



**JWN v ANW (Matrimonial Cause E024 of 2023)
[2024] KEHC 15404 (KLR) (Family) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 15404 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E024 OF 2023
EKO OGOLA, J
MARCH 7, 2024**

BETWEEN

JWN APPLICANT

AND

ANW RESPONDENT

RULING

1. The application before this court is dated 9th March 2023. The applicant prays for the following orders:-
 - a. Spent;
 - b. That pending the hearing and determination of this application, an order be issued granting the Applicant access and use of the house erected on L.R. Number xxxxx/xx (I.R. xx) along Peponi Road, Nairobi together with the fittings therein.
 - c. That pending the hearing and determination of this application, the Respondent either through himself or servants, agents or anyone acting under his authority, be restrained from harassing or in any other manner interfering with the Applicant's access and use of the house erected on L.R. Number xxxxx/xx (I.R. xxxxx) along Peponi Road, Nairobi.
 - d. That pending the hearing and determination of this application, the Respondent be restrained from leasing or granting access to any third party, the house erected on L.R. Number xxxxx/xx (I.R. xxxxx) along Peponi Road, Nairobi together with the fittings therein, without the consent of the Applicant.
 - e. That pending the hearing and determination of this application, the Respondent be restrained from demolishing, disposing and or in any other manner alienating the house erected on L.R. Number xxxxx/xx (I.R. xxxxx) along Peponi Road, Nairobi together with the fittings therein.



- f. That pending the hearing and determination of the Originating Summons filed herein, the Respondent be ordered to provide an account and to deposit in court, the proceeds of the income generated from the lease of the house erected on L.R. Number xxxxx/xx (I.R. xxxxx) along Peponi Road, Nairobi together with the fittings therein.
 - g. That pending the hearing and determination of the Originating Summons filed herein, the Respondent, his servants, agents or anyone acting under his authority, be restrained from harassing or in any other manner interfering with the Applicant's access and use of the house erected on L.R. Number xxxxx/xx (I.R. xxxxx) along Peponi Road, Nairobi.
 - h. That pending the hearing and determination of the Originating Summons filed herein, the Respondent be restrained from demolishing, disposing and or in any other manner alienating the house erected on L.R. Number xxxxx/xx (I.R. xxxxx) along Peponi Road, Nairobi together with the fittings therein.
 - i. That this Honourable Court do issue such further or alternative orders that may deem appropriate in the circumstances of the case.
 - j. That costs of this Application be borne by the Respondent.
2. The applicant was based on the grounds set out therein and the applicant's supporting affidavit.
 3. The applicant averred that she was married to the respondent on 17th November 2018. The marriage irretrievably broke down and the applicant petitioned for the dissolution of the marriage vide Nairobi MCDC/E255/2023, JWN vs. ANW. The petition is yet to be determined.
 4. The applicant further stated that during the subsistence of the marriage, the parties had constructed a house on L.R. Number xxxxx/ xx(I.R. xxxxx) along Peponi Road, Nairobi (hereinafter referred to as 'the property') which they were using as their residence and offices of the company (Great Spaces Effect Company Limited) which they jointly run as the directors/ shareholders. The applicant averred that they lived in the property until sometime in July 2021 when they separated. The respondent remained and resides in the said property.
 5. According to the applicant, the respondent converted the property into an Air BnB business for hosting a TV review Show where he generates an estimated monthly income of USD 2,950.00 and Kshs 300,000.00 for hosting the TV Show which income he applies to his exclusive use. The applicant deposed that the cost of the design and construction of the house was approximately Kshs 7,953,000.00, which amount was drawn from the income derived from their company out of which the timber worth Kshs 1,000,000.00 was donated to her parents.
 6. The applicant stated that her efforts to re-enter the property were met by violent eviction by the agents of the respondent and accordingly she has been constrained to seek alternative accommodation to house her and their child.
 7. The applicant has filed an Originating Summons seeking an order vesting the property and the income generated thereon in the names of the parties in equal or in such shares that this Court will determine, which claim stands to be rendered nugatory unless the reliefs sought in this application is granted.
 8. The respondent opposed the application vide a Replying affidavit dated 18th April 2023. The respondent deposed that while he was still formally employed, they registered a business which business specialized in offering both architectural and interior design work. He deposed that sometime in 2016 and before their marriage he resigned from formal employment and began to operate the business as his sole source of income. He added that at that time the applicant was gainfully and formally employed.



The respondent stated that the business was running and generated a substantial amount of income. The applicant resigned from her formal employment in 2019 and officially joined the business and subsequently thereto, in 2019 they incorporated the Great Spaces Effect Company Limited where they acted as the directors and shareholders.

