



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO.21 OF (O.S.)**

JANE NJERI KAMAU.....APPLICANT

VERSUS

PETER KAMAU MAINA.....RESPONDENT

**RULING**

The applicant filed suit by way of originating summons under the provisions of **Section 17** of the **Married Women’s Property Act, 1882** seeking several declaratory orders of the court regarding the ownership of several properties which the applicant refers to as matrimonial property. The applicant seeks to be declared to be a joint proprietor with the respondent of the said properties which include a parcel of land known as LR.No.140/39/21 situate at Nyayo Estate, Embakasi, Nairobi (hereinafter referred to as the suit property). Contemporaneous with filing suit, the applicant filed an application pursuant to **Sections 3 and 3A** of the **Civil Procedure Act** and the then **Order XXXIX (now Order 40) Rules 1, 2 and 3** of the **Civil Procedure Rules** seeking temporary injunction to restrain the defendant from transferring or otherwise adversely dealing with the properties listed on the face of the application, including the suit property pending, the hearing and determination of the suit. The applicant further prayed that the court compels the respondent to surrender physical possession of the suit property to the applicant to enable the applicant live therein together with the children of the marriage. The applicant further prayed for an order from the court to restrain the respondent, once the applicant has been put in possession of the suit property, from accessing the said property pending the hearing and determination of the suit. The application is supported by the annexed affidavit of the applicant. The application is opposed. The applicants swore a replying affidavit in opposition to the application. In essence, the respondent contends that the orders craved for by the applicant cannot be granted to her because the properties that the applicant claims to be matrimonial property are in fact properties that were purchased by the respondent using his own resources. The respondent urged the court to dismiss the application with costs.

Prior to the hearing of the application, the respective counsels for the applicant and the respondent filed written submissions in support of their respective opposing positions. Mr. Mshweshwe, counsel for the applicant and Mr. Kamotho, counsel for the respondent, during the hearing of the application, made oral submissions highlighting the written submissions. I have carefully considered the said submissions, including the pleadings filed by parties herein in support of their respective opposing positions. The issue for determination by this court is whether the applicant established a case to entitle this court grant her the injunction sought. The principles to be considered by this court in determining whether or not to grant an application for injunction are well settled. In **Giella vs Cassman Brown [1973] EA.358** at page 360, Spry V-P of the then East African Court of Appeal (the predecessor of the present Court of Appeal of Kenya) held as follows:

*“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)”*

The facts of this case are more or less not in dispute. The applicant and the respondent are husband and wife. They were married on 25<sup>th</sup> May 1996 under the **African Christian Marriage and Divorce Act**. The applicant and the respondent have been blessed with two (2) children. The applicant and the respondent are estranged. According to the applicant, the respondent has committed acts of cruelty against her by physically assaulting her to an extent that on 29<sup>th</sup> April 2010, the respondent forcefully and violently evicted her from the matrimonial home. The applicant made a report of the assault to the police. She subsequently, on 17<sup>th</sup> June 2010, petitioned this court to be judicially separated from the respondent. On the same day, the applicant filed the present suit seeking certain declarations regarding certain properties that she alleges were acquired by their joint efforts and therefore ought to be registered in their joint names.

Pending the hearing of the suit, the applicant has prayed that the respondent, firstly, be restrained from adversely dealing with the suit properties and secondly, she be allowed, by mandatory injunction to occupy the matrimonial home. She further prayed for orders restraining the respondent from interfering with her physical possession of the matrimonial home. On his part, whereas the respondent concedes that the matrimonial problems that resulted in the applicant leaving the matrimonial home was occasioned to a large extent by his aggressive behaviour toward the applicant, he denies the allegation by the applicant that the properties listed in the application, and particularly the suit property that constitutes the matrimonial home, were acquired by the joint effort of the applicant and himself. It was the respondent's case that he had acquired all the properties in question by his own effort and resources. He submitted that if the application by the applicant is allowed, it would result in his business being affected. This is because he uses part of the house as an office to run his business. He denied the allegation by the applicant that he any intention of selling the house or charging the house to secure any loan facilities. He conceded that he had purchased the motor vehicle registration No.KAP 523 J with the assistance of the applicant. He stated that the motor vehicle was currently in possession of the applicant. He reiterated that he had no intention of reclaiming the same. It is the respondent's case that the applicant was at liberty to return to the matrimonial home any time she so wished. He urged the court to dismiss the application with costs.

The applicant's application is predicated on the provisions of **Section 17** of the **Married Women's Property Act**. Under this section, a married woman is entitled to a declaration that she is a joint owner of matrimonial property if she can establish that she contributed for the purchase of the same. In the present application, it was clear from the affidavit evidence that there is prima facie evidence that at least the applicant substantially contributed for the purchase of the suit motor vehicle. However, it is difficult at this stage of the proceedings for this court to rule one way or the other that the applicant contributed to the purchase of the matrimonial home that is the subject of these proceedings. Prima facie, the applicant has established a case that she has an interest in the suit property that is capable of being preserved pending the hearing of the suit. For the purposes of preserving the suit property, this court will issue an order restraining the respondent from adversely dealing with the suit property, including selling it or charging it to secure a loan, pending the hearing and determination of the suit. The other properties listed in the application, including the shares, shall similarly be preserved by means of a temporary injunction pending the hearing and determination of the suit.

As regard the applicant's application that she should be granted orders of mandatory injunction to enable her be restored back to the suit property that is the matrimonial home, this court is of the opinion that the applicant has not established special circumstances that would entitle this court make such order. For this court to grant mandatory injunction, it must have high degree of assurance in regard to the success of the applicant's suit. This court cannot reach determination regarding the success of the applicant's suit without hearing oral evidence adduced by the parties in regard to how the suit property that is the matrimonial home was acquired. It was apparent to the court that the order that the applicant ought to have craved in the circumstances was for an order of maintenance for herself and the children of the marriage pending the hearing and determination of the suit. There are no grounds upon which this court can exercise its discretion in favour of the applicant in regard to the application for mandatory of injunction. To that extent the application fails.

There shall be no orders as to costs.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2011**

**L. KIMARU**  
**JUDGE**