



**PWM v BNM; Family Bank Limited (Interested Party) (Matrimonial Cause E008 of 2024) [2025] KEHC 3085 (KLR) (4 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3085 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MATRIMONIAL CAUSE E008 OF 2024**

**G MUTAI, J  
MARCH 4, 2025**

**BETWEEN**

**PWM ..... CLAIMANT**

**AND**

**BNM ..... RESPONDENT**

**AND**

**FAMILY BANK LIMITED ..... INTERESTED PARTY**

**RULING**

1. Before the court is a Notice of Motion dated 18<sup>th</sup> September 2024 vide which the claimant/applicant seeks the following orders:-
  - a. Spent;
  - b. Spent;
  - c. That this honourable court be pleased to issue a conservatory order restraining the defendant and the interested party from withdrawing any money from account number 0950000XXXXXX held at the Family Bank Ltd pending the hearing and determination of the Originating Summons; and
  - d. That costs of this application be provided for.
2. The application is based on the grounds in the body of the motion and also in the affidavit of Mr PWM, who I shall hereafter refer to as “the applicant”, sworn on 18<sup>th</sup> September 2024. The applicant averred that he married the respondent on 18<sup>th</sup> April 2021. Their marriage wasn’t blessed with issues.
3. During coverture, the applicant and the respondent established a short-stay business called Queen B Staycations on three units of leased Airbnb business apartments. In his view, this business was



- a matrimonial property acquired, developed, improved and maintained by the joint efforts of the applicant and the respondent during the pendency of their marriage. His contribution was monetary and non-monetary in the form of companionship and management of the matrimonial home and other expenses.
4. He stated that the respondent had the responsibility of managing and advertising the business. It was his contention that the respondent directed the proceeds of the said business to her personal account, to wit, account number 0950000XXXXX, at the Family Bank. He urged that the said account be frozen until this case is heard and determined.
  5. In support of the application, the applicant attached Mpesa statements and the judgment delivered on 5<sup>th</sup> September 2024, in which it was indicated that the decree nisi, which was issued on the said date, would be made absolute upon expiry of 30 days.
  6. In a replying affidavit sworn on 18<sup>th</sup> October 2024, the respondent accused the applicant of engaging in a philandering lifestyle and of physically abusing her. She alleged that it was due to his conduct that they decided to go their separate ways, with the applicant filing a petition for divorce, which was granted.
  7. Ms M deposed that they initially operated a joint Airbnb business with three units and had a joint bank account. The business was closed after the applicant failed to account for the funds he withdrew from the joint account. Due to verbal and physical fights, she left their joint home. Upon doing so, the applicant closed the Airbnb business, sold the furniture and never accounted for the proceeds.
  8. The respondent averred that she opened her business, Queen B Staycations, with a loan from her mother. It was her evidence that the applicant never made any contribution, whether monetary or non-monetary, towards the acquisition and maintenance of Queen B Staycations and that the said business was hers solely. She accused the applicant of pursuing her out of malice and of having filed the originating summons prematurely, as the certificate making the decree nisi absolute had not been issued at that time.
  9. The applicant filed a further affidavit sworn on 8<sup>th</sup> November 2024 in which he denied that Queen B Staycations was solely owned by the respondent. He averred that he contributed towards the said business by monetary and nonmonetary means and stated that his Mpesa statement proved that he made a monetary contribution. The non-monetary contribution was by providing companionship and management of the matrimonial home and other expenses.
  10. He averred that the respondent had the task of managing the business and advertising the business and that she used the said opportunity to divert funds to her own account. When the relevant account was frozen by the orders of this Court, she diverted the funds to an account she holds at ABSA Bank. He, therefore, prayed that the application be allowed.
  11. Parties filed written submissions, which were highlighted on 3<sup>rd</sup> February 2025.
  12. The applicant argued that the said business, Queen B Staycations was a matrimonial property. Relying on the case of PWK vs JKG [2017]eKLR, it was urged that the properties should be divided on a 50:50 basis. Therefore, the bank account ought to be frozen until the matrimonial property cause was heard and determined.
  13. The applicant submitted that Section 63 (e) of the *Civil Procedure Act* gave the High Court inherent power to issue such interlocutory orders as may appear to the court to be just and expedient in order to prevent the ends of justice from being defeated. Counsel urged that funds in account number 0950000XXXXX held at the Family Bank were in danger of being wasted or mismanaged if the orders sought were not granted.



