



**MNM v CKMM (Civil Case E002 of 2024)
[2024] KEHC 12300 (KLR) (14 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL CASE E002 OF 2024
RM MWONGO, J
OCTOBER 14, 2024**

BETWEEN

MNM APPLICANT

AND

CKMM RESPONDENT

RULING

Background

1. The Applicant and Respondent cohabited as husband and wife having formalized their marriage on 13th December, 1975 at the Kerugoya Catholic church. In 2006 she instituted divorce proceeding in Milimani Divorce Cause xx0 of 2006 which are at an advanced stage. At the time of the application Judgment was scheduled for 19th April, 2024.
2. According to the applicant, she has become aware that the Respondent is newly married and has been cohabiting with his new spouse on parcel No. Baragwe/Thumaita/xxx, over which she claims part ownership by contribution.
3. In this context, the applicant filed this notice of motion dated 2nd April, 2024 which seeks the following orders:
 1. That the status quo be maintained pending the inter-parte hearing and determination of this application.
 2. That a temporary injunction do issue against the Respondent, its agents, servants and/or anybody acting upon its instructions from selling, alienating, wasting, demolishing, and/or interfering with the suit land reference no Baragwe/Thumaita/xxx, Baragwe/Thumaita/xxx and Plot of land No. xx situated at Karumandi Town measuring approximately 50x100 pending the hearing and determination of the Originating Summons herein.



3. That a temporary injunction do issue against the Respondent, its agents, servants and/ or anybody acting upon its instructions from interfering with the quiet possession and occupation and caution be lifted on suit land reference no Baragwe/Thumaita/xxx pending the hearing and determination of the Originating Summons herein.
 4. That the OCS Gichugu Police Station to oversee the compliance of the above orders.
 5. That costs of this application be provided in the cause.
4. The application is based on the grounds on the face of the application, and the supporting affidavit of Margaret Njeri Mambo, in which she avers, inter alia:
- i. That she has become aware that the respondent has drawn a mutation plan over Baragwe/Thumaita/xxx and offered for sale portions of the land to third parties.
 - ii. That unless this honourable court intervenes, the matrimonial property will be sold, alienated and wasted away leaving nothing for the Applicant, rendering the matrimonial division cause nugatory.
 - iii. That the applicant is bonafide registered owner of Baragwe/Thumaita/xxx which the Respondent lays claim and interferes with the Applicant's possession and enjoyment by placing a caution over the said property.
 - iv. That the Respondent without any colour of right whatsoever is forcefully attempting to interfere with the peaceful use of Baragwe/Thumaita/xxx by the applicant.
 - v. That the Applicant has a prima facie case with high chances of success.
 - vi. That I collectively annex and produce my evidence marked "MN" in support of this application.
5. The respondent filed a Replying Affidavit on 14th November, 2023 with the following major averments:
- i. That he bought the said land parcel Number Baragwe /Thumaita /xxx in the year 1973 from Njage Muroko.
 - ii. That he married the Applicant in the year 1975 and she did not contribute anything toward the purchase of that land.
 - iii. That the caution lodged on land parcel Numbers Baragwe /Thumaita /xxx should not be lifted since that land belongs to him, and he transferred it to the Applicant to hold on trust for him.
 - iv. That he registered the land in the names of the Applicant after suppliers in their beverage business threatened to auction all their properties.
 - v. That land parcel Number Baragwe/Thumaita/xxx was gifted to him by one NG who was a relative in the year 1971 before he married the Applicant.
 - vi. That the Applicant has not contributed anything toward development of these properties.
 - vii. That he bought plot No.xx at Karumade market, in the year 1971 and developed the same without the assistance of the Applicant.
 - viii. That he do also has a matter which is still pending at Gichugu Law Court vide P.M ELC No 35 of 2023 where he is seeking removal of the caution.



6. The parties filed submissions as directed by the court.

Applicant's Submissions

7. The key issue as far as the applicant is concerned is whether the interlocutory orders should issue pending the hearing and determination of the suit.

8. The Applicant relies on the provisions Section 12 of the *Matrimonial Property Act* which provides:

“ 12. Special provisions relating to matrimonial property

(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.”

9. Section 17 of the *Matrimonial Property Act* further provides as follows:

“ 17. Action for declaration of rights to property (1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person. (2) An application under subsection (1)—(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

10. Further, Order 40 Rule 1 and 2 of the Civil Procedure Rules, 2020 provides that the court has powers to grant an order of temporary injunction to restrain such acts and prevent the wasting, damaging, alienation, sale, removal or disposition of the suit land.

11. She submits that the threshold for grant of an interlocutory injunction is as set out in the celebrated case of *Giella v Cassman Brown* (1973) EA 358.

12. The applicant further points out that the properties in respect of which the application relates are Baragwe/Thumaita/xxx, Baragwe/Thumaita/xxx and Plot of Land No.xx situated at Karumandi Town measuring approximately 50x100.

13. On the first limb of the requirements in the *Giella v Cassman Brown*, the Applicant stated that she has made a prima facie case for the orders sought. She submits that the parties' marriage has been dissolved, but the rights are yet to be determined relating to property acquired or developed during the pendency of the marriage. In the meantime, the Respondent is alienating portions of the said properties against the provisions of Section 12 of the *Matrimonial Property Act*.

14. Further, the Applicant submits she has an arguable case for declaration of rights over Baragwe/Thumaita/xxx and Plot of land No.xx, having been married to the Respondent since 1975, and the fact that the properties are also the parties' matrimonial homes during the pendency of their union. The Applicant has an arguable case for parcel Baragwe/Thumaita/xxx registered in her name, which is a gift acquired from the Respondent and to which she paid a significant portion for its purchase. There is no legally justifiable cause why the Respondent has continually interfered with the quiet possession and enjoyment of her property parcel number Baragwe/Thumaita/xxx.



