



**AKK v PKW (Civil Case 6 of 2018) [2024] KEHC 8828 (KLR) (Family) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8828 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**FAMILY**  
**CIVIL CASE 6 OF 2018**  
**HK CHEMITEI, J**  
**JULY 18, 2024**

**BETWEEN**

**AKK ..... APPLICANT**

**AND**

**PKW ..... RESPONDENT**

**RULING**

1. There are three sets of undetermined applications herein filed by the Applicant. The first application is dated 23<sup>rd</sup> January 2021 in which she seeks the following orders:-
  - (a) That prayer 5 in the notice of motion dated 22<sup>nd</sup> January 2018 be and is hereby amended to read;  
  
“That the Respondent be and is hereby ordered to vacate the house built on title number Nairobi /Block xx/101 registered in the joint names of the Applicant and the Respondent and the said house be let out to a 3<sup>rd</sup> party and the rent payable by such 3<sup>rd</sup> party be divided in the ratio of 1/3 to 2/3 in favour of the Applicant.””
  - (b) That in the interim, pending the hearing and determination of the suit the court issues preservation orders on the matrimonial properties of the Applicant and the Respondent in Kajiado/Dalalekutuk/xxxx, Nairobi Block xx, LR No 209/12823/xx, LR No 37/246/xx, LR No 209/xxxxx, LR No 209/xxxxx and LR No 2019/xxxxx.
  - (c) That in the interim, pending the determination of the suit the court issues preservation orders on the shares held in the name of the Respondent or his proxy in the companies stated in the Applicant’s notice of motion dated 28<sup>th</sup> February 2018.



- (d) That a mutually agreeable house agent be appointed by the Applicant and the Respondent to search for a suitable tenant to let the house.
- (e) That the Respondent be compelled to vacate the said house fourteen (14) days after the issuance of the court's order.
2. The application is premised on the grounds thereof as well as the supporting affidavit sworn on 22<sup>nd</sup> February 2021.
  3. The gist of the affidavit is that there is a pending divorce cause between the two parties herein. The Applicant deponed that she moved out of the matrimonial home on her own volition after the Respondent's cruelty and that the Respondent's preliminary objection was allowed by this court but her appeal to the Court of Appeal was successful. This was vide case no Civil Appeal 61 of 2019
  4. The Court of Appeal then directed that the application dated 24<sup>th</sup> January 2018 be set down for hearing.
  5. In the cause of time she has moved and rented another house with the children and that she was at risk of being kicked out with the two children for lack of payment of rent and that her ventures in business were affected by the Covid 19 situation. It is for this reasons that she prays that the house they have been residing in which is currently occupied by the Respondent be rented out.
  6. She prays that the rent accrued therefrom be split into a ratio of 1/3 and 2/3 respectively in her favour as she lives with the children.
  7. She further deponed that the Respondent was in control of all other family properties and collects rent therefrom which she does not benefit from the period they separated.
  8. Consequently, she prays that the properties be preserved pending the determination of the cause herein.
  9. In his replying affidavit sworn on 3<sup>rd</sup> June 2021 the Applicant has opposed the application on the grounds that the Applicant moved out of Nairobi Block xx/101 on her own volition and for greener pastures. He deponed that there was no evidence at all adduced by the Applicant indicating any demand for rent where she had moved to.
  10. He went on to aver that he singlehandedly pays for the children's school fees and upkeep which is over Kshs.500,000 and in the event of any eviction he will not be able to support them.
  11. He denied that he lives alone since the children are now adults and that he was willing to leave with them if the Applicant is facing any challenges.
  12. He said that the Applicant was a person of means who is currently employed and working at a managerial position with Gap Marketing Limited among others. That she was also a director of other various companies. She earns bonuses and income of over Kshs.50 million beside other shares in other enumerated companies in which she has invested.
  13. It is also instructive to note that by their further affidavits sworn on 5<sup>th</sup> July 2022 by the Respondent and 6<sup>th</sup> of July 2022 by the Applicants both acknowledged that the children were now old enough and they would move from one parent to another.
  14. The Respondent stated that the second son has moved and stayed with him in Nairobi Block xx/101 from January 2022.



