



**ZNG v PWG (Matrimonial Cause E002 of 2023)
[2023] KEHC 22578 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22578 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE E002 OF 2023
HM NYAGA, J
SEPTEMBER 25, 2023**

BETWEEN

ZNG PETITIONER

AND

PWG RESPONDENT

RULING

1. This is the Notice of Motion dated 20th January, 2023. It is brought under Order 40(1) and Order 51(1) of the Civil Procedure Rules, Sections 1A & 3A of the Civil Procedure Act, Sections 8,12,and 13 of the Protection against Domestic Violence Act and Sections 6,7,12(3) and 17 of the Matrimonial Property Act.
2. It seeks orders;
 1. Spent
 2. Spent
 3. Spent
 4. That a restraining order do issue directed at the Respondent to cease from harassing ,interfering with, evicting or in any manner whatsoever frustrating the quiet use and occupation of the Applicant of the suit parcels of land pending hearing and determination of this application interpartes and the main suit.
 5. That an order do issue reinstating the Applicant to her matrimonial home situate on the parcel of land known as Nakuru Municipality Block xxxx as well as on her business premises on the property known as Nakuru Municipality



Block xxxx pending hearing and determination of this application and main suit.

6. That costs of this Application be provided for.
3. The Application is premised on the grounds on its face and supported by an affidavit of ZNG sworn on 20th January, 2023.
4. She averred that she got married to the Respondent in the year 1992 and since then they lived peacefully and harmoniously as husband and wife, gotten children and acquired property.
5. She deponed that at the time of marriage neither the respondent nor herself had acquired any property and the suit properties herein were jointly acquired in the course of coverture.
6. She stated that they acquired the suit property known as Nakuru Municipality Block xxxx around the year 2006 in which they constructed their business premises and rental units and Nakuru Municipality Block xxxx on which the matrimonial property sits on from the proceeds of furniture workshop that they started in the year 1995.
7. She averred that they purchased the property known as Nakuru Municipality Block xxxx from one Gideon Gatei Mwangi and on agreement between them the same was registered in her name in the year 2011 and a title deed to that effect issued. However, in the year 2015, the respondent transferred the same to his name without her consent and her attempts to procure a certificate of search or an explanation from the lands registry has proved futile.
8. She stated that on the strength of the new title deed the respondent advertised and procured a buyer for the property known as Nakuru Municipality Block xxxx and by use of force and threats, kicked her out of her furniture workshop which she run on this property and also issued vacation notices to other tenants on the suit property.
9. She deposed that all the tenants save for one have vacated the rental units and she has thus been left economically challenged as the business premise was her only source of income that she relied on for the sustenance of her family and for her economic benefit.
10. She further averred that the respondent has kicked her out of the matrimonial home which is the only home she and her children have and they are now reliant on well-wishing relatives for accommodation and upkeep.
11. She deponed that she has reported the above issues to the chief who advised her to file the instant suit.
12. She is apprehensive that unless the respondent is barred by this Honourable Court, he will use his financial means to ensure she is totally locked out of her matrimonial property and business premises and alienate the suit properties to her detriment.
13. The Respondent opposed the application via his replying affidavit sworn on 7th February, 2023. He averred that that the application is bad in law, incompetent and incurably defective and should be struck out with costs to him.
14. He deponed that he is the registered owner of all parcels of land known as Nakuru Municipality Block xxxx (Muguga) measuring approximately 0.101 Hectares and Nakuru Municipality Block xxxx (Muguga) measuring approximately 0.0465 Hectares respectively.
15. That sometimes in the year 2017, he lost most of his documents among them the aforesaid 2 title deeds and he reported the said loss at Kapsoya Police Post under OB xxxx and upon conducting an official search on Nakuru Municipality Block xxxx (Muguga) & Nakuru Municipality Block xxxx



