



**IKO v JON (Matrimonial Cause E088 of 2022)
[2023] KEHC 24354 (KLR) (Family) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E088 OF 2022
MA ODERO, J
OCTOBER 19, 2023
IN THE MATTER OF MATRIMONIAL PROPERTY ACT NO. 49 OF 2013 LAWS OF KENYA**

BETWEEN

IKO PLAINTIFF

AND

JON DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion dated 16th December 2022 by which the Applicant IKO seeks the following orders:-
 - “1. Spent.
 2. Spent
 3. That this Honourable Court be pleased to issue interim order for injunction restraining the Respondent from selling, leasing, mortgaging, charging, transferring suit property known as Kajiado/Kaputei North/xxxx measuring approximately 0.0465 Ha, pending the hearing ad determination of this suit.
 4. That the costs of this application be in the cause provided for.”
2. The Application was premised upon Article 159 of *the Constitution* of Kenya, Order 40 Rules 1 and 2, Order 1 Rule 1 of the Civil Procedure Rules, 2010, Section 3A of the *Civil Procedure Act* and Section 12 (3) of the Matrimonial Properties Act 2013 and was supported by the Affidavit of even date and Supplementary Affidavit dated 10th March 2023 both sworn by the Applicant.



3. The Respondent JON opposed the application through the Replying Affidavit dated 4th April 2023 and the Reply to the Supplementary (undated).
4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 15th March 2022 whilst the Respondent relied upon his written submissions dated 4th April 2023.

Background

5. The parties herein got married to each other on 11th December 2010. The Applicant avers that due to irreconcilable differences she left the matrimonial home in May 2015. The marriage between the parties was later dissolved vide Divorce Cause No. 1026 of 2019. The Applicant then filed in the High Court the Originating Summons dated 16th December 2022 seeking division of Matrimonial Property.
6. The Applicant states that during the subsistence of their marriage the couple jointly acquired the property known as LR Kajiado/ Kaputei North/xxxx (hereinafter the 'suit property') which property is registered in their joint names. That the couple completed construction and development of their matrimonial home on the suit property in May 2015.
7. The Applicant states that the Respondent has retained possession of the suit property and has exclusive enjoyment of the same.
8. The Applicant states that she made both financial and non-financial contribution towards the acquisition and development of the said matrimonial home. She is apprehensive that the Respondent may move to sell, transfer and/or otherwise dispose of the suit property before the suit is determined. As such the Applicant seeks interlocutory orders to preserve the said property pending hearing and determination of her suit.
9. The Respondent concedes that he owns the suit property jointly with the Applicant. According to the Respondent the Applicant did not make any contribution towards the purchase and/or development of the suit property. That he completed construction of the home after the Applicant had moved out.
10. The Respondent states that in any event he has no intention of disposing the suit property. He prays that the instant application be dismissed entirely.

Analysis and Determination

11. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by the parties. The Applicant is seeking interim interlocutory injunction to preserve the suit property pending the hearing and determination of the summons dated 16th December 2022. The law regarding the issuance of interlocutory injunction is found in Order 40 Rule 1 of the Civil Procedure Rules which provides as follows:-

“Where in any suit it is proved by Affidavit 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;
- 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 order”.

12. The grounds upon which an injunction may be granted were set out in the case of *Giella vs Casman Brown* (1973) EA as follows:-

“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”.

13. The definition of a prima facies case was given in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* (2003) eKLR as follows:-

“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 been 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. This is clearly a standard, which is higher than an arguable case”.

14. At this stage the court is not required to make conclusive findings on the matters in issue. All that the court is required to do is to determine whether there exists a ‘prima facie’ case warranting issuance of the interlocutory orders. In *Silvester Momanyi Maribe -vs- Guizar Ahmed Motari & Another* (2012) eKLR Hon. Justice Odunga (as he then was) stated as follows:-

“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of act or law. Most certainly not on the basis of contradictory Affidavit evidence or disputed propositions of law and that in an application for injunction although the court cannot find conclusively who is to be believed or not, the court is not excluded from expressing a prima facie view of the matter and the court is entitled to consider what else the deponent to the supporting Affidavits has stated on oath which is not true”.

15. It is common ground that the parties herein were a married couple whose union has since been dissolved by a court of law. The Applicant’s case is hinged on her claim that the property in question constitutes ‘matrimonial property’ and that she contributed towards the acquisition and/or development of the same.

16. On his part the Respondent denies that the said property constitutes matrimonial property and further denies that the Applicant made any contribution towards the acquisition and/or development of the same.

17. Section 6 of the *Matrimonial Property Act* 2013 defined matrimonial property as follows:-

“6(1) For purposes of this Act Matrimonial Property means –

- a. The matrimonial home or homes.
- b. Household goods and effects in the matrimonial home or homes; or



- c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage”. [own emphasis]
18. The court cannot at this interlocutory stage make a determination as to whether the property in question constitute matrimonial property. Such determination will have to await the hearing of the main suit at which the parties will be entitled to adduce evidence in support of their respective positions.
19. All that the court needs to determine at this interlocutory stage is whether the Applicant has established a prima facie case to warrant the orders being sought. The property in question is registered in the joint names of the Applicant and Respondent and was acquired during the subsistence of the marriage between the parties. It is therefore, not outside the realm of possibility that the Applicant may have contributed directly or indirectly toward the acquisition of said properties. The extent if any of the Applicant’s contribution is a matter which is yet to be determined. I find that a prima facie case has been established.
20. The Applicant pleads that she is likely to suffer irreparable harm if the orders sought are not given as the Respondent is likely to dispose the suit properties unless he is restrained by the court.
21. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] eKLR the court in discussing irreparable harm stated as follows:-
- “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.”
22. Certainly the disposal of the suit property means that the substratum of the Applicants suit would no longer exist, rendering her suit no longer tenable. Moreover the sentimental value of a matrimonial home cannot be quantified in monetary terms.
23. I am satisfied that the Applicant is likely to suffer irreparable harm if the Suit property in question is disposed before this suit is determined.
24. Finally, the court is required to consider the balance of convenience.
- In the case of Pius Kipchirchir Kogo [supra] the court went on to define balance of convenience in the following terms:-
- “The meaning of balance of convenience tilts favour of the Plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the Plaintiff’s, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendant’s 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 Plaintiff’s to show that the inconvenience cause to them be greater than that which may be caused to the Defendant’s inconvenience be equal, it is the Plaintiff who suffer”.
25. In my view the balance of convenience tilts in favour of the Applicant.
26. In conclusion I am satisfied that this application has merit and I therefore, make the following orders:-



(1) 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, mortgaging, charging, transferring the suit property known as Kajiado/ Kaputei North/xxxx measuring approximately 0.0465 Ha.

(2) Each party will meet their own costs for this application.

DATED IN NAIROBI THIS 19TH DAY OF OCTOBER, 2023.

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MAUREEN A. ODERO

JUDGE

