



REPUBLIC OF KENYA



KENYA LAW
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**AMW v SW (Matrimonial Cause E076 of 2023)
[2025] KEHC 2005 (KLR) (Family) (7 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2005 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E076 OF 2023
PM NYAUNDI, J
FEBRUARY 7, 2025**

BETWEEN

AMW PLAINTIFF

AND

SW RESPONDENT

RULING

Introduction

1. By Notice of Motion dated 25th October 2023 and presented under Section 1A,1B and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules*, the Applicant Alexander Mwangi Wanjohi seeks the following orders, that
 1. Spent
 2. Pending the hearing and determination of this application inter partes, and the filed originating summons in matrimonial cause HCFOS/ E076/2023, the honourable court be pleased to issue an order restoring the plaintiff back to his matrimonial home/ house, plot 095 Kamae settlement scheme and further restraining the defendant from interfering with the plaintiff's peaceful occupation of the property
 3. Pending the hearing and determination of this application inter partes, and the filed originating summons in matrimonial cause HCFOS/ E076/2023, the honourable court be pleased to issue an order barring/ stopping/ restraining the defendant from interfering with the state of properties to wit, issuing notices to tenants to vacate plot 920 and 079 Kamae settlement scheme, changing water and electricity meter numbers with a view of frustrating their quiet possession for them to vacate the houses and appointing any estate agent including and not limited to Sharp-star Merchants Holdings Limited, selling, leasing or transferring properties



4. The orders herein be enforced by the Officer Commanding Station Kahawa West Police Station
5. Costs of the Application be borne by the defendant
2. The Applicant contends that the respondent is dealing with the matrimonial property with a view of changing its state, management, ownership and occupancy. He alleges that he has been barred from accessing the matrimonial home (which has been his residence for more than 20 years) and the defendant may change its state, management, ownership and occupancy without his consent.
3. The application is supported by the affidavit of the Applicant sworn on 25th October 2023. He avers that the subject projects were acquired during the pendency of the marriage. They commenced cohabitation in 2002 and formalised their marriage in 2017 and divorced in 2023. He avers that the respondent has blocked access to the house by placing a padlock and stationing hired men to prevent him from accessing the house. He contends that unless the orders sought are granted the Originating Summons shall be rendered nugatory.
4. The Respondent vide Affidavit sworn on 16th November 2023 opposes the application. She submits that she solely acquired the properties and that they were not acquired during the marriage. It is her position that they were married in 2017 and the properties were acquired before then.
5. She avers that it is the Applicant who has barred her from accessing the house and that he has another family in Jericho with whom he is residing.
6. In response thereto, the applicant has sworn a supplementary affidavit on 24th November 2023. He reasserts that he and the respondent were married earlier than 2017 and relies on the pleadings of the respondent in MCELC Suit No 287 of 2022 and statutory declaration sworn by her on 4th February 2003 when she stated that she and the applicant commenced cohabitation as man and wife in 2002 and formalised their marriage in 2017. It is his position that the respondent also swore an affidavit on 20th February 2010 confirming that the two were married under customary law.
7. He contends that he made both monetary and non-monetary contribution towards the acquisition and development of the 3 properties. He states that he regained possession of the house on 30th October 2023 arising from orders issued in MCELC Suit No 287 of 2022.
8. On 22nd January 2024 the Applicant lodged a Notice of Motion presented under Order 40 of the [*Civil Procedure Rules*](#) seeking that the respondent vacate Plot No 095. It is her position that the house belongs to her.
9. The Applicant in turn filed duplicate applications dated 5th February 2024 and 20th February 2024, seeking to compel the applicant and KPLC to restore electricity to the 3 assets. It is alleged that the Respondent orchestrated the disconnection of the power supply.
10. In response, the respondent has filed grounds of opposition dated 10th May 2024. In which she states that the application (20th February 2024) is misplaced and an abuse of Court process, it pre-empts the originating summons and the Plaintiff has introduced a 2nd Defendant without leave of the Court, the application should be struck out as it is frivolous and vexatious.
11. The Respondent has sworn a further affidavit on 13th November 2024 in which she attached evidence of loan repayment and affidavit of means sworn by the Applicant in the children's court in the child maintenance matter between the two.



Applicant's Submissions

12. In compliance with the Court's directions, the Applicant filed his submissions dated 16th September 2024 in support of the application dated 20th February 2024.
13. It would appear that in so doing the Applicant has abandoned the application dated 25th October 2023.
14. The submissions merely reiterate the pleadings and so I will not set them out here.

