



**EKR v PRN (Matrimonial Cause E024 of 2024)
[2025] KEHC 3499 (KLR) (19 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3499 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE E024 OF 2024
SM MOHOCHI, J
MARCH 19, 2025**

BETWEEN

EKR APPLICANT

AND

PRN RESPONDENT

RULING

1. The Applicant through Chamber Summons dated 2nd October, 2024 seeks the following:
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. Spent
 - v. spent
 - vi. That pending the hearing and determination of this Application and the main suit, this Honourable Court be pleased to direct that the Applicant shall collect all rental proceeds from units erected on Nakuru/Municipality/Block 24/XX the Applicant shall then apportion the same equally between herself and the Respondent; and the Applicant shall present quarterly account of the proceeds before this Honourable Court.
 - vii. That pending the hearing and determination of the substantive originating summons, this Court be pleased to issue an order of injunction restraining the Respondent by himself, his agents, servants, employees and/or any other person whomsoever acting under his instructions from evicting the Applicant from their matrimonial home sitting on all that parcel of land known as Nakuru/Municipality/Block 24/XX from harassing physically and verbally



abusing her thereby hindering her peaceful and quiet entry, occupation and egress from the matrimonial home and from selling leasing, sub leasing charging mortgaging, subdividing, partitioning, exchanging, creating an easement or wayleave and or transferring the suit parcel.

- viii. That pending the hearing and determination of the Originating Summons this Court be pleased to direct the Parties to attempts an out of Court settlement through mediation of Alternative Justice system.
- ix. Costs of this Application be borne by the Respondent.

Applicant's Case

2. The Applicant's application is supported by her sworn Affidavit of the same date wherein she deposes that she got married to the Respondent on 2nd May, 1989. That in 1997 they expended the Applicant's savings and acquired Nakuru/Municipality/Block 24/XX; where they put up their matrimonial home and commercial units for rent. She contends that she was uninformed then and consented as a married woman for the property to be registered in the name of the Respondent with the belief that it would be held in trust for her and her children.
3. It was her case she was involved in the supervision of construction work, payment of construction workers and direct purchase of materials as well as payment of land rates and rent for the subject parcel while meeting all the needs of the children solely. That when she sought the Respondent's assistance he began maintained acts of cruelty and assaults.
4. That upon his retirement the Respondent came back to Nakuru and threatened to auction the Applicant's shop which got her wary prompting her to register a caution on the suit property. The Respondent then relocated to their rural home in Kisii which she averred to have made direct and indirect contributions towards its development where they set up a home and tea development and banana plantation.
5. She averred that the Respondent purchased the Muthurwa property which he later disposed off without her consent utilized the proceeds for his exclusive use. That as a result of her direct an indirect contribution the family flourished and that she acquired an equal beneficial ownership in the Nakuru, Kisii and Muthurwa properties.
6. It was the Applicant's case that the Respondent has directed tenants on to deposit rental income into his sole account. That the Applicant wrote to the Respondent through her lawyers seeking an out of Court settlement which was not responded to and was met with cruelty where the Respondent evicted the Applicant from the matrimonial home. That she currently sleeps in the shop.
7. She averred that she needs the rental income to sustain herself and support her children. That the properties risk being alienated disposed or sold for the reason that the Respondent prefers staying in Kisii and may not be agreeable to sharing rental proceeds with the Applicant.

Respondent's Case.

8. The Respondent in opposing the Application filed his response titled "Request for Dismissal of the Petition" on 17th March, 2025. He stated that he still lives with the Applicant and that she was never evicted from the subject property and neither has divorce been filed or issued in this matter.
9. He further stated that the Applicant has been collecting rental income from rooms No. 7 and No. 8. totaling Kshs 10,000 and room No. 9 was occupied by the Applicant's business worth Kshs. 10,000. That sometime in 2023 the Applicant collected Kshs 780,000 per annum leaving behind an



- accumulation of public utilities of up to Kshs. 100,000 that is land rates on the subject property. That it was a reflection of the Applicant not being accountable on matters affecting finances at the family level.
10. He argued that the Applicant's utterances are as a result of being misadvised by divorced and single ladies with the objective of demoralizing and diminishing his dignity as head of the family that she puts personal interests a priority rather than putting family interests as first priority.
 11. That the elders and pastors are still making effort on negotiations to reach desired dialogue. That none of their children are below the ages of 18 with the lastborn who was born in 1993.