- (Muguga) he found out that the title deeds had fraudulently been issued to the Applicant herein on 18th September, 2017 and 17th June, 2009 respectively.
16. He averred that he had built their matrimonial home on Nakuru Municipality Block xxxx (Muguga) but the Applicant through corrupt means registered it in her name, sold it and has not accounted for the sale proceeds.
 17. He averred that the Applicant stays on Plot No. Nakuru Municipality Block xxxx (site) and nobody has ever evicted her from the said plot.
 18. He disputed that the Applicant had business on Plot no. Nakuru Municipality Block xxxx as claimed and averred that he bought the same from one Gideon Gateri Mwangi on 29th January, 2004 and upon completion of payment had it transferred and registered in his name.
 19. He prayed that the Application be dismissed with costs.
 20. In response to the aforesaid Replying affidavit, the Applicant swore a supplementary affidavit on 18th April, 2023. She averred that in 2017 when the Respondent claims to have lost the alleged documents including the said titles, the parcel of land Nakuru Municipality Block xxxx was already registered in her name in 2011 and the title deed was safely in her custody.
 21. She averred that the respondent is misleading the court as can be noted from his nonfactual account regarding the date which the title deed of the above property was registered in her name.
 22. She averred that they mutually agreed to sell all that property known as Nakuru Municipality Block xxxx (Muguga) and the respondent received the deposit and part of the proceeds from that sale.
 23. She deponed that the Respondent left her and the children living on the property known as Nakuru Municipality Block xxxx and that her matrimonial home has never been anywhere else including property known as Nakuru Municipality Block xxxx as the respondent alleges.
 24. It was her contention that she has never run any business in Eldoret or sold all the furniture and moved back to Nakuru.
 25. She contended that she fully participated in the development of Nakuru Municipality Block xxxx and believes that said property is a matrimonial property jointly owned in equal measure hence unavailable for the respondent to deal with in the manner he chooses without her participation, knowledge or consent.
 26. She prayed that this court does exercise its discretionary powers to order and direct investigations to be conducted in relation to the irregular cancellation, transfer and registration of Title deed dated 6th February, 2015 relating to Block xxxx and to declare the same a matrimonial property jointly owned in equal measure between the parties herein and to be jointly dealt with in a manner mutually agreed upon in the interest of justice and in all fairness.
 27. The Applications was canvassed by way of written submissions. Only the Applicant's submissions are on record.

Applicant's Submissions

28. It is the Applicant's submissions that she has established a prima facie case with high chances of success for reasons that:-The properties in issue were acquired during the subsistence of marriage hence a presumption that they are matrimonial property as provided for under Rule 14 of the Matrimonial Property Rules;It is indisputable that matrimonial home sits on the parcel of land known as Nakuru



Municipality Block xxxx and that she lives on the said property. In this regard provisions of Section 12(3) of the Matrimonial property was invoked and this court asked to reinstate the applicant into her matrimonial home and bar the respondent from interfering in terms of prayer no.4It is undisputable that there is a family business on Nakuru Municipality Block xxxx and that it was acquired during the subsistence of the marriage and as such her consent is mandatory before any sale of the property as provided for under Section 7(1) if the [Matrimonial Property Act](#)

29. The applicant contended that she will suffer irreparably if this application is disallowed since she is on the verge of losing a home and business that cannot be indemnified by an award of damages whereas the Respondent will not suffer any prejudice if the application was allowed since he admitted she lives there and there is a family business and will have his case heard and an award of damages made on merit.
30. The applicant asserted that it is necessary to preserve the properties pending the determination of the suit lest the very object of the suit is defeated and judgement rendered nugatory.

Analysis & Determination

31. I have read the application, affidavit in support of the application, replying affidavit, supplementary affidavit and their accompanying annexures. I have also considered the submissions on record. The issues for determination are;
 - i. Whether the Plaintiff/Applicant's case has satisfied the conditions for grant of temporary injunctions.
 - ii. Who should bear costs?
32. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of [Nguruman Limited vs Jan Bonde Nielsen & 2 others](#) CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.
33. Consequently, the Plaintiff ought to, first, establish a prima facie case.
34. The Court of Appeal gave a determination on a prima facie case in [Mrao Ltd vs First American Bank of Kenya Ltd](#) (2003) eKLR. The court stated that:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”



35. Section 12 of the *Matrimonial Property Act* No. 49 of 2013 is in the following terms:

- “ 12. An estate or interest in any matrimonial property shall not, during the
- (1) 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.
 - (2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution / or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.
 - (3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.
 - (4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except —
 - (a) on the sale of any estate or interest in the matrimonial home in execution of a decree;
 - (b) by a trustee in bankruptcy; or
 - (c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.
 - (5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.”

