



**SCM v FBB (Matrimonial Cause E003 of 2023)
[2024] KEHC 14034 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14034 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MATRIMONIAL CAUSE E003 OF 2023
AC BETT, J
NOVEMBER 8, 2024
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY
AND
IN THE MATTER OF MATRIMONIAL PROPERTY ACT, NO. 49 OF 2013, LAWS OF KENYA
AND
IN THE MATTER OF THE MATRIMONIAL PROPERTY RULES, 2022**

BETWEEN

SCM APPLICANT

AND

FBB RESPONDENT

RULING

1. Before me is a Notice of Motion dated 19th August 2024, brought pursuant to Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, Sections 6,7,9,12 and 14 of the *Matrimonial Property Act*, 2013, order 40 Rules 1 and 4, Order 51 Rule 1 of the Civil Procedure Rules 2010, and all other enabling provisions of the law. The Applicant is seeking the following orders: -
 - a) Spent
 - b) Spent
 - c) That pending the hearing and determination of the instant Originating Summons, there be issued an order of temporary injunction restraining the Respondent, his servants, agents or any person acting under his instructions from selling and/or disposing of land parcels number;

South Kabras/Shamberere/xxxx,



Butsotso/Shibeye/xxxx,
Butsotso/Shikoti/xxxxx,
Nairobi Block 82/xxxx/Maisonette No.151 and
Nairobi Block 82/xxxx/ Maisonette No. A10.

- d) That the costs of this application be awarded to the Applicant.
2. The application is premised on grounds (a) to (k) on the face of the application.
 3. The application is supported by a supporting affidavit sworn by the applicant and dated 19th August 2024, and a supplementary affidavit dated 11th September 2024.
 4. The Defendant/Respondent is opposed to the application and in doing so the Defendant/Respondent relies on a Replying affidavit dated 26th August 2024.

Background

5. According to the Applicant herein, she got married to the Respondent herein under Luhya customary law in the year 2009 and their union was blessed with two children. She avers that when she got married to the Respondent, he was a widower with the said previous union having been blessed with two children whom they continued living with as she accepted them as her own children and treated them as such. She further averred that during the subsistence of the said marriage, the Respondent was employed by various international organizations and was assigned to work in various countries. She stated that during the periods the Respondent was out of the country, she took care of the family single handedly while supporting the Respondent and engaged in activities that enabled them to acquire and/or develop various properties.
6. The Applicant averred that some of the suit properties listed herein are jointly owned in equal shares while some are registered solely in the names of the Respondent. She further avers that the said properties were acquired and/or developed together with the Respondent as a team and that she made both direct and indirect financial contributions towards the acquisition and/or development of the said properties. She claims that during the pendency of their marriage, she was employed and earned a salary which equipped her with the resources to contribute to the advancement of development activities. She asserts that apart from childcare and household chores, she used her employment proceeds to support the family needs inclusive of food, household expenses, bills and education needs.
7. The Applicant also avers that the Respondent made her to resign in 2016 to take care of the family since one of their children from his previous marriage had become very sickly due to a chronic ailment he was suffering from. She claims that despite the Respondent being aware of the child's chronic ailment, he failed to reveal the same to her and that she discovered of the ailment on her own which really traumatized her. She also claims that during her employment, all her leave days were spent on construction sites in Kakamega supporting the Respondent with coordination of construction workers, supervision and for quality assurance of the development projects, ascertaining the number of workers on site, searching and purchasing construction materials among other chores on behalf of the Respondent. She further claims that during the pendency of their marriage, she devoted her time and energy running up and down to assist in the procurement of building materials and incidental duties.
8. The Applicant further avers that when she filed the divorce proceedings, the Respondent went ahead without her knowledge to charge a property acquired during the subsistence of their marriage known as Butsotso/Shikoti/xxxxx, which proceeds he used to purchase a property known as Butsotso/



Shikoti/1302. She also avers that while executing the charge documents, the Respondent swore an affidavit that he was unmarried and that he also charged a property acquired during the subsistence of the marriage known as Nairobi Block 82/xxxx/ Maisonette No. A10 without her knowledge. She claims that these actions by the Respondent were malicious and fraudulent with the intention of dispossessing the Applicant of her interests over the said properties.

