



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Civil Suit 7 of 2010

SARAH AYITSO KURIA.....PLAINTIFF/APPLICANT

VERSUS

PETER ANDREW KURIA.....DEFENDANT/RESPONDENT

R U L I N G

1.The Application dated 9th February 2010 is premised on the provisions of **Section 63(b)(c) and (e)** of the **Civil Procedure Act** and **Order XXXIX Rules 1(a), 2 and 7(1)** of the **Civil Procedure Rules**. The Applicant seeks the following prayers that;

i) The honourable Court be pleased to grant a temporary injunction directed to the Respondent by himself, his servants, agents or otherwise anyone transferring, charging, selling, removing or in any other manner disposing of all the properties described here below;

- a) *L.R. No.209/10611/26- House No.222 at Villa Franca Estate (Mombasa Road).*
- b) *KAT 733L – Isuzu*
- c) *KAR 956V – Maruti Suzuki*
- d) *KAT 401E – Toyota Hilux*
- e) *KAL 123m – BMW*
- f) *All those shares comprised in Impact Communications (K) Limited.*
- g) *KAB 677Y Mercedes Actors Lorry.*

ii) The honourable Court be pleased to grant a permanent injunction restraining the Respondent by himself, his servants, agents or otherwise anyone claiming through him howsoever from alienating, transferring, or in any other manner disposing all that property described in Prayer number 2 herein above pending the hearing and determination of this suit.

iii) All further registration or change of registration in the ownership, user, occupation or possession or any change in any kind of right, title to or interest in all those properties and shares described in Prayer number 2 herein above be stopped forthwith until further Orders of the Court.

iv) The status quo be maintained.

v) The costs of the Application be provided for.

2. I have read the Affidavit in support sworn on 9th February 2010 by the Applicant and her case is straightforward; that the parties have hit rock bottom in their relationship as husband and wife and their marriage has irretrievably broken down; that all the above properties were jointly acquired during the existence of the marriage and there is real risk that the Respondent may dispose of them before the finalization of the proceedings herein. That therefore pending the determination of the proceedings under **Section 17 of the Married Women Property Act 1882**, an injunction should issue against the Respondent. I will revert in due course to the issue of the annexures indicating ownership of the properties in issue.

3. In a Replying Affidavit sworn on 16th February 2010, the Respondent's answer to the Applicant's contention is that none of the properties were jointly acquired or owned and that since they belong to limited liability companies, any dispute regarding the respective shares of the parties can only be determined in accordance with the **Companies Act, Cap 487 Laws of Kenya** and not **Section 17 of the Married Women Property Act, 1882**. Further, that since the parties separated from each other, the Respondent has continued to assist the Applicant with most of her financial needs in spite of the fact that she squandered all the properties, including motor vehicles, which were in her hands. In any event, he has urged, he has since that time acquired more properties, solely, and the Applicant should have no lawful claim to them.

4. As I understand the Law of Injunctions, a party seeking the exercise of that remedy must heed the words of Spry, V-P who read the majority decision in Giella vs. Cassman Brown Ltd [1973] E.A. 358 at page 360 where the learned Judge, stated as follows;

"I will begin by stating briefly the Law as I understand it. First, the granting of an interim injunction is an exercise of judicial discretion and an appellate Court will not interfere unless it be shown that the discretion has not been exercised Judiciously (Sargent vs. Patel (1949), 16 E.A.C.A.63).

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an Application on the balance of convenience. (E.A. Industries vs. Trufoods, [1972] E.A 420).

5. Quite in line with the above holding, **Order XXXIX Rule 1 of the Old Civil Procedure Rules** also provides as follows;

"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 wrongfully sold in execution of a decree;

b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit,

c) 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 Order.”

6. Has the Applicant met the above criteria set by Law?

7. Firstly, she ought to establish, at a prima facie level, that the properties were jointly acquired because the fact of marriage is not evidence that the properties were jointly acquired. I have seen the annexures to the Applicant’s Affidavit and I see no such evidence and therefore I am unable to tell whether indeed the Applicant made any contribution to the purchase of the properties. In other instances, such an Applicant would indicate her educational levels, her profession, income etc to show that she had the means and the capacity to raise funds for the purchase of matrimonial property aside from evidence that in fact he or she actually made payments to that end. All that is missing in this case.