14. It was urged that the elements an applicant had to show for an order of injunction to issue set out in the case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358 had been met. The said elements are as follows:-
  - a. There must be a prima facie with a probability of success;
  - b. The applicant might otherwise suffer irreparable injury not compensable by an award of damages; and
  - c. If in doubt, the balance of convenience.
15. Regarding the above principles, it was urged that the applicant had shown that he had a prima facie. It would be impossible to ascertain how much had been collected if the respondent still had access to the accounts. Therefore, he would suffer irreparable damage that could not be compensated by an award of damages. The balance of convenience lay with the grant of orders sought.
16. The applicant therefore urged that the application be allowed with costs.
17. In her submission in response dated 20<sup>th</sup> January 2025, the respondent identified the sole issue for determination as being whether the application has merit or is competent. The respondent urged that the parties had a joint business which was closed. Upon its closure, the applicant sold the items therein and did not account for the proceeds.
18. Counsel for the respondent submitted that the case was premature as the marriage had not been dissolved, as no certificate making the decree nisi absolute decree had been provided.
19. It was, therefore, urged that the application has no merit and ought to be dismissed.
20. I have considered the application, the affidavit in support, the replying affidavit and the submissions of the parties. Does the application have merit? Should the orders sought be issued?
21. Rule 20(2) of the Matrimonial Property Rules, 2022 provides that:-

“(2) A party to the proceedings may, before or after commencement of the proceedings under these Rules, but before the final determination of the respective claims, apply for temporary injunctions or other interlocutory orders in accordance with Order 40 of the Civil Procedure Rules (sub. leg), and the court may grant the orders sought on such terms or conditions as may be just in the circumstances.”
22. It is clear from the Rules that an application for injunctive relief under the *Matrimonial Property Act* is made on the same grounds as those applicable under the *Civil Procedure Act*.
23. The conditions that must be present for an order of injunction to be issued were stated authoritatively in the case of *Giella Vs Cassman Brown & Co Ltd* (1973) E A 358 in the following terms:-

“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.”



24. The first question then is whether the applicant has a prima facie case. What amount to a prima facie case was defined by the Court in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others*[2003] eKLR as being:-

“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...

But as I earlier endeavoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

25. There is no doubt that the applicant and the respondent were married when the said business was started. The applicant has provided extracts of his Mpesa statements showing that he sent money to the respondent. From the documents annexed, it would appear to me that the applicant has an arguable claim to the business known as Queen B Staycations on the grounds that it is a matrimonial property. That being the case, the first condition has been met.

26. If the said funds are not conserved, there is a clear and present risk that the same may be disposed of and irrecoverable. There would be a need to preserve the records of transactions so that the court can fairly divide the property between the applicant and the respondent once the originating summons is heard on merits. In my view, the second condition has been met.

27. The court is not in doubt that injunctive relief ought to be issued. Even if it were, it would seem that the balance of convenience tilts in favour of the grant of the injunctive relief sought. It is, therefore, in the interest of justice that a conservatory order be issued in this case.

28. The foregoing notwithstanding, the court must balance the interest of the applicant with those of the respondent, who may be rendered destitute if she is totally denied an opportunity to utilize the funds in her account. In my view, the interests of justice would be served by a narrowly crafted order that preserves some, but not all, of the funds in the account, pending the hearing and determination of the originating summons.

29. In the circumstance, I order that:-

- a. A conservatory order is issued restraining the respondent from withdrawing any sum of money exceeding in aggregate to more than half the credit balance in bank account Number 0950000XXXXXX held at the Family Bank as of 4th March 2025, pending the hearing and determination of the originating summons;
- b. The hearing of the originating summons be fast-tracked; and
- c. Mention on 18<sup>th</sup> March 2025 for directions.

30. As this is a matrimonial property dispute between former spouses, each party shall bear own costs.

31. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 4<sup>TH</sup> DAY OF MARCH 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**



## **JUDGE**

In the presence of:-

Ms Juma, for the applicant;

Ms Mubassu, holding brief for Ms Onyango for the respondent; and

Arthur – Court Assistant.