9. The Applicant vide her supporting affidavit avers that she has learned that the respondent advertised for sale one of the suit properties situated on land parcel number Butso/ Shikoti/xxxxx through KAREPS Agents. She also avers that she is apprehensive that the respondent will sell and/or dispose of other mentioned suit properties pending the hearing and determination of the main suit.
10. In response, the Respondent contends that during the subsistence of his marriage with the Applicant, he provided for all the family needs including paying school fees for the children, buying food, paying the house help, buying clothes for the children and the Applicant, fueling the family vehicle which the Applicant used to run her daily errands and providing a monthly upkeep money. He further contends that he enjoined the Applicant to his bank accounts thus enabling her to sign cheques and transact on his behalf. He claims that the Applicant never assisted or contributed in running the family home. He also claims that he assisted the Applicant in paying her HELB loan of Kshs. 210,000/= and also paid for her master's programme at the University of Nairobi.
11. The Respondent further contends that the Applicant herein did not contribute to the construction and development of the apartments on land parcel number Butso/ Shikoti/xxxxx since he supervised the construction himself during his rest and recuperation and on his leave days as provided by his employer. He claims that he worked with the suppliers and construction workers directly and paid them through bank transfers and direct M-Pesa payments.
12. The Respondent states that land parcel number Butso/ Shikoti/xxxxx is not matrimonial property as it was acquired before he was married to the Applicant. He also states that the developments thereon were made without the contribution of the Applicant. He further claims that he separated with the Applicant on or about the month of November, 2018 when he had not finished the construction of his home on land parcel number Butso/ Shibeye/xxxx thus the Applicant cannot claim the household items since he had not even purchased them.
13. In rejoinder, the Applicant avers that land parcel number Butso/ Shikoti/xxxxx had not been amalgamated from land parcels number Butso/ Shikoti/xxxxx,xxxxx and xxxxx at the time the Respondent married her. She also avers that when the Respondent married her, land parcel number Butso/ Shikoti/xxxxx was not developed and that she came up with the idea of commercializing the said parcel of land. She also avers that in 2017, the Respondent was out of the country on duty and that she personally facilitated the amalgamations of the land parcels number Butso/ Shikoti/xxxxx,xxxxx and xxxxx into the current land parcel number Butso/ Shikoti/xxxxx and paid for the expense of the said exercise.
14. The Respondent in his replying affidavit contends that he does not have any intention of disposing of or selling his properties which he claims are for the benefit of his children. He further contends that he neither has control over third party information posted on social media nor did he give any instructions to KAREPS Agency to dispose of or sell any of the suit properties as alleged by the applicant. The respondent also contends that land parcel number South Kabras/ Shamberere/xxxx and Butso/ Shibeye/xxxx are both jointly registered in the names of the Applicant and himself and thus cannot be disposed of without the express consent of the Applicant. He also avers that land parcel number Butso/ Shikoti/xxxxx has a charge registered in favour of KCB Bank Kenya Limited and thus he cannot dispose of the property without the express consent of the bank and that the Applicant is well



aware of this fact. He further claims that house number Nairobi Block 82/xxxx/ Maisonette No.151 and Nairobi Block 82/xxxx/ Maisonette No. A10 were both acquired through a KCB Bank mortgage facility which were taken up by Standard Chartered Bank where the respondent is still repaying the mortgages thus rendering him incapable of disposing of the properties without the express consent of the mortgagor.

The Applicant's Submissions

15. In her submissions, the Applicant referred to the case of *Giella-Vs- Cassman Brown* that sets out the conditions for granting an interlocutory injunction as follows: -

“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.”

16. She refers to her supporting affidavit sworn on 19th August 2024 and supplementary affidavit sworn on 11th September 2024 which she claims demonstrate that she stands to suffer irreparable loss in the event the orders sought are declined.

17. She further submits that prior to the instant suit there was a divorce cause where all the subject properties herein were mentioned as matrimonial properties, but the Respondent charged one of the properties with the full knowledge that the same had been mentioned in a matter pending determination. She submits that it is clear that the Respondent's intentions are geared towards subverting justice.

18. The Applicant relied on the case of *A N M-v- PMN [2015] eKLR* where the court issued preservation orders over matrimonial properties pending division of the same. She also relied on the case of *Leah Chepchumba Sugut -v- Kering Sugut [2009] eKLR* where the court while issuing preservation orders of the matrimonial properties had the following sentiments: -

“... the issue of personal contribution is not for this court to determine at this stage that being for the trial judge. It is quite clear that the Applicant is not in possession or control of the assets in issue and the possibility that the Respondent could deal as he wishes with the same is real and palpable. In my considered view, the Applicant has made out a case to warrant the issuance of the orders sought. It has to be understood that this is matrimonial property and until the same is distributed either by the consent of the parties, which is unlikely in the instant case, or by an order of the court, the interests of justice requires that the same be preserved pending the determination of the suit. I was not shown any law or authority that would stop the court interfering in this case. The conditions for granting an injunction that is to say that the Applicant has shown the existence of a prima facie case with a probability of success at trial and loss could be occasioned not adequately compensable in damages have been met in my view. I am not in doubt about the above but even if there were any doubt, I would hold that the balance of convenient tilts in favour of the grant of the injunction to preserve matrimonial property until the suit is heard and determined.”