15. As far as irreparable harm is concerned, she states that she will suffer if the injunction is not granted as the Respondent has settled his newly wed spouse in their matrimonial home. This will undeniably waste and destroy her personal property therein acquired during the union.
16. According to her, she has adduced concrete evidence of the Respondent selling and disposing portions of the matrimonial property, through subdivision and sale. The photographic evidence and draft mutation plan adduced have not been controverted and are compelling evidence of such sale and disposal.
17. As to whether the balance of convenience favours her, the Applicant says she has made out a case for the court to grant the interlocutory orders sought herein, the Applicant being the registered proprietor of Baragwe/Thumaita/xxx.
18. She urges that being the former spouse of the Respondent who is registered as proprietor of Baragwe/Thumaita/xxx, and Plot of land No.xx acquired during their marriage, she enjoys the legal presumption that the Respondent holds such property in trust for the Applicant pending the final determination of the main suit.
19. Finally, she argues that the Respondent shall not suffer, and has not demonstrated any prejudice he shall suffer, if the interlocutory orders are granted to preserve the properties, pending the hearing and determination of the main suit. At that point the court shall conclusively determine the rights of the parties to the matrimonial properties.

Respondent's Submissions

20. The respondent submits that the application for injunction should be determined in line with principles set out in the case of *Giella* (supra). Thus, the applicant must establish a prima facie case with a probability of success; must show that he will suffer irreparable injury that cannot be compensated by an award of damages; and that the court will determine the application on a balance of convenience.
21. He submits that the Applicant has not established a prima facie case with a probability of success. That the Applicant did not attach any sale agreement or receipt to show that she contributed any money during the purchase of the three properties.
22. On the other hand, the Respondent has demonstrated through evidence that he acquired those properties before marrying the Applicant. She, on the other hand did not produce any documents to prove she assisted in developing the properties therein.
23. The respondent submits that the applicant has not satisfied the first requirement for temporary injunction. The Applicant left her matrimonial home in the year 1996 and she filed a divorce cause. She has not been living in the matrimonial home since then and the Respondent has been taking care of the properties.
24. He submits that since the Applicant has not established and proved her contribution towards improvement of the matrimonial properties, then the said loss can be compensated in monetary terms. If this application is not allowed the Applicant will not suffer any irreparable damages at all. The person who stands to suffer damage if the application is allowed is the Respondent.
25. Finally, the Respondent argues that it is clear from the foregoing that the balance of convenience tilts in favour of the Respondent. As since the Applicant's application herein lacks merit and should be dismissed with costs.



Issue for Determination

26. The only issue for determination is whether the temporary injunction should be granted.

Analysis and Determination

27. The applicant seeks conservatory orders pending the hearing and determination of the matrimonial cause. The basis of her application is that she has evidence of the Respondent advertising, and actively seeking buyers for the matrimonial properties herein, thereby wasting and alienating the same.

28. The case of *Giella v Cassman Brown*(supra) sets out the conditions for the grant of an interlocutory injunction as follows:

- “i. Is there a serious issue to be tried (prima facie case)
- ii. Will the Applicant suffer irreparable harm if the injunction is not granted;
- iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").”

Whether the applicant has made out a prima facie case

29. There is no doubt from the affidavit evidence that the Applicant has an arguable case for declaration of rights over Baragwe/Thumaita/xxx and Plot of land No.xx. It is not disputed that she was married to the Respondent since 1975, and that the properties are also the parties' matrimonial properties during the pendency of their union.

30. In respect of property No. Baragwe/Thumaita/xxx registered in the applicant's name, and which is alleged to have been a gift acquired from the Respondent and to which she paid a significant portion for its purchase, there is no doubt an arguable case arises on her part.

31. It is clear that all the properties need to be protected from sale by the respondent pending the hearing and determination of the suit.

Irreparable harm

32. The Applicant has also adduced concrete evidence of the Respondent selling and disposing portions of the matrimonial property, through subdivision and sale. The photographic evidence and draft mutation plan adduced have not been controverted and are compelling evidence of such sale and disposal.

33. The respondent submits that if the Applicant establishes and proves her contribution towards improvement of the matrimonial properties, then the said loss can be compensated in monetary term. In the case of *Bob Njoroge Ngarama v Mary Wanjiru Ngarama & Another* (2014) eKLR, where the court held that:

‘a matrimonial home does not only have fiscal value but also has a great sentimental value to a surviving spouse and children of the deceased which cannot be equated to monetary value.’

34. The respondent is seeking to sell the suit properties to the detriment of the applicant and rendering the matrimonial division, a nugatory exercise. This definitely calls for the court to stay the transactions pending hearing.



On a balance of convenience

35. According to the applicant, the balance of convenience, falls in her favour. In the case of Chebii Kipkoech v Barnabas Tuitoek Bargoria & Another [2019] eKLR, it was held that:

“the meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed.”

Disposition

36. In my considered view, taking all the above into account, the Applicant has made out a case for the court to grant the interlocutory orders sought herein. The respondent will not suffer inconvenience in case the status quo is maintained, as the applicant has no intention of alienating the suit property.

37. Accordingly, the applicant’s application is allowed in its entirety, pending the hearing of the matrimonial suit.

38. Costs in cause.

39. Orders accordingly.

DATED AT KERUGOYA THIS 14TH DAY OF OCTOBER, 2024

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Nyabuto - for Applicant
2. Ndana - for Respondent
3. Murage, Court Assistant