9. The respondent averred that he single-handedly designed and executed all architectural projects without the applicant's input since it was a construction and architectural company and the applicant would be involved in the day-to-day administrative operations of the company. He added that it was the applicant's responsibility to draw up Invoices, send the invoices to clients, and follow up on the payments due to the company.
10. The respondent further deposed that during the subsistence of their marriage, he executed an Occupancy Agreement dated 15th March 2019 with his uncle, Samson Njau Nganga ("Licensor") who allowed him to access, occupy, reside and construct a temporary structure on his piece of land known as L.R. N. xxxxx/xx (IR xxxxx). The terms of the Agreement were that he could construct a temporary structure on the premises and the duration of his occupancy would automatically end once he relocated to Kenya. Being a young and newly married couple, they agreed to construct a temporary dwelling house made of timber, through the income derived from the Company and subject to obtaining the necessary consents from the City Council and the Licensor. The respondent deposed that the shipping pallets were not bought for them but collected from the applicant's place of work freely as they were usually disposed of as waste once the shipped goods were offloaded. Upon completion of the property, they subdivided it into a dwelling house and the offices for the company and the total cost of construction of the offices and house was Kes.3,500,000.00 and not Kes. 7,953,000.00 as alleged by the Applicant.
11. According to the respondent, the informal agreement between the parties that the timber donated by the applicant's father as a gift would be considered part of the applicant's contribution to the development of the property while the land where the property was erected would be his contribution. The monetary contribution was from the income derived from the Company.
12. The respondent deposed that the events leading to this dispute culminated in August 2019, when the applicant learnt that before their marriage, he had sired a child with another lady. Information he had not disclosed before their marriage union. As a result, the applicant became hostile towards him and after that ordered him to execute an oppressive Post Nuptial Agreement which terms were inter alia that any access to or communication with the child or any communication with the mother of the child would be sanctioned by the applicant. When he declined to execute the agreement, she deserted the property and the company. He deposed that the applicant irregularly accessed the company's bank accounts and proceeded to withdraw from the company's account over Kes 700,000.00 in July 2021 for her use without his knowledge and consent. As a result, he was left with no option but to issue the Bank a no-debit order on the company accounts to deter the applicant from withdrawing more cash.
13. The respondent contended that the applicant has been sabotaging the company by re-directing some of the company's clients to a company known as Design Café, incorporated by the applicant. Due to the applicant's sabotage and frustration, the company's income has declined to an extent that it was untenable and it was his main source of income. The respondent then sought alternative options to generate income. He enlisted the property on the Airbnb online platform to generate additional income but contrary to the applicant's assertions he only generate between Kes. 15,000.00 to Kes. 50,000.00 per month from the said business. The respondent averred that he does not host any TV show in the premises.



14. The respondent deposed that sometime in 2022, he proposed to the applicant that since the construction of the property and the improvements thereon were undertaken by both their efforts in the Company, and noting her un-monetary contribution, they should let out the property, subject to obtaining the consent from the Licensor, and share the proceeds equally. The applicant declined and adamantly insisted that she must access the premises and run the company solely.
15. According to the respondent, the orders sought to be granted are not practically enforceable since the property is not matrimonial property because it is neither jointly owned nor leased by the parties. The orders therefore cannot be granted unless the Licensor is enjoined in these proceedings as the Occupancy Agreement merely allows the parties to access and use the premises for a temporary purpose. The Agreement does not give either party exclusive possession and control of the suit property as the temporary structure can be demolished at any time. Furthermore, the respondent deposed that the prayers sought are mandatory orders of access, control and restraint over the use of the property which cannot be granted at an interim stage.
16. The applicant responded to the Replying affidavit vide a supplementary affidavit dated 6th May 2023. She deposed that the respondent is incapable of demonstrating that he earned "Substantial Income" between 2016 and 2019. The applicant further stated that the respondent has not proved that that he is an Architect who designed the company's projects. Hence, in the absence of such proof, it is evident that the Interior Design projects were sourced and run by her and were the only source of income for the Company between 2019 to 2021 which was in turn the sole source of the funds used to construct the property.
17. The applicant deposed that the actual value of the construction as well as the current market price can be subjected to valuation and the report submitted to this Court if the respondent is ordered to grant access to the house as sought in the Application.
18. The applicant further averred that the child was born on 5th January 2018 while the wedding was on 17th November 2018 yet they had been in courtship since March 2013 and therefore his allegations support his infidelity. She added that the post-nuptial agreement was prepared and emailed to him on 29th July 2020 and he had agreed to sign it which then led to the moving back to the property to save the marriage. The parties then conceived the child sometime in February 2021 and delivered on 21st November 2021
19. The applicant annexed to her affidavit invoices indicating the dates of billing up to 2021 and the bank statements that show the income received within the years. According to her, this is evidence that she was still working at Great Spaces. The applicant deposed that the bank statements show withdrawals from both of them. Therefore, they were all operating the business and the withdrawals by the respondent made from the company account were unconsented. The applicant stated that since the respondent paralyzed her ability to operate under the company, she registered a separate business, Design Café. The applicant contended that the customers decided to work with Design Café.
20. The applicant stated that the respondent in his replying affidavit confirmed renting the property and office with all her personal belongings. She stated that the respondent gave access to strangers to use all her personal belongings including sleeping on the matrimonial bed, using her beddings, towels and other household items without her consent. Furthermore, the respondent has collected rental income which he has applied for his sole use which action lays the foundation for the reliefs sought in this instant application and the Originating Summons.
21. According to the applicant, The Occupancy Agreement upon which the house was constructed has not been terminated therefore there is no need to have the registered owner of the land enjoined in