19. The Applicant also cited the case of *JKN V RGN [2019] eKLR* where the court stated:-

“What is up for determination is whether there is imminent danger that the Respondent may dispose of matrimonial property to the detriment of the Applicant. The court has been



told that the Respondent is in possession of these properties and the eventuality of their disposal will irreparably affect the interests of the Applicant. As such, I find that an order of injunction against the Respondent is merited.”

20. The Applicant submits that she has set out a prima facie case to warrant the issuance of the interim orders being sought.

The Respondent’s Submissions

21. The respondent submits that land parcels number South Kabras/Shamberere/xxxx and Butso/ Shibeye/xxxx are jointly registered in his names and the Respondent herein and thus cannot be disposed of without the knowledge and consent of both parties as per law hence making the application for injunction totally misconceived, vexatious, unfounded, improper, misplaced and lacks merit. He further submits that the Applicant cannot seek prayers of injunction against the said properties as she is one of the registered owners.
22. The Respondent also submits that house number Nairobi Block 82/xxxx/ Maisonette No.151 Greenspan and Nairobi Block 82/xxxx/ Maisonette No. A10 though registered in his names are still under mortgage and that the mortgagee’s interest supersedes any other interest and is protected by the law and in case of default of repayment and/or servicing of the mortgage amount, the mortgagee has a right to exercise their statutory power of sale and cannot be estopped by an injunction.
23. The Respondent further submitted that in respect to Butso/Shikoti/xxxxx, the chargee’s interest supersedes all other interests as there is a registered charge in respect to the said property by KCB Bank Limited of a loan advanced to the Respondent and that the chargee’s interest is protected unless and till the discharge of the charge.
24. The Respondent submits that the authenticity of the Applicant’s annexure ‘S.C.M 1’ cannot be proved and/or relied upon as it is obtained from a third party’s social media account which the respondent has no control over.
25. The respondent submits that the Applicant’s application does not meet the laid down threshold laid down in *Giella-Vs- Cassman Brown* for the issuance of an interlocutory injunction.

Analysis

26. I have very carefully considered the Notice of Motion herein, the supporting affidavit and supplementary affidavit filed by the applicant as well as the replying affidavit filed by the respondent. I have also considered the written submissions as made by both counsel in support of their opposing positions.
27. The issue arising for consideration is whether on the evidence and material placed before this court, the applicant has satisfied the conditions upon which a temporary injunction can be granted.
28. The law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides: -

“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."

29. Further, the conditions for consideration in granting an injunction are set out in the case of *Giella vs Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as earlier stated above.
30. The court in the case of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR cited *R. J. R. Macdonald vs. Canada (Attorney General)*, which captured the principles in *Giella vs Cassman Brown* as follows:-
 - i. Is there a serious issue to be tried?
 - ii. Will the applicant suffer irreparable harm if the injunction is not granted?
 - iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience")
31. The applicant must therefore satisfy all of the above three conditions in order to secure an interlocutory injunction as sought for.

i. Whether the Plaintiff/Applicant has demonstrated a prima-facie case with a probability of success

32. In determining whether an Applicant has demonstrated a prima facie case, the court of Appeal in *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:-

"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. That is clearly a standard, which is higher than an arguable case."

33. I am further guided by the decision in *Nguruman Limited V Jan Bonde Nielsen & 2 Others* (2014) eKLR where the Court of Appeal held 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 is 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 right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."



34. It is undisputed 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 properties in question constitute matrimonial property and that she contributed towards the acquisition and/or development of the same.
35. Section 6(1) of the Matrimonial Act defines matrimonial property as follows: -
- “For the 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.”
36. Further, Section 14 of the Matrimonial Act states as follows: -
- “Where matrimonial property is acquired during marriage—
- (a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
 - (b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”
37. In light of the above provisions and in light of the certificates of search adduced by the Applicant, the suit properties mentioned herein were all acquired and/or developed during the pendency of their marriage with some of the suit properties registered jointly in their names and some registered solely in the name of the Respondent.
38. On the issue of contribution, Section 2 of the [Matrimonial Property Act](#) has defined contribution as follows: -
- “"contribution" means monetary and non-monetary contribution and includes—
- (a) domestic work and management of the matrimonial home;
 - (b) child care;
 - (c) companionship;
 - (d) management of family business or property; and
 - (e) farm work.”
39. Further, Section 9 of the [Matrimonial Property Act](#) states as follows: -
- “Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”
40. The Applicant herein claims to have contributed to the acquisition and/or development of the suit properties during the subsistence of their marriage. She has furnished the court with bank statements,



M-pesa statements, emails and messages that denote she substantially contributed, both monetarily and non-monetarily to the acquisition and/or development of the said suit properties. She claims that despite land parcel number Butso/Shikoti/xxxxx being acquired before her marriage to the Respondent, she substantially contributed to the development of the said land through amalgamation of titles and supervision of the construction of the rental units on the said property since the respondent was always away at work which was mostly out of the country.

41. In the case EMN v DNN [2021] eKLR, the court stated as follows:-

“Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity.”

42. The Applicant has presented evidence before this court vide annexure ‘SCM 1’ which shows that one of the suit properties which is under the custody of the Respondent and which she claims to have interest in has been advertised for sale.

43. She has also averred, and it is evident from the certificates of official searches that the Respondent charged one of the suit properties that she had claimed was matrimonial property, during the pendency of the divorce cause. She has also adduced an affidavit of marital status in favour of a mortgage that was sworn on 23rd March 2017 by the Respondent where the Respondent alluded to be a widower while he was still married to her.

44. Despite the Respondent’s claims that he is unable to dispose of any of the suit properties since some are jointly owned and require the consent of the applicant to be disposed of and that some are mortgaged and require the consent of the mortgagor to be disposed of, it is clear that the Respondent has on several occasions acted with impunity with regards to the suit properties. Although he claims that all these restrictions bar him from interfering with the suit properties as alleged by the applicant, it is possible, considering his previous conduct, that the Respondent might dispose of these properties by way of private treaty to unsuspecting persons and this is what this court has been invited to shield.

45. Having considered the issues raised by the Applicant and the evidence before this court, I find that the Applicant has established a prima facie case for the purposes of the grant of an injunction pending the hearing and determination of the suit.

ii. Whether the Plaintiff/Applicant has demonstrated that she is likely to suffer irreparable injury that cannot be compensated by award of damages

46. The court in the case of Pius Kipchirchir Kogo v 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.”

47. In the instant application, the Applicant has demonstrated reasonable apprehension that the Respondent might dispose of the properties that she claims is matrimonial. It is also clear that one of the suit properties is the couple’s matrimonial home for even the Respondent referred to it as a family home.

48. In the case of Bob Njoroge Ngarama vs. Mary Wanjiru Ngarama & Another (2014) eKLR, the court held that:-

“ A matrimonial home does not only have fiscal value but also has a great sentimental value to a surviving spouse and children of the deceased which cannot be equated to monetary value.”

49. Additionally, the court in Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR held as follows:-

“ Damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction.”

50. Having considered this, I find that the Applicant indeed stands to suffer irreparable loss in the event that the Respondent disposes of the suit properties.

iii. Which party on a balance of convenience will suffer the greater harm from granting or refusing the remedy pending a decision on the merits?

51. In the case of Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue on balance of convenience held as follows:-

“ 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.”

52. In the instant case, the Applicant, in the scenario that the main suit is decided in her favour, will bear great loss if the order of injunction is not granted and the Respondent proceeds to dispose of the properties since they are within his control. On the other hand, in the event that the main suit is decided in the Respondent’s favour, this court is of the view that the Respondent stands to suffer less chiefly because the properties are currently in his possession and within his control.



Determination

53. The upshot is that I find that the Applicant's application should be allowed and I hereby make the following orders: -

- a) That pending the hearing and determination of the instant Originating Summons, an order of injunction do issue restraining the Respondent, his servants, agents or any person acting under his instructions from selling and/or disposing of land parcels number;
South Kabras/Shamberere/xxxx,
Butsotso/Shibeye/xxxx,
Butsotso/Shikoti/xxxxx,
Nairobi Block 82/xxxx/ Maisonette No.151 and
Nairobi Block 82/xxxx/ Maisonette No. A10.
- b) That the costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF NOVEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

Both parties present

Court Assistant: Polycap

