



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL SUIT NO. E002 OF 2021(OS)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF SECTION 2, 6, 7, 9, 10, 12,

14 & 17 OF THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

BETWEEN

CWM.....APPLICANT

VERSUS

GMN.....RESPONDENT

RULING

1. Before this court is a notice of motion dated 16.09.2021 in which the applicant has sought the following orders inter alia:

1. Pending the hearing and determination of the application and the originating summons filed herein, the respondent be restrained by way of a temporary injunction whether by himself, his agents, servants, and/or employees or any persons claiming under him or otherwise howsoever from alienating, disposing, selling, encumbering, assigning, transferring or in whichever way and manner dealing and/or interfering with all those properties known as:

- a. Title Number: Ngandori/Kirigi/xxxxx measuring 0.23Ha.
- b. Title Number: Ngandori/Kirigi/xxxxxx measuring 0.05Ha.
- c. Title Number: Ngandori/Kirigi/xxxxx measuring 0.05Ha.
- d. Title Number: Ngandori/Kirigi/xxxx measuring 0.05Ha.
- e. Title Number: Ngandori/Kirigi/xxxx measuring 0.041Ha.
- f. Title Number: Gaturi/Weru/xxxx measuring 0.10Ha.
- g. Title No. Gichugu/Settlement/Scheme/xxxx measuring 0.10Ha.
- h. Title No. Gichugu/Settlement/Scheme/xxxx measuring 0.20Ha.
- i. Subdivision No. xxxx (Original No. xx/xx) Section 1 Mainland North (CR xxxxx)
- j. Subdivision No. xxxx (Original No. xx/xx) Section 1 Mainland North (CR, xxxxx).
- k. Motor Vehicle Registration No. KBW xxxxx, (Toyota Prado).

1. Motor Vehicle Registration No. KCW xxxx, (Toyota Crown).

3. That orders do issue compelling the respondent to submit and file all business proceeds records for the business previously known as [Particulars Withheld] Chemist and now [Particulars Withheld] Chemist Ltd within Embu Town, rent proceeds records and bank statements of the respondent and any documents pertaining to the above properties for accounting clarification and transparency.

3. That this Honourable court be pleased to order the respondent to release Motor Vehicle Registration No. KBW xxxx to the applicant for her own use pending the hearing and determination of the suit.

4. That pending the hearing and determination of the application and the instant suit, there be a stay of the proceedings in Embu Chief Magistrate's Court MC ELC Suit No. 95 OF 2019, GMN Vs CWM.

5. That costs of this application be provided for.

2. The applicant's case is that she is married to the respondent and they are blessed with three children. That they began a pharmacy business together and out of the proceeds realized from the business, they managed to acquire a number of properties which she contends, is matrimonial property and should thus be shared equally since she contributed to its acquisition. The list of those properties is set out on the body of the application.

3. The respondent via replying affidavit dated 13.10.2021 and grounds of opposition dated 1.10.2021, opposed all the averments in the notice of motion arguing that the application violates his rights as enshrined in Article 31 and 40 of the Constitution and further that the application is *sub judice* as there is a pending matter being Embu MC ELC No. 95 of 2019. It was his case that the properties listed thereon do not form part of matrimonial property as alleged by the applicant.

4. It is the respondent's case that, to the contrary, he has no plan to dispose any of the alleged matrimonial property and that [Particulars Withheld] chemist being a limited liability company cannot be said to form matrimonial property. That it follows that the assets of the company including bank statement and bank accounts cannot form part of proceedings in a matrimonial cause. It is his case that other properties have huge loans which he is struggling to pay and that the residential property comprised of Gichugu/Settlement/xxxx was funded through bank loans and the same is yet to be paid and there remains a balance of Kshs.20,000,000/=; that when the bank mortgage financed its development, it had already established that it was not a matrimonial property and hence no spousal consent was needed.

5. He further depones that a blanket injunction on all his assets will render him destitute because he will not be able to service his loans. It is his case that he bought motor vehicle KCW xxxx on 28.10.2019 when the applicant had long gone and in any case, he sold the motor vehicle to a 3rd party. Further that, the respondent's current wife, one MNW whom he married since the year 2014 has equally contributed to the acquisition of the alleged matrimonial property and as such, prays that she be enjoined in the proceedings. That this application is akin to infringing his right to own property and right to privacy as enshrined in the constitution.

6. The parties consented to have the application dispensed with by way of written submissions.

7. The applicant submitted that in regard to the prayers sought in the notice of motion, she has satisfied the principles laid down in the case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358** where according to her, she has demonstrated how together with the respondent, they were able to acquire the properties listed on ground 4 on the face of the Motion. She relied on the case of **CKS v JSHS & Another [2019] eKLR**. Further, that contribution is considered as both monetary and non-monetary and as a result, the property forming the matrimonial property is clearly to be regarded as belonging to the parties herein.

8. On irreparable harm, it was submitted that the applicant has also demonstrated that the respondent has transferred one of the matrimonial properties by including the names of one MW and JN in Title No. Gichugu/ Settlement/Scheme/xxxx as registered proprietors of the land in an attempt to defeat the applicant as the respondent's spouse as required by the law. According to the applicant, this action by the respondent was an attempt to defeat the applicant's interest in the suit properties which can only be safeguarded by way of injunctive orders. This is so since the applicant would not be compensated by way of damages as the suit shall have been rendered nugatory by the actions of the respondent disposing off the properties. Reliance was made on the case **Olympic Sports House Limited v School Equipment Centered Limited [2012] eKLR** where the court was of the view thata party cannot be compelled to take damages in lieu of his crystallized right which can be protected by an order of injunction.