Applicant's Submissions.

12. The Applicant relied on Section 17 of the *Matrimonial Property Act* and the decision in the case of *AKK vs PKW Civil Appeal No. 61 of 2019* CA. to submit that the Court does indeed have jurisdiction to determine this matter.
13. On whether the Application has merit, the Applicant submitted that the threshold required was settled in the case of *Giella vs Casman Brown*. On the limb of prima facie case relied on the attachments in her affidavit to submit that she has a prima facie case.
14. Irreparable harm likely to be suffered if it was the Applicant's submissions Respondent is likely to sustain his acts of harassment, violence and eviction of the Applicant thus rendering her destitute. That the Applicant is of advanced age and the subject property has been her home for over 3 decades and she has no alternative place to live.
15. On the limb of balance of probabilities, it was submitted that in the face of irreparable harm facing the Applicant titles in the Applicant's favour.
16. On the issue of costs, the Applicant submitted that this being a family matter the Respondent's deliberate actions have rendered the Applicant a pauper and only just fair that the costs of the Application be awarded to her.

Analysis and Determination.

17. Having considered the application, the response by the Respondent and submissions by the Applicant, the issues for determination are:
 - a. Whether this Court has the jurisdiction to entertain this matter
 - b. Whether the Applicant has met the threshold for grant of an interlocutory injunction
 - c. Who bears the costs of the application
18. First and foremost, Court has noted that the Application has been brought by way of Chamber Summons as opposed to a Notice of Motion as required by Order 40 Rule 2 of the Civil Procedure Rules and Rules 20(1)(2) of the Matrimonial Property Rules. This is a trend that has since been noted.
19. Procedure is fundamental in the dispensation of justice. The question the Court should ask is whether the Respondent stands to suffer prejudice should the Court proceed to determine the Application based on the fact that it was brought by way of Chamber Summons and not by way of Notice of Motion? I think not. The infraction although procedural, it does not also go into the substance of the case nor the jurisdiction of the Court.



20. The Court in *Khamis Ahmed Khalif ss - Ezekiel Kothi Kaleli (Suing Thro' Mariam Ezekiel Kitho [2004] eKLR* stated that:

“In that case the court was also dealing with an application brought by chamber summons instead of notice of motion. It overruled a preliminary objection raised on the mode of procedure followed. I entirely concur with the holding in that case and decline to follow the above mentioned Ugandan cases. The complaint in this matter does not go to jurisdiction and no prejudice will be caused to the Respondent if the application for stay of execution is brought by chamber summons instead of motion on notice. I suppose, in the light of this ruling, the Applicant will, if leave to amend is granted, bring the application by way of motion on notice. In any case this preliminary objection does not relate to the application for amendment which is before the court for hearing but to the proposed application for stay of execution.”

21. The above case was decided before the 2010 Constitution. *The Constitution* breathed life into procedural technicalities. *The Constitution* behooves the Courts to render substantive justice and disregard technicalities of procedure when it appears that no prejudice shall be faced by the other party. Striking out the Application should be the last resort. Nonetheless litigants are cautioned to conform to procedure since discretion is determined on a case to case basis and what is applicable in one scenario may not necessarily be the same in another.

22. Pertaining the first issue of jurisdiction, the Respondent argued that the Application ought to be dismissed for the reason that the parties are yet to be officially divorced. The Applicant submitted that this Court's jurisdiction is derived from Section 17 of the *Matrimonial Property Act* since the prayers sought in the Originating Summons seek the declaration of Matrimonial Property.

23. Under Section 17 (1) and (2) of the *Matrimonial Property Act*, it states that:-

- “(1) A person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.
- (2) An application under subsection (1) –
 - a. shall be made in accordance with such procedure as may be prescribed;
 - b. may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

24. The wording of Section 17 is that it allows the Applicant to make an application for declaratory orders the subsistence of the marriage notwithstanding. Among the prayers sought in the Originating summons is the declaration that the properties listed form part of matrimonial property. At this point the Court is not concerned with the main suit but the interlocutory orders sought prior to determination of the suit.

