



**Anyona v Munzatsi (Civil Suit 28 of 2022) [2023] KEHC 3207 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3207 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**CIVIL SUIT 28 OF 2022**  
**RN NYAKUNDI, J**  
**APRIL 18, 2023**  
**IN THE MATTER OF SECTION 45(3) OF THE CONSTITUTION, 2010**  
**AND**  
**IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY**  
**ACT**  
**2013(N0 49 OF 2013)**  
**AND IN THE MATTER OF SECTION 13 OF THE MARRIAGE ACT, 2014**  
**IN THE MATTER OF ORDER 40 RULES 2 OF THE CIVIL PROCEDURE**  
**RULES AND SECTION 63(E) OF THE CIVIL PROCEDURE ACT**  
**AND**  
**IN THE MATTER OF SECTION 1A, 1B, 3 & 3A OF THE CPA, CAP21**  
**BETWEEN**  
**CHRISTABEL ANYONA ..... APPLICANT**  
**AND**  
**ALLAN KAISHA MUNZATSI ..... RESPONDENT**

**JUDGMENT**

**Background**

- 1 It is on record that the petitioner Christabel Anyona has petitioned for divorce against the respondent Allan Kaisha Munzatsi as Referenced in the Chief Magistrate’s Court Divorce Cause No E14 of 2022. This petition is currently pending determination before that trial court. Thereafter the petitioner lodged an originating summons dated November 18, 2022 seeking the following orders:-



1. That a declaration be and is hereby issued declaring that the Applicant/Plaintiff is entitled to whole share or such other share as the court may award of the properties (movable and immovable) acquired by the plaintiff prior to and/or during the substance of their marriage and that the Defendant holds title, interest, ownership and/or possession of the said properties in trust for the plaintiff/Applicant in their respective shares as the legal owners and cestui que trust respectively namely:-
  - a. Eldoret Plot No LR No 11/717
  - b. Lusala North Maragoli/kisatiru/1746
2. That an order be and is hereby issued directing that the above matrimonial properties be shared according to the contribution made towards its acquisition, development and/or improvement or in any other ration as this Honourable court may deem just and expedient to order/direct
3. That and order be and is hereby issued directing that the household items be released to the Applicant/Plaintiff and/or tht the same be shared in any ration as this Honourable Court may deem just and expedient to order.
4. That in the alternative to all the above, an Order be and is hereby issued directing that the respondent/Defendant is not entitled to any share of the above said properties as enumerated in (1) (a-b) above
5. That in the alternative to all the above, an order be and is hereby issued directing that a valuation be carried out on all the above properties and a valuation report be filed in court by a mutually acceptable valuer after which the court will apportion what is payable to each party and subsequent to the said valuation, the Defendant be ordered to pay to the plaintiff her entitlement and/or such other share as the court may order in the best interest of justice.
6. That upon the grant of any and /or all of the foregoing, a permanent injunction be and is hereby issued restraining the Defendant by himself, his servants, agents and/or employees from interfering with the plaintiff's lawful enjoyment and quiet possession of the properties awarded to her.
7. That such other and/or further orders be granted as the court may deem fit, air and expedient in the circumstances
8. That the Defendant be condemned to pay costs and interests to the plaintiff. In support of the summons is an annexed affidavit sworn by the petitioner, accompanied by the annexures. Simultaneously with the summons, the petitioner filed a Notice of Motion pursuant to Order 40 Rule 2 of the *Civil Procedure Rules* and Section 1A and 1B, 3 &3A, 63(E) of the *Civil Procedure Act*, Order 5 Rule 17, Order 51 Rule 1 of the *Civil Procedure Rules 2010*. In the stated motion the following orders were also applied for:
  1. That this application be certified as urgent and service of the same be dispensed with in the first instance.
  2. That Pending the hearing and determination of the main suit, this Honourable Court be pleased to compel the respondent to allow the Applicant together with the issues access into their matrimonial in Eldoret Plot No LR No 11/717 as schools are closing and the issues have no home to go to.



