



**SK v FM (Matrimonial Cause E006 of 2024)
[2024] KEHC 10986 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10986 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE E006 OF 2024
SM MOHOCHI, J
SEPTEMBER 19, 2024**

BETWEEN

SK APPLICANT

AND

FM RESPONDENT

RULING

1. This is a Ruling on the Notice of Motion Application dated 5th March, 2024. The Application was premised upon Sections 2, 6(1), 14 and 17 of the Matrimonial Properties Act, Rules 20 and 30 of the Matrimonial Property Rules 2022 and Order 40 Rule 1 of the Civil Procedure Rules and seeks the following orders: -
 - a. Spent
 - b. Spent
 - c. That pending hearing and determination of the Plaintiff/Applicant’s Originating Summons filed herein, the Defendant/Respondent be restrained by way of injunction by himself, his agents and or servants from selling, leasing, charging, disposing off and or in any other way adversely dealing with all that parcel of land known as LR No Kiambogo/Miroreni Block 2/ X (RVST) and all the developments thereon.
 - d. Costs of the application.

2. The Application was supported by the Affidavit of even date sworn by the Applicant. The case for the Applicant is that she started cohabiting with the Respondent as man and wife in October 2014 and later separated in 2017. During the coverture they subsequently blessed with two issues born in 2015 and 2017. It was further averred that together they purchased LR No Kiambogo/Miroreni Block 2/X (RVST) herein the subject property and registered it in their joint names:



3. She averred that the Applicant secured a bank loan towards the purchase of the property and a SACCO loan towards construction of the matrimonial home to which she supervised the construction. That she has natured the issues of the marriage and has been exclusively providing for them. That she also provided companionship during the marriage as well as discharging domestic duties.
4. She stated that the Respondent had threatened to burn their home prompting the Applicant to make a police report vide OB No 32/29/9/2019. That upon being summoned by the police, they entered into an oral agreement to sell the subject property and share the proceeds and that the Applicant would source for a buyer which she stated she managed to. That sometime in September 2019 the Respondent told the Applicant and their issues to hurriedly vacate the property as he had secured a buyer, they did but it turned out to be a facade.
5. It was also the Applicant's averment that she was forced to take a rental unit together with the issues of the marriage and is apprehensive that the Respondent will adversely deal with the property. That she is deserving of the orders sought in light of the direct and indirect contribution to the property.
6. The Respondent opposed the Application and filed a Replying Affidavit sworn on 10th June, 2019 where he stated that the Applicant is not deserving of a 50% share in the property as she did not contribute to it despite it being registered in their joint names. That he solely purchased the property and contributed to the developments thereto and only registered the property in their joint names out of love and affection.
7. He also stated that the Applicant did not take any loan or tendered any evidence to confirm that the said loans if any were taken for the purposes claimed. He added that he has been single handedly taking care of their issues' needs as well as those of the applicant; that they had a help who took care of the household and he solely paid for. As for companionship, he averred that it was mutual and does not amount to acquisition of property.

Submissions

8. The Applicant in her submissions dated 8th July 2024, submitted Application met the threshold for grant of an interlocutory injunction as laid down in *Gella v Casman Brown & Company Limited* (1972) EA and *Nguruman Limited v Jan Bond Nielsen & 2 others* [2012] eKLR .
9. It was her argument that the property is registered in their joint names and there was presumption was that the suit property is equally owned and therein lies a *prima facie* case and relied on the provisions of Section 14 of the *Matrimonial Property Act* and the Court of Appeal decision in *PJS v MHAD; AMH (Interested Party)* [2022] eKLR.
10. She also submitted that the Applicant is apprehensive of an adverse dealing having been told to vacate and therefore has a well-founded fear that the loss cannot be compensated by an award of damages. The Applicant also submitted that the balance of convenience tilts in her favour since if the orders are not issued, the Respondent will undertake an adverse dealing on the property and she will suffer inconvenience as opposed to what would be caused to the Defendant if the orders sought are issued.
11. The Respondent on the other hand in his submissions dated 9th July, 2024 submitted that the application has not met the threshold for grant of an interlocutory injunction as a *prima facie* case has not been made out as was laid down in *Mrao v Frist American Bank of Kenya Limited & 2 others* (2003) KLR 125 as there was no contribution on the part of the Applicant towards acquisition and development.