25. Accordingly, this Court therefore has the jurisdiction to entertain this application and by extension the main suit and is not confined to only the provisions of Section 7 of the *Matrimonial Property Act*.

26. Secondly, on the issue of whether the Application has merit; the Applicant has the duty to convince the Court that she has met the conditions precedent for granting and interlocutory injunction pending the hearing determination of the Originating Summons.



27. The case of *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358 set out the principles guiding the grant of interlocutory injunction. The same principles were reproduced in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] KECA 606 (KLR), as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. 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. Afraha 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.”

Prima Facie Case.

28. The case of *Mrao Ltd. v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) defined what constitutes a prima facie case as follows:

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

29. The Applicant averred that she has been living for over 3 decades at Nakuru/Municipality/Block 24/XX where they put up their matrimonial home which she now stands to lose. The Respondent did not deny being married to the Applicant or the subject property being matrimonial home. As a matter of fact, the Respondent contended that he never evicted her from the house and that they were still living together. The Applicant further provided photographs to suggest that the two are still living together. It is not clear when those photographs were taken or if indeed they were taken inside the matrimonial home subject of this application.
30. The Applicant has however insisted that there is imminent risk of the Respondent alienating the property to her detriment which prompted her to place a caution against it. Further she availed a sale agreement dated 29th November, 1997 wherein she and the Respondent were joint purchasers of



the subject property Nakuru/Municipality/Block 24/XX I find that the Applicant has established a prima facie case.

Irreparable injury.

31. On the condition of irreparable injury, the Applicant has attached several OB numbers having reported the Respondent to the police station for assault and harassment with the recent one being on 18th September, 2024 vide OB No. 31/18/09/2024. The Applicant has also annexed a chief's letter dated 27th September, 2024 confirming the parties' marital woes. The Respondent did not deny the marital woes and admitted that the case was with the elders and the pastors. He did not also deny the allegations of harassment or assault.
32. The Respondent has disputed all other allegations but has not supported his allegations with any proof whatsoever. He even went ahead to state that all their children are adults disputing the applicants claims of using the property for her support and that of their children
33. Loss of a matrimonial home which one has lived in and raised one's children it holds significant value. The Applicant has demonstrated that she was co-purchaser of the property and it being registered in the name of the Respondent alone poses a risk of being disposed of. For the Applicant to be kicked out of the place she calls home and forced to sleep in her place of business is unfathomable. I am of the considered view that the Applicant has demonstrated to the Court that she stands to suffer irreparable injury and should the injunction not issue.

Balance of Convenience.

34. The third limb is that if the Court is in doubt about the existence or otherwise of a prima facie case the Court ought to determine in whose favour the balance of convenience tilts.
35. The Court in the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] KEELC 2424 (KLR) held as follows:-

“The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

36. This Court is not in doubt that the balance of convenience tilts in favour of the Applicant.
37. The Applicant has also sought other orders. Prayer No. 5 seeks for the Applicant to collect rental income from the rental properties on the subject property pending determination of the suit. There is no information that has been given on how many rental units or how much is fetched or if they are occupied. The Respondent has admitted that the Applicant collects income from shops number 7 and 8 and she occupies shop No. 9. The Applicant can continue collecting rent from Shops 7 and 8 and conduct her business from shop 9.



38. Prayer No. 8 seeks for the parties to attempt mediation. The Applicants counsel on 19th November, 2024 advised Court that there was no room for dialogue. The Court will proceed as though that was still the position.
39. Consequently, the Court finds that the Application dated 2nd October has merit and is allowed as follows:
- a. An Order of Temporary Injunction is hereby issued against the Respondent, restraining the Respondent, his agents, servants, employees and/or any other person whomsoever acting under his instructions from evicting the Applicant from their matrimonial home sitting on all that parcel of land known as Nakuru/Municipality/Block 24/XX or from harassing physically and verbally abusing her thereby hindering her peaceful and quiet entry, occupation and egress from the matrimonial home and from selling leasing, sub leasing charging mortgaging, subdividing, partitioning, exchanging, creating an easement or wayleave and or transferring the suit parcel.
 - b. The Applicant shall collect rent from Shops Numbers 7 and 8 and conduct her business from shop number 9.
 - c. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 19TH DAY OF MARCH, 2025

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MOHOCHI S.M.

JUDGE

