



**SWN v GNN (Matrimonial Cause E020 of 2024)  
[2024] KEHC 15842 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15842 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MATRIMONIAL CAUSE E020 OF 2024**

**JM NANG'EA, J  
DECEMBER 16, 2024**

**BETWEEN**

**SWN ..... PLAINTIFF**

**AND**

**GNN ..... DEFENDANT**

**RULING**

**The Plaintiff's Notice of Motion Dated 19/8/2024**

1. The plaintiff seeks these reliefs against the defendant;
  1. Spent
  2. Spent
  3. That the defendant/respondent, his servants, employees and/or agents whatsoever be restrained by way of injunction from selling, leasing, charging, disposing of and/or in any other manner adversely dealing or interfering with a parcel of land known as Nakuru/ Municipality Block 2/194 and all developments thereon pending hearing and determination of this Originating Summons (O.S) filed simultaneously with the application.
  4. That the costs of this application be provided for.
2. The Motion is supported by affidavit sworn by the plaintiff.
3. The defendant opposes the application relying on an affidavit in reply he filed on 20/11/2024.

**Averments In The Plaintiff's Affidavit**

4. The plaintiff avers that she started cohabiting with the defendant as his spouse in July 1994 or thereabouts during which union they were blessed with two children. Through their joint efforts the



couple managed to purchase and develop their matrimonial home on the above described parcel of land Number Nakuru/ Municipality Block 2/194 (the whole of which property is hereinafter referred to as “the suit property”) which they agreed to register in the defendant’s name. The plaintiff further avers that she took a loan from Kenya Women Finance Trust with which she contributed to construction of the matrimonial home. In addition, she helped in taking care of their offspring who are now adults, as well as providing companionship to the defendant and discharging domestic chores.

5. The plaintiff continues to state that she separated with the defendant on 8/1/2017 owing to the latter’s alleged acts of physical and verbal abuse against her. The marriage was subsequently dissolved by decree of the court issued in Nakuru Chief Magistrate’s Court Divorce Cause No. E022 of 2023. The plaintiff fears that the defendant could deal with the suit property to her detriment, hence her plea for conservatory orders.

### **Averments In Defendant’s Affidavit**

6. The defendant dismisses the application contending that he solely purchased the subject parcel of land on 11/5/2003 and undertook construction thereon using earnings and savings from his job as a Tobacco distributor on behalf of many manufacturers in Nakuru County. He had also bought a parcel of land known as Nakuru Municipality Block 14/198 on 29/3/2000 which he sold and utilized the proceeds towards development of the suit property that he says comprised 8 rooms and latrines connected to sewer lines which he rented out. According to him, they lived in rental premises at the time and that he only started occupying part of the suit property after the plaintiff abandoned him.
7. The defendant further avers that on 24/4/2013 he sold his inheritance property known as Solai Ndungiri Block 3/58 and obtained another loan, applying the proceeds to complete a second Phase of his development involving putting up additional 11 rooms.
8. The defendant continues to state that he also ran a tailoring and dress-making business for which he had trained. He used the skills he learnt to make face masks during a pandemic that hit the country in March 2020, among other textures. From savings made from the business he undertook Phase 3 of his development on the suit property, putting up 8 more rooms.
9. The defendant confirms that he begot two children with the plaintiff whom he also took part in maintaining including by paying their school fees. He laments that it is in fact the plaintiff who has treated him with cruelty by frequently deserting their matrimonial home leaving him with an unfair burden of looking after their children. This compelled him to marry a second wife with whom he sired two children. Because of the expanded family they took up more space at the suit property.
10. The defendant therefore refutes the plaintiff’s claim of contribution to acquisition of the suit property contending that she has not offered proof. He avers that at the material the family was living in rented premises at a place called Langa Langa. He adds that he only moved to occupy part of the suit property when the plaintiff deserted him. The court is accordingly urged to dismiss the application.

### **Analysis and Determination**

11. Only Learned Counsel appearing for the plaintiff filed written submissions which I have read through together with the record and the rival affidavit evidence. The Advocates correctly cited the often quoted case of *Giella vs Cassman Brown* (1973) EA 358 as setting out the guiding principles in determination of an application for temporary injunction such as before me.
12. Firstly, the applicant must show a prima facie case with a probability of success. Secondly, the applicant should also demonstrate that irreparable loss will result if injunction is not ordered. Lastly, the Court,



- where in doubt, will determine the application on a balance of convenience. It is now settled that the three limbs are required to be surmounted sequentially (see the Court of Appeal decision in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* (2014) eKLR).
13. Learned Counsel for the plaintiff submit citing in reliance case law in *WVM vs SMW* ( Matrimonial Cause No. E015 of 2022 ) KEHC 10971 (KLR) that where property is acquired during subsistence of marriage, the fact is prima facie evidence that the property is matrimonial property entitling the applicant to interlocutory conservatory orders.
  14. Similarly, in *BWK vs EMG* ( 2015) eKLR also relied upon by the plaintiff it was observed that where there is no dispute that the parties were legally married, that is prima facie evidence that they may have acquired property claimed as matrimonial jointly and thus conservatory orders are necessary.
  15. The plaintiff further submits that she could suffer irreparable loss if the defendant disposes of the suit property during pendency of the Originating Summons. The court is referred to various cases including the judicial determination in *BMM vs EMM* (2020) KEHC 3127 ( KLR) in which my brother (D. K Kemei J) observed that matrimonial property is of immense sentimental value, loss of which may not be compensated by damages.
  16. Counsel for the plaintiff are also of the view that the balance of convenience tilts in favour of the applicant for the reason that she stands to suffer greater loss than the defendant if injunction relief is declined and she eventually succeeds in the suit seeing that the suit property is registered in the name of the defendant.
  17. The defendant did not file submissions.
  18. In the case of *Mrao vs First American Bank of Kenya Ltd & 2 Others* (2003) eKLR 125 a prima facie case was defined as one which on the material presented to court or a tribunal a conclusion can reasonably be reached that the applicant's right has been infringed as to call for an explanation or rebuttal.
  19. In *Moses C. Muhia Njoroge & 2 Others V. Jane W. Lesaloi and 5 Others* (2014) eKLR a prima facie case was similarly defined to include "but not confined to a genuine and 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 other".
  20. It is common ground that the contested property was acquired whilst the parties were married. As the defendant points out, the plaintiff has not offered proof as by means of documentary evidence showing direct financial contribution she made towards acquisition of the suit property. Documentary evidence showing how the loan was utilized in construction of the suit property are not exhibited. She, however, contends that she also made indirect contribution including by taking care of the children; giving companionship to the defendant and discharging domestic duties. This kind of contribution is recognized by dint of section 2 of the *Matrimonial Property Act*. This is an arguable issue that merits further ventilation in the trial of the action. I concur with the plaintiff's submissions that the first limb of *Giella vs Cassman Brown supra* has been made out.
  21. In the circumstances, I find that the plaintiff has shown a prima facie case with a reasonable probability of success at trial.
  22. There is no doubt that irreparable loss could result if injunction relief is not granted to the plaintiff. If the disputed land is disposed of, it is not shown that the defendant will be able to compensate her in damages, particularly given the sentimental value she would be expected to attach to the suit property if indeed she proves that it is matrimonial property. As helpfully submitted by Counsel for the plaintiff



citing *Halsbury's Laws of England* Third Edition Volume 21, Paragraph 739 at Page 352, even if the applicant could be compensated with damages it does not preclude the exercise of discretion to grant injunction in his favour if his rights cannot be adequately protected or vindicated by damages". The learned author adds that even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question.

23. In light of this finding, the court need not consider the third limb of *Giella vs Cassman Brown supra*.

### **Disposition**

24. In the result, the Notice of Motion dated 19.8.2024 is allowed. Consequently, the defendant/respondent, his servants, employees and/or agents whatsoever are hereby restrained by injunction from selling, leasing, charging, or otherwise disposing of and/or in any manner adverse to the interests of the plaintiff/ applicant, interfering with the suit property to wit; parcel of land known as Nakuru/ Municipality Block 2/194 and all developments thereon pending hearing and determination of this Originating Summons. The costs of the Motion shall be in the cause.

**J. M. NANG'EA - JUDGE.**

**RULING DELIVERED BY VIRTUALLY THIS 16<sup>TH</sup> DAY OF DECEMBER 2024 IN THE PRESENCE OF :**

The plaintiff's advocate, Mr Oyondi for Ms Mukira

The defendant's advocate, Mr Kiragu

The Court Assistant, Mr Lepikas

**J. M. NANG'EA - JUDGE.**

