensed with in the first instance.
2. That an interim order of injunction do issue restraining the Respondent, his servants, agents, employees, assignees or anybody acting for or through him from selling, entering into an agreement for sale, wasting or in any manner alienating, transferring, completing any conveyance whatsoever, charging, mortgaging, disposing of the following land parcel numbers:
 - a. *The parcel of land Kericho/Nyamanga/594 located in Cheboin, Cheptentendiet Roret near Cheborge acquired during the marriage of the parties herein.*
 - b. *The matrimonial home at Ngesumin and all household goods therein.*
3. That an interim order of injunction do issue restraining the Respondent, his servants, agents, employees, assignees or anybody acting for or through him from selling, entering into an agreement for sale, wasting or in any manner alienating, transferring the parcels of land pending the hearing and determination of this application inter partes.
4. That an interim order of injunction do issue restraining the Respondent, his servants, agents, employees, assignees or anybody acting for or through him from selling, entering into an agreement for sale, wasting, or in any manner alienating, transferring the following properties:
 - a. *All other properties acquired during coverture including several registered and unregistered plots, shares in various companies and deposits in accounts full details whereof are within the knowledge of the respondent pending the hearing and determination of this application inter partes.*
5. That an interim order of injunction do issue restraining the Respondent, his servants, agents, employees, assignees or anybody acting for or through him from selling, entering into an agreement for sale, wasting or in any manner alienating, transferring, completing any conveyance whatsoever, charging, mortgaging, damaging, disposing the above parcels of land and properties mentioned in 2(a), (b) & 4(a) above pending the hearing and determination of the main cause.
6. That costs be borne by the respondents.

The Motion is supported by the affidavit of **Grace Chepkemoi Too** sworn on 22nd April, 2013. When served with the Motion, **Philip Koech**, the Respondent herein, opposed the same by filing the replying affidavit he swore on 6th June, 2013. The Motion came up for inter partes hearing on 17th July, 2013. The Applicant was granted leave to prosecute the Motion ex parte when the Respondent and his counsel failed to appear despite having been served. However, this court is enjoined by law to consider the replying affidavit filed by the Respondent notwithstanding the Respondent's absence from court.

I have considered the grounds set out on the face of the Motion plus the facts deposed in the affidavits filed in support and against the motion. I have further considered the oral submissions made by Mr. Koko, learned advocate for the Applicant. Mr. Koko informed this court that the applicant was only pursuing prayers 5 and 6 of the Motion because the other prayers were granted at the ex parte stage. Mr. Koko urged this Court to grant the order of injunction to preserve the suit properties until this suit is heard and determined. The applicant pointed out that the Respondent is registered as the owner of **L.R. NO.**

Kericho/Nyamanga/594, a plot in Ongata Rongai, a parcel of land measuring 5 acres situated at Olenguruone and two(2) plots in Litein. She also averred that the **matrimonial home at Ngesumin Location** is also registered in the Respondent's name. It is the Applicant's submission that she will at the substantive hearing of the Originating Summons show that the aforesaid properties were acquired during the subsistence of their marriage hence the Respondent holds the same in trust for himself and the Applicant. The Applicant is apprehensive that unless the Respondent is restrained from disposing of or alienating in any manner the aforesaid properties, she stands to suffer irreparable damage. The Applicant enumerated instances where the Respondent disposed of some of the assets and thereafter squandered the proceeds without the Applicant receiving any penny. She also stated that the Respondent sold several motor vehicles and the parcel of the land situated in Ongata Rongai and that at Olenguruone and never gave her any of the proceeds. The Applicant has also alleged that the Respondent has started taking steps to have **LR.NO. Kericho/Nyamanga/594** sold unless he is restrained. In his replying affidavit, the Respondent urged this court to dismiss the Motion on the grounds that the same lacks merit, since there is no sufficient material placed before court to enable this court issue the orders. He argued that he did not acquire the properties stated on the face of the Motion jointly with the Applicant. He further averred that the Applicant did not make any contribution towards the acquisition of the aforesaid properties.

The principles for granting orders of injunction are well settled. **First**, an applicant must show that he has a prima facie case with high chances of success. In the case before this court, the Applicant has shown that she got married to the Respondent and that their marriage was solemnized at the District Commissioner's office in Nakuru in 1997. This fact is not denied by the Respondent. The applicant has also enumerated a number of properties she claims were acquired during the subsistence of their marriage. She avers that at the hearing of the Originating Summons, she will be able to prove that the aforesaid properties were acquired with her contribution. The Respondent avers that the Applicant did not contribute. On the face of it, the Applicant's Originating Summons raises very serious issues which can only be tested during a substantive hearing. The question as to whether the Applicant made any contribution or not will be one of the issues to be heard and determined. I am convinced that the Applicant has shown a prima facie case with high chances of success.

Secondly, an applicant must show that unless the order of injunction is given, he would suffer irreparable loss. In this dispute, the applicant has alleged that the Respondent has disposed of some motor vehicles and the parcels of land in Ongata Rongai and Olenguruone. She further alleges that she did not receive any penny from the proceeds of the sale. The Respondent did not deny these allegations. He just stated that the applicant did not make any contribution. In my opinion, if it is true that the Respondent indeed disposed of those properties and kept the money, the Applicant may not access those proceeds. Even if she was to take steps to recover the money she will incur huge expenses to file the necessary proceedings which may take time to conclude. In my view, I am convinced that unless the order of injunction is given, the Applicant is likely to suffer irreparable loss.

Thirdly, if the court is in doubt, the balance of convenience will be applied. But, since I have no doubt, I do not need to belabour to consider in detail this principle. However, I am satisfied that the Applicant will be the most inconvenienced party if the order is denied. She will be forced to incur huge expenses to file suits to recover her share of the sold properties from the Respondent.

In the final analysis, I am convinced that the Motion dated 22nd April, 2013 is well founded. It is allowed in terms of prayers 5 and 6.

Dated, signed and delivered in open court at Kericho this 25th day of July, 2013

J.K. SERGON

JUDGE

In the presence of

Mr. Koko Advocate for the Applicant

N/A for Responent

Mr. Koech – Court Clerk