3. That pending the hearing and determination of the originating summons filed herein, this Honourable Court be pleased to restrain the Defendant herein either in person or through proxies from causing the Applicant, her children any kind/form of harm.
4. That pending the hearing and determination of the originating summons filed herein this Honourable Court be pleased to restrain the Defendant herein either in person through proxies from destroying the Applicant's properties and/or belongings
5. That the OCS Central Police Station do enforce compliance of prayer (2)(3) and (4).
6. That this court be pleased to make any other further orders it may deem just in the circumstances pending the hearing and determination of the main suit
7. That costs of this application be in the cause

The respondent in contesting the notice of motion and originating summons filed a notice of preliminary objection coached in the following terms:

1. That there is no petition and/or matrimonial cause and/or application properly filed by the plaintiff/applicant before this honourable court for determination as the court lacks jurisdiction to entertain, hear and determined the same at the juncture as there is no *decree nisi* and decree absolute between the parties hence the same ought to be struck out in the first instance with costs to the defendant/respondent.
2. That the entire plaintiff/applicant's application dated the 18<sup>th</sup> day of November, 2022 (November 18, 2022), petition and/or matrimonial cause offends the provisions of Section 7 and 17 of the [Matrimonial Property Act, 2013](#).
3. That the issue of whether there was marriage between the plaintiff/Applicant and the Defendant/respondent is yet to be determined by the subordinate court in Eldoret Cmc Divorce Cause No E114 of 2022 which was just filed on the 4<sup>th</sup> day of November, 2022 (November 4, 2022) thus making the Plaintiff/Applicant's application dated 18<sup>th</sup> day of November 2022 (November 18, 2022). petition and/or matrimonial cause dated the 18<sup>th</sup> day of November, 2022 (November 18, 2022) premature, ill advised fatally incurable, incompetent, incurable defective, misconceived, bad in law, ill advised, misapprehension of the law and the only remedy available in law is to struck it out with costs to the Defendant/respondent. The respondent in buttressing the objection placed reliance on the following cases. [ENN v SNK](#) (2021 eKLR, [PNN v ZWN](#) (2017) eKLR, [T M W v FMC](#) (2018) eKLR, [MWM v EMK](#) (2019) eKLR. As it can be gleaned from the cited cases, the question is whether in determining the originating summons this court lacks the requisite jurisdiction. In my considered opinion the law is explicit as provided for in Section 17 of the [Matrimonial Property Act](#) No 49 of 2013. Therefore, there was no need to belabor the point on subject matter and personal jurisdiction of this court.

In prosecuting the originating summons together with the Notice of Motion, the petitioner deposes briefly as follows:-



1. That in or about the 2016 or thereabout, the Defendant/respondent and I started cohabitation as husband and wife before we solemnized the union in the year 2017 pursuant to Luhya Customary Marriage.
2. That the Defendant/respondent and I each had been blessed with issues from our previously, dissolved relations.
3. That the Defendant/respondent later brought another woman into our matrimonial home in Lusala North Maragoli/kisatiru/1746 and forcefully, illegally and unlawfully evicted me together with my children. (copies of the OB evidencing the formal complaints raised is hereby annexed and marked “CA 1(a) CA-1(b)
4. That due to the Defendant/respondents threats and the fact that the sent goons to illegally and unlawfully evict us from our home in Eldoret Plot No LR No 11/717 had to seek restraining orders for my safety and that of our children
5. That during the subsistence of our union, I was gainfully employed hence financially able to acquire and/or develop properties
6. That for the benefit of our family, I applied the proceeds of most of my salary towards the development of both our matrimonial properties majorly in the Lusala North Maragoli/kisatiru/1746. (Evidence of my income is hereby annexed and marked “CA-4”)
7. That the Defendant/respondent has now retained possession and/or control of all the aforesaid properties to my detriment.
8. That our marriage/union being on the verge of dissolution, it is only fair and just that the properties be distributed in accordance with our respective contributions and/or as shall be quantified by this Honourable court in the best interest of justice