Analysis And Determination

15. At the outset I note that the parties herein both threw out the rule book on how to how to present pleadings. Each has adopted a kitchen sink approach where anything and everything is thrown at the Court without complying with the [Civil Procedure Rules](#).
16. The Applicant in the application dated 20th February 2024 (which is duplicate of that application dated 5th February 2024) seeks orders against Kenya Power and Lighting Company Limited who are not parties to the suit. No leave was sought to enjoin them. For this reason, I will strike out the name of Kenya Power and Company Limited from the Notice of Motion dated 20th February 2024 and 5th February 2024.
17. The respondent swore an affidavit on 13th November 2024 without leave of the Court after the pleadings had closed. I will strike out that affidavit.
18. That leaves us with the applications dated 25th October 2023; 22nd January 2024 and the duplicate applications dated 5th February 2024 and 20th February 2024. Having analysed those Applications, affidavits sworn in support and opposition and the submissions on record, I consider the following to be the issues for determination
 1. Whether the Applications dated 25th October 2023 and 5th and 20th February 2024 have merit and the respondent should be restrained in the manner proposed by Applicant
 2. Whether a mandatory injunction should issue against the Respondent in application dated 22nd January 2024.
 3. Who should bear the costs herein
19. On the 1st issue as stated earlier the pleadings herein fall short as relates to precision and clarity. From my reading of the prayers I surmise that the Applicant seeks injunctive orders. The principles to guide the Court in an application seeking injunctive orders are set out in Order 40 of the [Civil Procedure Rules](#) which states-

Cases in which temporary injunction may be granted [Order 40, rule 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; or
- (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, 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 orders.

20. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR reiterated the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent and stated thus

It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. (Emphasis Supplied)

21. In the instant case the Applicant has established he has a *prima facie* case, there is evidence of a marriage, property was acquired during the pendency of marriage and there has been a termination of the marriage thereby necessitating a division of matrimonial property.
22. The property is registered in the name of the Respondent and this must be the basis of his apprehension that she may 'interfere with the state of properties'. The applicant has submitted that the Originating Summons will be rendered nugatory if the orders sought are not granted. The specific prayers sought in the originating summons seek an order that the assets be sold and proceeds shared equally or in the alternative the respondent pay to the applicant 50 per cent of the assets. It is evident therefore that the remedy sought is one that is quantifiable as the respondent seeks monetary compensation to the tune of 50 per cent of the value of the properties in the event that the assets are found to be matrimonial property.
23. By his own admission in the application dated 20th February 2024 he is in occupation of the residential house and is managing the rental units. He seeks that the respondent be barred from instructing KPLC Limited to interrupt the power supply. It has not been demonstrated how she has done this.
24. In the circumstances I find that the applicant has not met the 2nd hurdle; establishing that the injury he will suffer if the order is not made will be irreparable. Having not surmounted the 2nd hurdle, there is no room for consideration of the 3rd, that is the balance of convenience. For this reason, the applications dated 25th October 2023, 5th February 2024 and 20th February 2024 will fail.
25. On the 2nd issue, whether the respondent's application dated 22nd January 2024 is merited? In the case of *Nation Media Group & 2 others v John Harun Mwau* (2014) eKLR, the Court of Appeal stated:-

It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of special circumstance. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted.



Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.

26. It is also trite law that an application for injunction can only be issued where there is a substantive suit in place otherwise the injunction will be in vain and it cannot stand in law. This was the position held by the court in the case of *Cresta Investments Limited v Gulf African Bank Limited & another* [2020] eKLR which held:-

Moreover, an application for injunction under Order 40 of the *Civil Procedure Rules* is predicated on a suit filed by the party seeking the injunction. An injunction without a substantive claim is a plea in vain and cannot lie in law or at all.

27. The respondent in her application states the applicant has been in occupation of the matrimonial home while she has had to secure alternative accommodation that she is paying rent for. This was the situation subsisting before the Originating Summons was filed in Court. She has not filed a reply and counterclaim to the originating summons, meaning she does not have a substantive claim in place. For those reasons I will dismiss the application dated 22nd January 2024 in its entirety.
28. The upshot of the above is that the applications dated 25th October 2023, 5th February 2024, 20th February 2024 and 22nd January 2024 are dismissed with no order as to costs
29. This is a matter that may be better resolved via Court annexed mediation. Accordingly, the matter will be mentioned before the Deputy Registrar Mediation on 18th February 2025 for appointment of a mediator. The mediator will file their report within 45 days of appointment.
30. In the meantime, the Defendant is granted leave to file her response to the Originating Summons within 21 days from the date hereof.

It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 7TH DAY OF FEBRUARY, 2025.

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P M NYAUNDI

HIGH COURT JUDGE

In the presence of:

Noel Court Assistant

