



**EWM v JMK (Civil Suit E021 of 2023)
[2023] KEHC 23268 (KLR) (Family) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL SUIT E021 OF 2023
PM NYAUNDI, J
SEPTEMBER 22, 2023
IN THE MATTER OF THE DECLARATION RIGHTS IN MATRIMONIAL PROPERTY
AND
IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT, 2013**

BETWEEN

EWM PLAINTIFF

AND

JMK DEFENDANT

RULING

1. This Ruling relates to the Notice of Motion dated 27th February, 2023 brought under Order 1, Order 40, Order 51 and 51 Rules 1 of the Civil Procedure Rules, 2010, Section 10 of the Judicature Act Cap 8, Rules 2, 3 and 4 of the High Court Practice and Procedure Rules and Section 3A of the Civil Procedure Act, Article 159(2) of the Constitution seeking orders that are on the face of the Application.
2. This application is supported by an Affidavit sworn by the Applicant on 27th February 2023 in which she deposes that she got married to the Respondent under the Kikuyu custom and that the marriage is pending dissolution in the Ruiru Chief Magistrate Court, Divorce Cause No. E006 of 2023 with the Respondent having petitioned for divorce.
3. She deposes that soon after the marriage the Couple worked together to acquire and develop both immovable and movable properties and registered Companies and business. That some of the properties acquired were registered in their joint names while others were registered in the sole name of the Respondent. It is her contention that she made a substantial contribution to the acquisition and development of the properties.



4. Following a souring in their relationship she deposes that the Respondent has evicted her from the matrimonial home and diverted rental income that was previously paid into a joint account into a separate account that the Applicant has no access to. This action has prejudiced the Applicant as she has an outstanding loan that she was servicing with funds in that account.
5. The Respondent opposes the Application vide his affidavit sworn on the 27th of March 2023. He concedes that he was married to the Applicant but that the marriage has since irretrievably broken down and that he has instituted divorce proceedings.
6. He contests the Applicants assertion that she contributed to the acquisition and development of assets that were acquired during the pendency of the marriage. He asserts that even where the properties are jointly registered it was out of love and affection that he included the Applicants name, but she did not make any contribution.
7. He submits that he was forced to divert the rental income from the joint account following the Applicants unilateral action of withdrawing funds from the account and failing to account for the same.
8. He challenges the Applicants assertion that she was servicing loans from the rental income.
9. Further he asserts that the Appellant has failed to disclose properties that were acquired during the pendency of the marriage and that are registered in her sole name.
10. Parties agreed to canvass the Application by way of written submissions. The Applicant's Submissions are dated 13th April 2023. The Respondents Submissions are dated 14th July 2023

Summary of Applicants Submissions

11. The Applicant identifies the following as the issues for determination
 - a. Whether the suit properties constitute matrimonial property
 - b. Whether a declaration should issue that the Applicant is entitled to and / or obliged to benefit from the matrimonial properties herein
 - c. Whether the Applicant contribute towards the acquisition and development of the matrimonial properties herein
12. As the submissions are on the record, I will not set them out in detail as they are a restatement of the averments in the supporting affidavit.
13. The Applicant cites the following Authorities
 - a. [*MO v AOW*](#) [2017] eKLR
 - b. [*MEK v GLM*](#) [2018] eKLR
 - c. [*NWM v KNM*](#) [2014] eKLR
 - d. [*PWK v JKG*](#) [2015] eKLR
 - e. *White v White* (2000) UKHL 54
 - f. [*Njoroge v Ngare*](#) (1985) KLR 480
 - g. [*AWN v FMN*](#) [2018] eKLR



Summary of Respondent's Submissions

14. In the Submissions the Respondent identifies the following as the issues for determination
 - a. Which among the properties listed by the parties constitute matrimonial property
 - b. What is the entitlement of each of the parties of the properties that are identified as matrimonial property
15. I will also not set out the Respondent's submission in detail as they are a reiteration of the Replying Affidavit. In support of his proposition, he cites the following authorities
 - a. *EKTM v ECC* [2021] eKLR
 - b. *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & Another* (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment)

Analysis and Determination

16. Having considered the Notice of Motion filed herein along with Affidavits and rival submissions filed, authorities cited and relevant law the issue for determination is whether the interim orders for injunction sought can issue
17. It is common ground that the Parties marriage has since been dissolved and decree nisi issued by Court. The fact of marriage is not disputed by the Respondent. He only denied that the Applicant contributed to the acquisition of the property under dispute. Section 6 (1) of the *Matrimonial Property Act* gives the meaning of matrimonial property as 'the matrimonial home or homes; household goods and effects in the matrimonial home or homes or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.'
18. While I find that the totality of proof that the properties listed in this Notice of Motion and what each party contributed is yet to be presented before this court, I cannot fail to appreciate that the Applicant and the Respondent were married and lived as a couple from 2006 until the dissolution of their marriage.
19. Having so stated I would find that the parties herein acquired rights that will be determined at the hearing of the Originating Summons and that those rights must be protected.
20. The law under order 40 (1) of the *Civil Procedure Rules* provides as follows on the issue of when temporary injunctions can be granted:

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; or
- (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.



