



**SWG v GGG & another (Matrimonial Case E023 of 2022)
[2024] KEHC 6344 (KLR) (Family) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CASE E023 OF 2022
MA ODERO, J
JUNE 3, 2024**

BETWEEN

SWG APPLICANT

AND

GGG 1ST RESPONDENT

SGG 2ND RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion dated 31st March, 2022 by which the Applicant SWG seeks the following orders;-
 1. Spent.
 2. Spent.
 3. Pending the hearing and determination of this suit, an order be and is hereby issued restraining the Respondents from either themselves, through their agents, servants, representatives and any other party claiming under them from selling, alienating, appropriating, transferring, disposing, alienating, appropriating, transferring, disposing, encumbering, sub-dividing, demarcating or in any other like manner dealing with the property [Particulars Withheld] situate within Nairobi Municipality in the Republic of Kenya.
 4. Spent.
 5. Pending the hearing and determination of this suit, an order be and is hereby issued that the rental income from property [Particulars Withheld] situate within Nairobi Municipality in



the Republic of Kenya be deposited in a joint interest earning account in the names of the Applicant and the 1st Respondent.

6. This Honourable Court be pleased to make such further orders as it may consider necessary.
7. The costs of this application be provided for.
2. The application which was premised upon Order 40 Rules 1 & 4 & 51 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A and 63 (c) & (e) of the Civil procedure Act and all other enabling provisions of law was supported by the Affidavit of even date sworn by the Applicant.
3. The 1st Respondent GGG opposed the application through the Replying Affidavit dated 30th January 2003. Likewise the 2nd Respondent SGG opposed the application through his Replying Affidavit dated 28th December, 2022.
4. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated 4th July, 2023. The 1st Respondent relied on her written submissions dated 28th July, 2023, whilst the 2nd Respondents written submissions are dated 28th July, 2023.

Background

5. The Applicant and the 1st Respondent are a couple who got married to each other on 2nd August 1975. A copy of their marriage certificate appears as Annexure SWG 1' to the Applicant's supporting Affidavit. It would appear that this marriage having never been legally dissolved is still subsisting. The children of the union are now all adults.
6. The Applicant avers that during the subsistence of the marriage the couple acquired the property known as Plot No. Mathare Area (Particulars withheld) (hereinafter 'the Mathare Plot') situated in Nairobi County. The said property was registered in the name of the 1st Respondent.
7. The Applicant states that the couple are now estranged and are living separately. That the 1st Respondent has been enjoying the benefit of the 'Mathare Plot' to her exclusion.
8. The Applicant further avers that the 1st Respondent has fraudulently transferred this Mathare Plot to the 2nd Respondent who is his son born out of wedlock. That the 1st Respondent already transferred another property known as Githurai [Particulars Withheld] to a third party without the knowledge and/or consent of the Applicant.
9. The Applicant has filed in court an originating summons seeking orders to preserve the Mathare Plot, which the Applicant alleges is matrimonial property pending the hearing and determination of the suit.
10. The 1st Respondent denies that the Mathare Plot is matrimonial property. He asserts that he acquired said plot single handedly.
11. The 2nd Respondent avers that he is the genuine owner of the Mathare Plot. He denies that the suit property constitutes matrimonial property.

Analysis And Determination

12. I have carefully considered this application, the replies filed thereto as well as the written submissions filed by both parties.



13. The law regarding grant of interlocutory injunctions is found in Order 40 Rule 1 of the [Civil Procedure Rules](#) which provide as follows:-
- “(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;
 - 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”
14. The Applicant is seeking temporary injunctive orders to restrain the Respondents dealing with the suit property pending the hearing and determination of her suit.
15. The principles upon which a temporary injunction may be granted were set out in the celebrated case of *Giella v Cassman Brown & Co* [1973] EA as follows:-
- i. The Applicant must establish a prima facie case with a probability of success.
 - ii. The Applicant must show that he is likely to suffer irreparable loss or damage if the relief being sought is not granted.
 - iii. In case of any doubt the balance of convenience should tilt in favour of the Applicant.
16. None of the parties in this matter has annexed to their respective Affidavit a copy of the Title Document for the suit property.
17. All that the Applicant has annexed to her supporting Affidavit is a Sale Agreement dated 22nd January, 1986 indicating that one Phillip Mosoontu sold the Mathare Plot to the 1st Respondent for Kshs. 30,000 (Annexure ‘SWG ‘2’). The said Sale Agreement contain several alterations and more pertinently the description of the suit property has been altered from Plot 306 to Plot 308. Even the 2nd Respondent who claims to be the owner of the Mathare Plot has not produced any document to prove that he is in fact the registered owner of the said property.
18. In the circumstances it is difficult to tell which property this Sale Agreement refers to and in the absence of a Title Document the court is unable to state with any certainty exactly who the Mathare Plot property belongs to.
19. A Sale Agreement is not proof of ownership. In the circumstances I find that the Applicant has failed to show a prima facie case. Courts do not make orders in vain. The court will not make orders in respect of a property whose ownership has not been conclusively proved.
20. The question of who owns the suit property and the question of whether the same constitutes matrimonial property are issues which can only be determined after the hearing of the suit. The value



of the Mathare Plot is quantifiable and if the Applicant succeeds after hearing of the suit she may be adequately compensated in monetary terms.

21. Finally I find no merit in this application for injunctive orders. The same is dismissed in its entirety. Each party to meet its own costs.

DATED IN NYERI THIS 3RD DAY OF JUNE, 2024.

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MAUREEN A. ODERO

JUDGE