9. On the balance of convenience, the applicant was of the view that the respondent being the registered owner of the properties, he could easily dispose them at his own will if no injunctive orders are granted as such shall be to the disadvantage of the applicant herein. Reliance was made on the case of **CWW v PWM [2020] eKLR** where the court was of the view that *....the respondent has not filed an affidavit to challenge the applicants arguments...there is need to preserve the property listed by the applicant pending hearing and determination of this matter...As such, it is her prayer that the application be allowed.*

10. The respondent submitted that the application lacks merit and should be dismissed with costs. That all the properties in prayer 3 save for K and L have existing cautions registered on them and that is why the respondent filed Embu MC ELC No. 95 of 2019 which has already been stayed by consent of the parties herein. He deponed that he bought motor vehicle KBW xxxx after selling his Equity Bank Shares that he had bought during Equity Bank initial share offer, years before he met the applicant. Further, that motor vehicle KCW xxxx was bought and sold long after the applicant had left the marriage and so she has not contributed towards the same. That the applicant's share in the said company is specific and in regard to the Articles of Association of the company, her shareholding is 10% and as such, her remedy is specific. It is his prayer that the application be dismissed with costs and further that leave be granted to enjoin the other two wives in these proceedings for the purpose of reaching a proper determination.

11. I have considered the application herein, the respondent's replying affidavit and the parties' submissions. The central issue for

consideration is whether **the applicant has presented sufficient reasons to warrant a grant of conservatory order of injunction pending the hearing and determination of the originating summons.**

12. The law regarding grant of interlocutory injunctions is found in **Order 40 Rule 1 of the Civil Procedure Rules** which provide as follows:

“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;

(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.”

13. **The applicant herein is seeking for orders of temporary injunction. The conditions for the grant of interim injunctions is well settled in the case of Giella v Cassman Brown & Co. Ltd (1973) E.A 358 where it was held that: -**

“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.”

14. The Applicant has alleged that during the course of their marriage the couple jointly acquired various properties. She has annexed copies of the ownership documents for said properties **all** of which are registered in the names of the Respondent. The Applicant claims a **50% share** of the said properties on the basis that the same were acquired through the **joint** efforts of the Respondent and herself.

15. Order 40, Civil Procedure Act gives the court discretion to issue orders which are in the nature of an injunction restraining dealings on land pending further orders by the court. The provision was designed to preserve property from acts that would otherwise render a court order incapable of being executed and to preserve the suit property from being wasted pending hearing and determination of a suit.

16. The court is at this stage required to satisfy itself that there is a prima facie case established.

In Silvester Momanyi Marube –Vs- Guizar Ahmed Motari & Another (2012) eKLR, Odunga J. held that: -

“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 fact 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 affidavit has stated on oath which is not true.”

17. Further, at this stage this Court is not required to determine the merits of the applicants claim over the said properties. All that the Court is required to determine is whether a prima facie case has been established. The applicant has complained that the respondent has transferred one of the matrimonial properties by including the names of one MW and JN in Title No. GICHUGU/SETTLEMENT/ SCHEME/xxxx as registered proprietors of the land in an attempt to defeat interest of the applicant as the respondent’s spouse; further, that the matrimonial home is already mortgaged without the consent of the applicant herein.

18. **Section 2 of the Matrimonial Causes 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.”

19. Further in **Section 6 of the Matrimonial Act** the meaning of ‘**matrimonial home**’ is given as:-

a. The matrimonial home or homes;

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

c. Or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

20. Although the suit properties registered in the names of the respondent, the applicant has pleaded that the respondent holds them in trust for her and their children, and that she has substantially contributed towards the acquisition of the same.

21. In regard to whether injury caused would be irreparable, in the case of Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR the court 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. In the instant case, the applicant is apprehensive that the respondent is likely to dispose off the matrimonial home that is registered in his own name and that they jointly bought it using their own money a fact that has been vehemently denied by the respondent in his replying affidavit and submissions.

23. In the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai [2018] eKLR (supra)**, the court defined the concept of balance of convenience as follows:

‘The meaning of balance of convenience tilts favor 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 plaintiff’s’ to show that the inconvenience caused to them be greater than that which may be caused to the defendant’s inconvenience be equal, it is the plaintiff who suffer.

24. 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.

25. As regards the third condition, it is clear that the properties are registered in the name of the respondent. The applicant has laid a stake on them by virtue of her having contributed to their acquisition. The balance of convenience tilts in her favour.

i. The upshot of the above is that pending the hearing and determination of this suit, an interim order of injunction is hereby issued restraining the respondent, his agents, servants, and/or employees or any persons claiming under him or otherwise howsoever from alienating, disposing, selling, encumbering, assigning, transferring or in whichever way and manner dealing and/or interfering with all those properties listed in prayers (2) and (3) of the application.

ii. Prayers (4) and (5) are hereby granted.

iii. The suit be prosecuted within 120 days from today failing which the injunctive orders shall lapse.

iv. The costs shall abide the outcome of the suit.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF FEBRUARY, 2022

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent