



**EMN v JMN & another (Civil Case E002 of 2022)  
[2024] KEHC 14619 (KLR) (18 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14619 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL CASE E002 OF 2022**

**MW MUIGAI, J**

**NOVEMBER 18, 2024**

**N THE MATTER OF THE MATRIMONIAL PROPERTY ACT,2013**

**AND**

**IN THE MATTER OF SECTIONS 2,6,7,12,14 & 17  
OF THE MATRIMONIAL PROPERTY ACT,2013**

**BETWEEN**

**EMN ..... APPLICANT**

**AND**

**JMN ..... 1<sup>ST</sup> RESPONDENT**

**MU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Notice of Motion**

1. Vide an application dated 18.02.2022 under Article 40 of the Constitution of Kenya 2010, Section 2,6,7,9 & 17 of the Matrimonial Property Act, Section 93 of the Land Registration Act, Section 1A,1B and 3A of the Civil Procedure Act and Order 40 of the Civil Procedure Rules, the Applicant seeks the following orders;
  - a. Spent
  - b. Spent
  - c. That in the interim and pending of the hearing and determination of this suit, this Honourable Court be pleased to issue an order prohibiting/restraining the respondents either jointly or severally, their agents, employees, servants, accomplices and any other person from fencing, selling, leasing, mortgaging, charging, transferring and or in any manner interfering with



the land title number Donyo Sabuk/ Komarock Block 1/3776, 3777, 3778, 3780, 3781, 3782,3783,3789,3790,3791 or any other matrimonial property of the applicant.

- d. That cost of the application be awarded to the applicant
  - e. That this Honourable Court be pleased to issue any order it deems just and fair in the circumstances.
2. The Application is supported by the Affidavit of Erick Mutinda Ndaka who stated that he got married to the 1<sup>st</sup> Respondent in 1978 under Kamba Customary law and he purchased property reference numbers Donyo Sabuk/komarock Block 1/3776, 3777, 3778, 3780, 3781, 3782,3783,3789,3790,3791 and Land Reference Number 20913284/20 in Nairobi South B.
  3. He alleged that the Respondent's father, one George Uku initially fraudulently caused the whole parcel of land to be registered in the name of the 1<sup>st</sup> Respondent as he was the chairman of the Komarock Housing Co-operative Society but after his intervention, the same was rectified as captured in the letter he annexed to the application. In 1995, the registration was changed into their joint names and they immigrated to the USA after securing job opportunities.
  4. He stated that they lived happily until December 2021 when the 1<sup>st</sup> Respondent flew back to Kenya and before her departure, he overheard the wife speaking to her brother, the 2<sup>nd</sup> Respondent of their intention to fence, subdivide and put on sale his matrimonial properties without his knowledge and he immediately instructed his advocates to put a restriction on the property.
  5. He contended that on or about January 2022, he received a call from his friend Muindi Mbingu whom he had told to be watching over the land who informed that a permanent fence had been erected around his piece of land by the 2<sup>nd</sup> Respondent together with the land belonging to their sister, Lily Uku as if the same were under the same title with the intention of sub dividing and selling the said properties as one block.
  6. He stated that he called the 1<sup>st</sup> Respondent to confirm the activities but she yelled at him uncontrollably and told him that he had no share in the property. Further, the 1<sup>st</sup> Respondent has refused to talk to him ever since and that is why he sought the orders to protect his rights.
  7. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent were served with the Application as seen in the affidavit of service filed on 7.03.2022 but have not responded to it.
  8. The Application was disposed of by way of written submissions and at the time of writing this ruling, only the Applicant's submissions were on record.

### **Applicant Submissions**

9. The Applicant filed submissions dated 13.09.2024 and submitted that the subject properties of the suit were acquired and registered in the joint names of the couple during the subsistence of their marriage and ought to be categorized as matrimonial property for their joint use ad disposal in equal measure and subject to the contribution of each spouse in acquiring and maintaining the same.
10. It was submitted that the Respondents attempts to dispose the property without the consent of the Applicant contravenes section 12 of the *Matrimonial Property Act* which provides that matrimonial property cannot be sold, leased or mortgaged without consent of both spouses.
11. Third, it was submitted that the conditions established in the case of *Giella v Cassman Brown & company Limited* [1973] EA 358. It was contended that a prima facie case had been established as it was not disputed that the properties in question were matrimonial property. In addition, that failure



to issue the orders sought would lead to irreparable loss on his part which was not capable of being compensated by damages. Lastly, it was submitted that the balance of convenience tilts in favour of the Applicant.