12. The Respondent placed reliance in *JWK v JKN* (2022) eKLR to submit that no proof has been tendered in Court to prove that the Respondent tinted to adversely deal with the subject property. He argued that in any case the property is not exclusively owned by the Respondent to adversely deal with.
13. The Respondent also submitted that there will be no irreparable loss if the orders sought are not issued as there has been no demonstration that the Applicant made any contributions towards the purchase of the subject property. It was also the Respondent's argument that the balance of convenience tilts in his favour through his solo efforts at purchasing the subject property.

Analysis and Determination

14. Having considered the pleadings and submissions on record, from the onset, parties are reminded that what is up for determination is not the distribution of the property based on contribution of each party but the injunctive orders sought by the Applicant.
15. The only issue for determination therefore is whether the Applicant therefore has satisfied the Court that she has met the threshold for grant of injunctive orders at the interlocutory stage.
16. When it comes to granting of an interlocutory injunction, the main principles applicable were set out in the case of *East Africa industries v Trufoods Ltd* [1972] EA 420 that: -

“A plaintiff has to show a *prima facie* case with a probability of success and if the Court is in doubt it will decide the application on the balance of convenience. 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.”

17. Those principles were reiterated in the case of *Giella v Casman Brown* [1973] EA 358 to wit: -

“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”.

18. On the first limb of whether the Applicant has established a *prima facie* case, the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR provides in part that: -

“.... the words “*prima facie*” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of *prima facie* case, the former being the lesser standard of the two...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 being 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.”



19. The marriage has not been disputed. The subject property is registered in the joint names of the Applicant and Respondent and was acquired during the coverture. The Respondent only denies that the Applicant made any contribution towards acquisition and development of the property. He also argued that in the absence of proof of contribution, a *prima facie* case has not been established.
20. It is clear that the issue of contribution cannot be determined at this interlocutory stage. The injunctive orders sought are based on the fact that she is a co-owner and the presumption of a marriage between the two which has not been denied and therefore preservation of her matrimonial property rights. I find that the threshold for establishing a *prima facie* case has been established.
21. Secondly on whether the Applicant is likely to suffer irreparable injury, which would not adequately be compensated by an award of damages, the Applicant's case is pegged on the fact that the property in question is matrimonial property and that the Respondent intends to adversely deal with the property thereby standing at an inconvenience. The Respondent on the other hand argued that the property is not exclusively owned by the Respondent to adversely deal with it and that allegations of disposal of the property were not substantiated therefore falling short of this requirement.
22. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR stated that:-

“...The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”
23. The Court takes note of the fact that a police report was made vide OB 32/29/29/2019 on threats to burn the property. The Applicant further pleaded that the Respondent told her to vacate the property under the guise of finding a buyer which was not the case. The Respondent has not addressed those allegations nor denied them but has instead insisted adamantly that the Applicant did not make any contributions to the property and is therefore not entitled to a share of the property.
24. The Applicant has not demonstrated what she would suffer irreparable harm should the property be sold as she can adequately be compensated in monetary form. As a matter of fact, she has admitted there being an oral agreement to sell off the property.
25. Be that as it may, the property is the subject of the summons dated 28th February 2024. The Applicant is not living in the property and there has been non-disclosure of the current state of the property. If the property is disposed of or adversely dealt with adversely by the Respondent without the input of the Applicant prior to determination of the Summons, then the subject of the suit no longer exists. The Applicant stands at a greater prejudice should the orders sought not issue.
26. Further, the allegations of the Respondent threatening to burn down the property and failure to address those allegations do pose a threat to the property and the individual rights protected under the *Matrimonial Property Act*. There may be no reasonable accuracy as to monetary compensation if such a scenario came into being. The Court is therefore satisfied that the Applicant may suffer irreparable injury, which would not be adequately compensated by an award of damages in this instance.
27. Thirdly on whether the balance of convenience tilts in favour of the Applicant, where there is doubt a Court will only consider the balance of convenience. There is no doubt on the face of it for the Court to result to the balance of convenience.



28. In conclusion the Court is satisfied that this application has merit and I therefore, make the following orders: -

- a. Pending the hearing and determination of this suit a temporary order of injunction be and is hereby issued restraining the Respondent his agents, employees, servants and/or any person(s) acting through him from selling, leasing, charging, disposing off and or in any other way adversely dealing with all that parcel of land known as LR No Kiambogo/Miroreni Block 2/ X (RVST) and all the developments thereon.
- b. Respondent to file response to the Originating Summons dated 28th February within Fourteen (14) days form this day.
- c. There shall be no orders as to costs.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 19TH DAY OF SEPTEMBER, 2024.

MOHOCHI S.M.

JUDGE