8. Secondly, it is obvious to me that none of the properties listed elsewhere above are registered in the names of any of the parties and most of them except L.R.No.209/10611/260 are registered in the names of a Company known as Impact Communications (K) Ltd. It is common ground that the Company is a family concern and both parties may have had or have shares in it, but it is unclear what shares the Applicant now has, if at all.

9. L.R.No.209/10611/260 was initially registered in the names of the Respondent but was on 26th February 2010 transferred to Panama Ventures Ltd. It is unclear to me whether the Respondent has any interest in the company but the transfer of the land was made after the present proceedings were filed on 9th February 2010. I also note that in Supplementary Submissions the Advocate for the Respondent has argued that the property does not fall **“under Matrimonial Property but by contribution from parties who are Directors of Panama Ventures Ltd for whom the Respondent held the property in trust.”**

10. Without evidence that there is any connection between the Respondent and Panama Ventures Ltd and without any iota of evidence even at a prima facie level that the Applicant made contribution towards purchase of that property and in spite of my suspicions as to why the property was transferred a fortnight after these proceedings were filed, I am unable to grant any orders regarding the said property.

11. Turning back to the properties registered in the names of Impact communications Ltd, the matter portends no difficulty at all as the Law on the subject is now settled. In DM vs. MM (2008)I KLR (G & F) 264, the Court of Appeal stated as follows;

1) ...

2) Where there were disputes between the husband and the wife as to their respective rights to shares in a company registered in the name of one of the spouses, then the Court like in any other property in dispute between spouses had the power to ascertain their respective beneficial rights thereof.

3) The Respondent’s claim that she was entitled to half the shares in the company was untenable as it was not supported by evidence including the Companies register. There was no evidence to show that she had beneficial interest in the company, she was only entitled to the shares she owned in that company.”

12. Similar Orders were made in the case of M vs M [2009] 1 KLR (G & F) 247 and in applying that reasoning to this case, motor vehicles registration numbers KAT 733L, KAR 956V, KAT 401E were all initially registered in the names of the Company but were later sold and from evidence availed to this Court, the Respondent did not benefit from their sale. That leaves only motor-vehicles KAL 123M and KBA 677Y but both of them are charged to banks to secure certain loans advanced to the Company. The Applicant has not claimed that she is paying those loans or that she has any significant role in the company so that it can be said she is contributing to their repayments. Any Orders in her favour in such circumstances would be unfair.

13. Lastly, as regards Impact Communications (K) Ltd, the Applicant was a shareholder and Director but the company would seem to have passed a resolution to remove her on 20th January 2007. She took no

action to enforce her rights as such and since there is prima facie there is no evidence that the company has any unsecured assets, the matter should be dealt with under the **Companies Act, Cap 487**.

14. From what I have said above, prima facie, I see no reason to grant the injunction as prayed and whatever loss the Applicant may suffer will be compensatable in damages.

15. In very few cases regarding matrimonial property does this Court not protect the alleged property until the Cause is determined. However, each case must be looked at in its own facts and circumstances and this case, sadly, the exception to the general rule shall apply. The Applicant has made allegations but has failed to meet the requisite threshold.

16. I have applied my mind to the Law and the facts and on a balance of probabilities, equity must favour the Respondent with the result that the Application dated 9th February 2010 is dismissed with no order as to costs.

17. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2012.

10/2/2012

CORAM

BEFORE LENAOLA – JUDGE

MIRON – COURT CLERK

MR. ONDIEK FOR RESPONDENT

MISS KINYUA FOR APPLICANT

ORDER

RULING DULY READ.

ISAAC LENAOLA

JUDGE

FURTHER ORDER

PARTIES TO HAVE COPIES OF THE RULING.

ISAAC LENAOLA

JUDGE