2 The philosophical legal foundation of the averments by the petitioner draws their inspiration from Section 17 of the [Matrimonial Property Act](#) and Article 3 of [the Constitution](#). Acknowledging the power of the law the petitioner has moved this court for a declaration of entitlement to the Referenced marital estate pending the hearing and determination of the filed Divorce Cause in the Magistrate’s Court. In essence issues of acquisition whether jointly or severally, contribution by each spouse either directly or indirectly becomes central determinants for a declaration to issue under Section 17 of the [Matrimonial Property Act](#). The other pivotal parameter is whether the property in question was acquired during the currency of the marriage and registered in the joint names of the petitioner and the respondent or in the names of one of the spouses. The concept of contribution is essential to justice for each individual in delving into the condition precedent of declarations under Section 17 of the [Act](#). For as the maxim goes: “ No man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today” Piercing the corporate Veil of marriage in so far as the marital estate is concerned invites the court to carry out the taxonomy of the statutory Provisions Under the [Matrimonial Property Act](#). Depending on the approach of Interpretation, of what constitutes contribution and the weight given to each element in Section 2, as read in conjunction with Section 6, & 17 of the [Act](#) a proper perspective for the understanding of both the constitutional and statutory scheme is conceived. It will not out of context to mention that the fundamental question as to whether the petitioner and respondent minds met in mutual consent to give effect to a status of



marriage is yet to be determined by the Lower Court. Additionally, the term cohabitation as husband and wife or the system of customary marriage are all well within the purview of the Chief Magistrate's Court. All of the essential elements of such a relationship are to be canvassed in the proper forum. Without going through all the issues on this subject of marriage, the exercise of such discretion under Section 17 of the Act purely anchored on declarations calls upon the petitioner to discharge the burden of proof and standard of proof. As stated in Section 107 (1), 108 & 109 of the Evidence Act the burden of proof lies of the party asserting the existence or nonexistence of a fact in issue so that any court can give judgement to vindicate his or her Legal Rights. From the Affidavit Evidence of the petitioner I seem to be persuaded the onus of proof vested in her remains in the realm of possibilities. Taken alone the substantive components of the affidavit are not enough to basically decide cases such as this in which the parties make conflicting assertions. A level of confidence rule would have been for the court to be provided with the registration extracts of titles specifically mentioned in the originating summons with clear convincing evidence for this court to exercise discretion under Section 17 of the matrimonial Property Act. For clarity of exposition both parties have had access to a body of evidence necessary to be furnished before this court to secure a favourable ruling on the issue. The petitioner and the respondent had no reason to give sketchy information as to the nature of the marital union and any tangible Assets optimally acquired during the subsistence of the contested marriage in the Court below. This follows from my analysis of the parties equilibrium conduct in this litigation none met the critical threshold of upholding the Notice of Preliminary Objection dated December 14, 2022 or making declarations under Section 17 of the Act in favour of the petitioner.

- 3 Accepting the pleadings on the face value the jurisprudence around the protection and care of the children under the high banner of the best interest of the child is properly ring-fenced in Section 4 of the Children's Act and a plethora of case law. The problem inherent in the current application, is that it identifies factors to determine the best interest of the children but abandons to seek a remedy before the Children's Court with jurisdiction to adjudicate the best interest of the particularized Children of the Marriage between the petitioner and the respondent. In the interim during the litigation on the Divorce Cause with whom will the children live, to whom and by whom will children support be paid and in what amount are pertinent issues with compelling agency to be resolved without further delay by the appropriate forum. Here the best interest of the children is at stake and is of paramount consideration requiring a judicial process to determine. The ascertainable checklist in the originating summons of the petitioner is unlikely to be safeguarded fully and their rights promoted in a jurisdiction primarily under the Matrimonial Property Act.
- 4 When all I said and done I pause the question whether it is just and convenient for the court to grant an interim injunction restraining the respondent either by himself, or through his agents and or servants from restricting, prohibiting the petitioner in accessing the suit property. The principles in answer to this question are well illustrated in the cases of: American Cyanamid v Ethicon Limited (1975) 1 AC 396-410, Glella v Cassman Brown & Co Ltd (1973) EA 358, A *prima facie* case was defined by the Court of Appeal in Mrao Ltd v First America Bank of Kenya Ltd & 2 Others (2003) eKLR 1215, Waithak -v- Industrial and Commercial Development Corporation (2001) KLR 374.
- 5 It is recognized that a balance must be struck between two competing interest of both the petitioner and the respondent and adopt a dimension which serves the interest of justice. In the Cynamid case learned Lord went on to state the object of the interlocutory injunction as being: " ....to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. But the plaintiffs need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal right for which he could not be adequately compensated under the plaintiff's undertaking in damages if the