these proceedings. She added that since the respondent has admitted that he has exclusive possession and use of the property jointly constructed by them, it follows that the reliefs sought in the application are legitimate and merited because she has a legitimate expectation to enjoy the use of the property and derive a return on her investment. The applicant contended that the Occupancy Agreement is in the form of a lease according to which the property was constructed during the subsistence of the marriage and upon completion was used as the family home until the parties separated.

22. According to the applicant, the respondent has not made a full disclosure of the income generated from the lease of the house and his records only show payments up to July 2022. Therefore, the respondent should submit his bank and Mpesa statements on the business from July 2021 as well as all contracts relating to the company as screenshots of the social media accounts demonstrate that the respondent has not made a full disclosure. The applicant annexed to her affidavit a printout from the Instagram accounts showing the occupancy of the house and crew recording the TV show on the property.
23. The court directed the parties to canvass the application by way of written submissions. This was complied with.

Determination

24. I have considered the application, the rival affidavits, submissions, and the entire record of the court.
25. The applicant is seeking for orders of temporary injunction. The principles for granting of injunctions are well-settled in Kenyan law. These are as was stated in *Giella –Vs- Cassman Brown & Co. Ltd (1973) EA 358* that:-

“The Conditions for the grant of an interlocutory injunction are 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.”

26. The court is at this stage required to satisfy itself that there is a prima facie case established. In *Silvester Momanyi Marube –Vs- Guizar Ahmed Motari & Another (2012) eKLR, Odunga J. (as he then was) held that:-*

“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the court cannot find conclusively who is to be believed or not, the court is not excluded from expressing a prima facie view of the matter and the court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.”

27. Furthermore, the Court of Appeal in *Mrao Ltd –Vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125* considered what constitutes a prima facie case and held that:

“In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but



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.

28. I adopt the definition aforementioned. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.
29. However, it must be noted that at this juncture, this court will not conduct a mini-trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the applicant has a right which has been or is threatened with violation. The positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. It is enough if the applicant can show that she has a fair and bona fide question to raise as to the existence of the right which she alleges. The standard of proof of that prima facie case is on a balance of probabilities.
30. In this instant case, it is uncontested that the parties jointly contributed to the construction of the property. Also, the parties do not deny that the land on which the property is erected, belongs to a third party. This is a case of owning a house without land, which is just a form of lease/rent agreement. In this case, the agreement between the parties and the owner of the land is based on an Occupancy Agreement.
31. Since the applicant contributed to the construction and furnishing of the property, she has a right over the property. The respondent has averred that indeed he has rented the property on several occasions to third parties under the guise of Airbnb. He stated that he has received income from this, income that he has used to the exclusion of the applicant. Furthermore, the house is erected on land that belongs to the respondent's uncle and the applicant lacks access to the property. Since the parties' union ended bitterly and with underlying strife, the fact that the applicant has incorporated a competing company and general issues about money, there is a high chance that the property could be alienated, transferred or demolished without the consent and knowledge of the applicant. From the foregoing, I am satisfied that the applicant has proved that she has a right that is being infringed by the respondent and if at all the property is disposed of, the applicant will suffer irreparable loss that damages will not adequately compensate.
32. It must also be noted that the respondent has been in occupation of the property since their separation. It would be unjust to evict him and grant access to the applicant. The respondent also has a right to the property since he also made a significant contribution to the construction of the said property.
33. The upshot is that I allow the application dated 9th March 2023 to the following extent:-
 - a. That status quo ante be maintained as at the time the parties separated. That is, the respondent shall remain in occupancy of the property until the Originating Summons is heard and determined; the property shall not be leased to any third party, transferred, alienated or in any way disposed of; and the respondent shall not conduct any further construction on the property or demolish any part of the property.
 - b. The Respondent is hereby ordered to provide to the court an account of the proceeds generated from the lease of the house erected on L.R. Number xxxxx/xx (I.R. xxxxx) along Peponi Road.
 - c. The respondent is hereby ordered to give the applicant 50% of the proceeds/profits he has received from renting the house to third parties via the Airbnb platform or any other platform from July 2021 to date.
 - d. Each party to bear their own costs.



Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2024

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E.K. OGOLA

JUDGE

In the presence of:

Ms. Nyambeka h/b Mr. Githugi for the Applicant

Ms. Wamoyo for the Respondent

Ms. Gisiele Mohamed court Assistant