36. Section 2 of the Act defines matrimonial home as follows:

“Matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”

37. It is undisputed that the matrimonial property sits on parcel of land known as Nakuru Municipality Block xxxx and the Applicant and her children live there. The Applicant contended that the Respondent has since kicked her out of the Matrimonial property together with their children. The Respondent disputed this position. In support of her contention the Applicant attached a letter by a chief dated 18.1.2023 confirming that the respondent has removed her and her children from the matrimonial home.

38. The Applicant also contended that the property known as Nakuru Municipality Block xxxx was acquired during the subsistence of marriage and therefore it is a matrimonial property jointly owned in equal measure. She averred that the business premises and rental premises were developed on this property and that similarly the respondent has removed her from this property and issued vacation notices to the tenants who have since vacated the rental units. She also averred that the title to the said property was initially registered in her name in 2011 but the respondent under unclear circumstances and without her consent caused the same to be registered in his name and on the strength of the new title advertised and procured a purchaser of the property.



39. The Applicant has not attached any documentary proof that would enable this court ascertain that the tenants have been kicked out of the aforementioned property and that the Respondent is in the process of disposing off that property. However, the respondent did not dispute these assertions. The respondent did not also controvert the Applicant's averment that the properties in issue were acquired during the subsistence of the marriage. According to him he is the registered owner of a parcel of land known as Nakuru Municipality Block xxxx. He has attached title deed proving ownership. The issue of ownership and how each party acquired the suit land will be determined at the trial where each will present their evidence.
40. In light of the above, I consider that the Applicant has a strong prima facie case in the provisions of section 12 (1), (3) & (4) of the *Matrimonial Property Act* No. 49 of 2013.
41. Secondly, the Applicant has to demonstrate that irreparable injury will be occasioned to her if an order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;
- “Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.
42. The Applicant submitted that she is on the verge of losing a home and business which cannot be indemnified by an award of damages. It is clear that the loss of a home is not a matter for compensation by damages as observed by Platt JA in *Mbuthia vs Jimba Credit Finance Corporation & Anor.* (1988) KLR. It is usual to grant injunctions in land cases.
43. Thirdly, the Applicant has to demonstrate that the balance of convenience tilts in her favour. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR which defined the concept of balance of convenience as:
- “The meaning of balance of convenience will 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 the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
- In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.
44. In the case of *Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus:-
- “Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on



the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

45. The decision of *Amir Suleiman vs Amboseli Resort Limited* [2004] eKLR where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

46. In *Mbuthia vs Jimba Credit Finance Corporation*, supra, the Court in deciding interlocutory applications does not finally decide disputed facts upon affidavits. It rather weighs the respective merits of the parties’ cases and leaves the final determination of the matter to the full trial.

47. In this matter, the balance of convenience lies with the Applicant who has been removed from her matrimonial home where she lived with her two children.

48. The balance of convenience also lies with the Applicant as she has demonstrated that the Nakuru Municipality Block xxxx is in a danger of being wasted, damaged or alienated by the Respondent.

49. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits.

50. In *Robert Mugo Wa Karanja vs Ecobank (Kenya) Limited & Another* [2019] eKLR the court in deciding on an injunction application stated;

“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...”

51. I am convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Applicant.

52. In view of the foregoing, I find that the Applicant has met the criteria for grant of orders of temporary injunction.

53. Consequently, I make the following order:

1. That pending the hearing and determination of this suit, an order of temporary injunction be and is hereby issued restraining the Respondent by himself, his servants, agents, proxies and/or persons exercising authority from him from evicting, selling and/or in any other manner interfering with the Applicant’s quiet use, occupation and possession of all those parcels of land known as Nakuru Municipality Block xxxx.
2. That pending the hearing and determination of this suit, an order of temporary injunction be and is hereby issued restraining the Respondent by himself, his servants, agents, proxies and/



or persons exercising authority from him from selling and/or in any other manner interfering with the parcel of land known as Nakuru Municipality Block xxxx.

3. The costs of the application do abide the outcome of the main suit.

54. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF SEPTEMBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Mr. Ombese for Oumo for respondent

N/A for applicant