21. In this matter the Applicant has set out the grounds upon which she seeks for injunction in her application. She states that the enumerated were acquired during the pendency of the marriage. Owing to the souring of the relationship the Respondent has denied her access to those properties.
22. Further she contends that by diverting the rental income the Respondent has denied her access and benefit from properties that were acquired through their joint efforts during the pendency of the marriage. She avers that unless the orders are granted, she and the children of the marriage will suffer grave and irreparable prejudice.
23. The Respondent has challenged the Applicant's entitlement to the properties and has prayed that no injunctive orders should be issued against properties that are not jointly owned.
24. The principles to guide the Court in the grant of injunctive relief are set out in the landmark case of *Giella v Cassman Brown & Co. Ltd* (1973) EA 358 as

“A party shall present evidence to establish a prima facie case with probability of success. The party shall demonstrate that if the act or omission is not enjoined, the aggrieved party shall suffer irreparable loss, damage or injury. The court where in doubt may grant an injunctive relief on a balance of convenience.”
25. In *Nguruman Limited v Jan Bonde Nielson* [2014] eKLR the Court of Appeal stated further that the 3 conditions and stages are to be applied as separate and distinct hurdles which an applicant must surmount sequentially to qualify for an award of an order of interlocutory injunction.
26. On the establishment of Prima facie case in *SJM v MK* [2020] eKLR the court stated that:

“The Court's first task is to determine if the Plaintiff has established a prima facie case with a probability of success once the full case is ventilated. I must be careful to reiterate that this first Giella factor does not suggest that the Applicant must establish with certainty that she will succeed on the merits; only that she raises an arguable case with a probability of success (see, for example, *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125).”
27. In the above cited case of *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (*supra*) the court was categorical that at this stage of the proceedings, the court must not examine the merits of the case closely. The court stated that: -

“... We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or it's threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the rights which he alleges.”
28. In the instant case, it is not in dispute that the parties were married and that the properties were acquired and or developed during the pendency of the marriage. I am satisfied with her argument at this stage. It is my finding that the Applicant has established a prima facie case with a probability of success.
29. I observe that at the time of making this Application, the Applicant was not in occupation of the home at Daykio Plantations Limited LR Number [particulars withheld] .



30. On the second test, this court should consider whether the Applicant will suffer irreparable injury, which would not be adequately compensated by an award of damages. The Applicant has submitted that the Respondent has blocked access to some assets and specifically the matrimonial home, has diverted rental income from a joint account and that she is fearful he may dispose of the properties without seeking her concurrence, especially those registered in his sole name.
31. I find that the Respondent has already demonstrated that he is capable of taking unilateral decisions involving the property in question and that given the fact that he is adamant that the Applicant did not contribute to the acquisition and/ or development there is a possibility he may proceed to do so.
32. I am satisfied that the Applicant may suffer irreparable injury if this happens, and she would not be adequately compensated by an award of damages.
33. Given that I am persuaded that the Applicant has met the first 2 tests, I do not need to resort to the 3rd test, re- the balance of convenience.
34. Having found that the Notice of Motion dated 27th February 2023 is meritorious; I grant the following specific orders:
 1. That the Defendant whether by himself, his servants, agents, employees and/ or by whomsoever is restrained from alienating, transferring, selling, giving in exchange, mortgaging and or otherwise encumbering or in any other manner whatsoever disposing of or dealing in any of the properties enumerated in prayer 4 of the Notice of Motion without the plaintiff's express and / or written consent pending the hearing and determination of the Originating Summons.
 2. That the rental payments and/or income from properties enumerated in prayer 7 of the Notice of Motion revert back to the initial Bank accounts that is Account numbers [particulars withheld] and [particulars withheld] jointly owned and held by the parties at Equity Bank pending the hearing and determination of the Originating Summons.
 3. That consent of both parties will be required for transfer/ withdrawal of any amounts from the aforesaid Account numbers [particulars withheld] and [particulars withheld] jointly owned and held by the parties at Equity Bank pending the hearing and determination of the Originating Summons provided that no party shall be entitled to more than 50 % of the share of the monies held in the account after expenses related to running the Account are paid out.
 4. That to effect order 3 above, both parties to sign the necessary documentation with the bank to effect the change in bank mandate and communicate these instructions to the tenants of the subject properties within 7 days of this order
 5. For purposes of effecting order 3 above the Applicant shall be entitled to access her 50 per cent share once every month effective 5th October 2023 and every 5th day of each successive month pending the hearing and determination of the Originating Summons.
 6. Matter to be mentioned on 17th October 2023 to confirm compliance
 7. That this being a family dispute, I order that each party bears its own costs in respect of this Application.

DATED, SIGNED AND DELIVERED THIS 22ND DAY OF SEPTEMBER 2023.

P M NYAUNDI

JUDGE



In the presence:

Wachira Kibnya for the Defendant

Ndege for the Applicant