12. The Applicant prayed that he be awarded the costs of the suit as they follow the event.
13. The Applicant relied on the cases of *Mrao Limited v First American Bank of Kenya Limited & 2 other* [2003] eKLR, *Kenya Commercial Finance Co Limited v Afraba Education society* [2001] Vol 1 EA 86, *J.M. Gichanga v Co-operative Bank of Kenya, MD v SL* [2017] eKLR.

#### Determination

14. I have considered the Notice of Motion, the supporting affidavit, affidavit of service and the submissions on record and find that the issue for determination is whether the Applicant is entitled to the orders sought. The Court record confirms despite service the Respondent did not file pleadings and/or Written Submissions and the application is unopposed.
15. Section 6 (1) of *Matrimonial Property Act* defines matrimonial property as follows;

“Matrimonial home, household goods and effects in the matrimonial home, any movable or immovable property jointly owned and acquired during the subsistence of the marriage.”
16. The Applicant seeks an order of temporary injunction on the named properties and any other matrimonial property pending the hearing and determination of the suit. The three conditions for grant of such an order were well set out in the leading case of *Giella v Cassman Brown* (1973) EA 358 and later reiterated in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR where it was held *inter alia*, that:

“The conditions for the grant of an interlocutory injunction are now, I think, 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 be normally 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.”
17. As to whether the Applicant has established a prima facie case with a probability of success, this court is guided by the observation of the court in the case of *Mrao Limited v First American Bank of Kenya & 2 Others* [2003] eKLR as follows:

“A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”
18. The Applicant has told the Court that the Respondent has refused to talk to him since December 2021 when his wife left the USA for Kenya. It is not clear whether there is a decree nisi or absolute or even if there is a pending divorce cause before the Court but it is clear that the parties were married and acquired properties together. I therefore find that a prima facie case has been established.



19. As to whether the Plaintiff/Applicant shall suffer irreparable injury should the temporary injunction not be granted I am guided by the holding of the court in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR, where the court observed that,

“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.”

20. The Applicant has argued that the Respondent has erected a fence on his piece of land without his consent. The Applicant also attached photographs which show the fencing as well as land application forms for restrictions to be placed on the properties. This evidence has not been disputed. Section 12 (1) of the *Matrimonial Properties Act* provides as follows;

“(1) An estate or interest in any matrimonial property shall not, during the 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.”

21. The Applicant’s consent is very crucial for all the decisions regarding the properties acquired jointly during the substance of the marriage. I thus find that the second ground has been satisfied by the Applicant and there is need to protect his interest in the properties that bear his name.

22. Article 45 (3) of the *Constitution* provides that Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

23. For the reasons above, I find that the balance of convenience tilts in favour of the Applicant and I am inclined to grant the order sought. I am guided by the case of *Paul Gitonga Wanjau v Gatbuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, where the Court held that,

“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 injury 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 on convenience lies.”

24. I direct that each party bears its own costs.

## **Disposition**

1. Further to Court Orders granted on 10/03/2022 and 22/02/2022, I hereby grant an order prohibiting/restraining the respondents either jointly or severally, their agents, employees, servants, accomplices and any other person from fencing, selling, leasing, mortgaging, charging, transferring and or in any manner interfering with the land title number Donyo Sabuk/komarock Block 1/3776, 3777, 3778,



3780,3781, 3782,3783,3789,3790,3791 or any other matrimonial property of the Applicant pending the hearing and determination of the suit, further Court Orders from this Court and/or dissolution of parties marriage under Section 7 of *Matrimonial Property Act*.

It is so ordered.

**RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 18/11/2024 IN MACHAKOS HIGH COURT (VIRTUAL/ PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