15. The Applicant on the other hand deponed that “our sons are adults and often visit their father in the matrimonial home.” Although she moved with them from the matrimonial home from November 2016.
16. Before looking at the merits or otherwise of this application it is necessary to bring in the other applications as well.
17. The application dated 22<sup>nd</sup> January 2018 seeks the following orders:-
  - (a) That the Respondent his servants and agents be restrained from selling or disposing or in any other way pending the determination of the suit the following properties, namely KJD/Dalalekutuk/xxxx measuring 3.64 hectares, and Nairobi/Block xx/101 measuring 0.1869.
  - (b) The Respondent pending the hearing and determination of the suit is stopped from selling, disposing shares of any nature in the following companies; Streetwise Media Services Limited, Springboard Holdings Limited, Essential Mountain Links Limited, Upper Hill Springs Restaurant Limited, Apollo Merchants Limited, Eight Investments Limited and Spring Board Capital Limited.
  - (c) That any monies, dividends and profits payable to the Respondent his proxy agent or nominee from the above (b) listed companies be deposited in an escrow account to be opened in the name of Musyimi and company advocates and the Respondent pending the hearing and determination of the suit.
  - (d) That any proceeds from the sale of the following properties, Kajiado/Dalalekutuk/xxxx, Nairobi Block xx, LR No.209/xxxx, 209/12823/xx, LR No 37/246/x, LR No 37/246/xx, LR No 209/xxxx, xxxxx and xxxxx all situated in Nairobi county and which are registered in the companies listed above which are due to or may become payable to the Respondent be deposited in an escrow account to be opened in the joint names of Musyimi & company advocates and the Respondent pending the determination of the suit.
  - (e) That the Respondent be and is hereby ordered to vacate the house built on Title number Nairobi/Block xx/101 registered in the joint names of the Applicant and the Respondent and the said house be let to a 3<sup>rd</sup> party and the rent payable by such 3<sup>rd</sup> party paid as per the application dated 23.1.2021.
  - (f) That the money, revenue or proceeds realised and or collected from property title number KJD/Dalalekutuk /xxxx registered in the joint names of the Applicant and the Respondent including rent and proceeds of sales of farm produce be shared equally between the Applicant and the Respondent from the date of such order.
18. The Applicant prayed for costs as well.
19. The application is based on the grounds thereof and the Applicant’s sworn affidavit dated 22<sup>nd</sup> January 2018.
20. The said affidavit reiterates the issues raised in the application dated 23<sup>rd</sup> January 2021 above.
21. The same as well goes into issues raised in the Originating Summons between the Applicant and the Respondent and in particular their marriage and how they acquired the properties. Essentially it enumerates her contributions in the acquisition of the said properties and the shares in the various companies.



22. It is her case therefore that there is need to preserve the same pending the determination of the suit otherwise it was at risk of being disposed by the Respondent.
23. In his replying affidavit sworn on 26<sup>th</sup> April 2018 the Applicant has opposed strongly the above application. He argued that the court had no mandate and locus before the divorce proceedings were finalised as provided under the *Matrimonial Property Act*.
24. He also went ahead to counter blow by blow the issues raised by the Applicant concerning their marriage and acquisition of the properties. He said that they each invested separately and in some occasion like in the Kajiado property invested jointly.
25. According to him he had made significant contribution to the family contrary to the Applicant's assertion. He had contributed in the welfare of the two children, domestic and management of the home, companionship among many others.
26. In terms of business he had fully contributed and was involved in daily business management. Some of the companies were not family business while those which are family the Applicant had not made any significant contribution.
27. The Applicant swore a supplementary affidavit dated 29<sup>th</sup> June 2021 which among other grave issues accused the Respondent of violence as well as raping her.
28. The Respondent filed a further affidavit denying the said allegations and wondered why he did not report the same to the nearest police station.
29. As regards the Kajiado properties he said that he had singlehandedly constructed about 30 single rooms in 2017 after the Applicant had left. He said that he had carried out other development on the property which included some farming.
30. The other further affidavit by the Respondent dated 27<sup>th</sup> April 2018 denied that Upper hill springs limited was selling 3 plots at a costs of Kshs.1.7 billion or at all. In any case, he deposes that the Applicant had not participated in acquisition of any of the properties.
31. The court has perused the application dated 28<sup>th</sup> February 2018 and the prayers therein, other than praying that the applications dated 22<sup>nd</sup> January 2018 and filed on 24<sup>th</sup> January 2018 be heard on priority basis the other prayers are captured in the two applications above. For that reason, the court does not see any reason of duplicating the same.
32. The court did direct the parties to file written submissions which they have complied. The court has perused the same extensively together with the attached authorities and in view of the sentiments i shall express below, the court sees no reasons to reproduce them

### **Analysis and determination**

33. I have perused the history of this matter including the Court of Appeal decision. The issues basically are two namely whether in light of the Applicant moving away from the matrimonial home in LR No Nairobi/Block xx/101 the Respondent ought to be evicted therein and the same be leased out to a third party who should be able to pay rent and the same be shared between the two as suggested by the Applicant.
34. The other issue is the preservation of the matrimonial property pending the determination of the divorce cause. It is true that their divorce proceedings are yet to be concluded. It is also now established that the only time to distribute the matrimonial property is after the decree absolute has been granted.



- All that the court can do at the moment is to simply preserve the same and or simply make some declarations.
35. It is too early in the circumstances to know which is the matrimonial property or not. This needs adduction of evidence.
  36. On the first issue however it appears from the affidavit evidence on record that when their marriage hit rock bottom the Applicant left the matrimonial home with the two children and went and rented elsewhere. There is however no evidence of any rent payments or demands by the landlords.
  37. It is not disputed as well that the Respondent remained at the matrimonial home. The children who by then were young left with the mother, the Applicant.
  38. The *prima facie* evidence on record shows that they were now adults and they oscillate between their mother's house as well as the Respondent's, their father.
  39. There is also uncontroverted evidence that the Respondent is responsible for their schooling and other upkeep and necessities. He argued that if the house is rented out and forced to get a rental house it will cause great inconvenience to the two boys. That since he meets all their obligations there was therefore no reason to move out of the home.
  40. I find the argument by the Respondent plausible for the simple reason that to the extent that he takes care of the schooling needs of the two children it becomes very disruptive if he is evicted from the matrimonial home. The two boys are definitely comfortable in the two homes occupied by their parents.
  41. At any rate and as stated above I have not been shown any evidence to suggest that the Applicant has been unable to pay rent in the premises she has been staying since moving out. Of course if there was any rent demanded and threat of eviction she would have made the necessary application.
  42. Consequently, it is my view that pending the determination of the suit let the status quo remains. In other words, the Respondent to stay in the matrimonial home and the children be at liberty to visit or stay as much as they desire.
  43. As regards the properties, it is not at this level possible to ascertain what and what is not matrimonial properties. The fact that they are registered in the companies names does not as found by the Court of Appeal oust the jurisdiction of this court to make a determination. This determination is general in nature until the parties adduce their evidence during trial.
  44. The same goes with the shareholding or otherwise in the companies enumerated above. This court will only preserve them till the period each of the parties are granted the opportunity to prove his /her rights over the same and establish whether or not it forms part of matrimonial property.
  45. For now, I think this matter is ripe for hearing. The multiplicity of applications herein though legitimate goes to delay the matter further. The only caution however is that no distribution shall be done until the divorce cause is heard and determined and decree absolute granted. The business of the court is to ensure for now preservation of the properties.
  46. While at it, it is also not the business of the court to impede or disrupt the businesses or the companies mentioned by the parties. They must be allowed to flourish and in the usual manner keep accounts which the court may require during the substantive hearing of the suit if necessary.
  47. The following orders are therefore issued, pending the hearing and determination of the suit:-



- (i) There shall be no sale, disposal, wasting transfer, subdivisions or in any other way by either the Applicant or the Respondent or their agents and or proxies pending the hearing and determination of this suit, namely;
- (a) land parcels numbers Kajiado/Dalalekutuk /xxxx, Nairobi Block xx, LR No 209/xxxx, 209/12823/xx, LR No 37/246/x, LR No 37/246/xx, LR No 209/xxxxx, xxxxx and xxxxx
  - (b) Shares in the following companies Streetwise Media Services Limited, Springboard Holdings Limited, Essential Mountain Links Limited, Upper Hill Springs Restaurant Limited, Apollo Merchants Limited, Eight Investments Limited and Spring Board Capital Limited.
- (ii) This matter be fixed for hearing forthwith.
- (iii) Costs shall await the outcome of the suit.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 18<sup>TH</sup> DAY OF JULY 2024.**

**H K CHEMITEI**

**JUDGE**