uncertainty were resolved in the defendants favour at the trial. The court must weigh one need against another and determine where the balance of convenience lies. It is no part of the court's function at this stage of the litigation to try to resolve conflicts or evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which calls for detailed argument and mature consideration. These are matters to be dealt with at the trial". One of the most critical element is expressly stated in *Commercial Finance Co Ltd v Afraba Education Society* (2001) Vol EA 86 in which the court pronounced as follows:

that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction. Is a threshold requirement and the burden is on the applicant to demonstrate prima facie the nature and extent of the injury, speculative injury will not do, there must be more than unfounded fear or apprehension on the part of the applicant. 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 mature that monetary compensation of whatever amount will never be adequate remedy."

- 6 From a more practical perspective, there existed a legitimate expectation that the petitioner and her children operated on an express promise that the respondent was under duty to provide housing and basic provisions in support of their survival rights. Similarly, under the marriage union the explicit scheme of the family created an inclusive barrier free access of the homestead facilities which by virtue of the differences with the respondent were suddenly terminated. The *Constitution of Kenya* in Article 26 upholds the right to life and provides that no person shall be deprived of his life except according to procedure establish by law. Central to the constitutional definition on the right to life includes: Right to shelter, housing, water, food, known source of light i.e electricity, solar, and other specific livelihood and survival rights. It is clear from the affidavit that without notice from the respondent the petitioner and her children were forcibly evicted from the known house they commonly knew as a matrimonial home. The respondent has not explained to the court the circumstances which gave rise to the eviction of his own family. The court in *Millennium Educational Trust v. State of Karnataka*, ILR 2013 Karnataka 1452. This persuasive jurisprudence laid down the test as follows: " Shelter for a human being, therefore, is not a mere protection of his life and limb. It is home where he has opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter, therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being". On the surface of it at least the respondent could have provided an alternative housing recognizing the challenges and violation of rights likely to be occasioned by that one Act of Eviction from the family home. On its face Article 26 appears an absolute right save for the express qualifications. At the end of the day as illustrative of the principles in the above outlined cases the petitioner's loss of adequate housing would not be compensable in damages. The interlocutory injunctive relief sought by the petitioner against the respondent restraining him from continuous violation of her right to housing ought to be granted until the trial of the Divorce Cause pending before the trial magistrate's courts is fully determined. The fact that the respondent has already moved on and even opened the matrimonial home for another tenant to subsume the companionship role from the petitioner is inexcusable for it deprives the holder of her rights. The status of the petitioners rights ought to remain undisturbed and protected against injury until the final verdict and exhaustion of her rights within the legal system to resolve the conflict.



In my view even the balance of convenience governing the principles of injunction is unforgiving of the respondent conduct on eviction. This is an issue that will be a theme of litigation pursuant to which the joint venture of marriage is appropriately dissolved, sustained or otherwise as the case may be.

7 From the foregoing on this aspect the OCS within the locality of this matrimonial home is directed to see to it that the initial eviction is rendered null and void by granting the petitioner access to the premises. In the alternative it is ordered that the respondent makes provision for an alternative accommodation /shelter to the petitioner and her children pending the hearing and determination of the cause of action on whether the marriage is to be dissolved. Both of my noble considerations with regard to the preliminary objection and the originating summons as categorized failed the test capable of giving rise to the remedies.

8 I make no orders as to costs.

**DATED AND DELIVERED AT ELDORET THIS 18<sup>TH</sup> DAY OF APRIL, 2023**

**R. NYAKUNDI**

**JUDGE**

In the Presence of Isigi & Co Advocates for the respondent

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