



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**MATRIMONIAL CAUSE NO. 6 OF 2019 (OS)**

**IN THE MATTER OF SECTION 2 3 6 12 AND 17 OF THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013 LAWS OF KENYA**

**IN THE MATTER OF ORDER 37 RULES 1 & 2 OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012**

**AND**

**IN THE MATTER OF ARTICLE 45 (3) 48 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF INHERENT JURISDICTION OF THE HONOURABLE**

**COURT**

**BETWEEN**

**PEL.....PETITIONER/APPLICANT**

**VERSUS**

**HL.....RESPONDENT/RESPONDENT**

**RULING**

1. **PEL (the applicant)** has by a Notice of Motion dated **4.06.2019** which is anchored on the provisions of Order 40 Rules 1,2,3 order 51 Rule 1 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act seeking for orders inter alia: -

a) Spent

b) That the Respondent by herself, servants and/or agents be restrained by means of a temporary injunction from leasing, selling, charging, subdividing, interfering and/or dealing in any other manner whatsoever with the matrimonial properties herein being land parcel **No. Uasin Gishu/Kimumu Settlement Scheme/xxxx measuring 0.2 Ha** situated within Uasin Gishu County or thereabouts together with the house on it (herein after referred to as the matrimonial properties pending hearing and determination of this application inter parties and subsequently pending the hearing and determination of this suit.

c) That the Respondent be compelled to allow the Applicant to reside on the matrimonial house on the matrimonial property pending hearing of this application inter parties and thereafter pending the hearing and determination of this suit.

d) That the O.CS, Eldoret Police Station be directed to oversee compliance of this order.

e) That costs of this application be provided for.

2. **HL (the Respondent)** opposes the application via a Replying Affidavit sworn on **06.12.2019** where she deposes that she was married to the

petitioner herein in the year 2006 and they solemnized the same on 23.11.2017 (a copy of marriage certificate marked as annexure HL1). That marriage was formally dissolved via divorce proceedings in **Divorce Cause No. 90 of 2018 on 11.03.2019** and there is no possibility that the two can live together under the same roof.

The marriage resulted in four issues namely;

- a. LNL
- b. EAL
- c. RAL
- d. PLL

3. She deposes that she and the four children reside on parcel **No. Uasin Gishu/Kimumu Settlement Scheme/xxxx**, the subject of the present application. That the Petitioner/Applicant does not reside on the said property and has even alluded to the fact that his stay in the said property has not been peaceful because of their estranged relationship. She blames the applicant for being physically violent against the Respondent even without considering the presence of their children. She points out that it has taken the intervention of the local Administration and the police to bring peace and sanity.

4. The respondent describes herself as an athlete by profession and contends that the petitioner is neither employed nor does he have any known source of income and as such depended on her income from the athletics. She further argues that from the income earned from athletics, she has purchased the following properties: \_

- a) **Uasin Gishu/Kimumu Settlement Scheme/xxxx;**
- b) **Pioneer/Ngeria Block1(EATEC)/xxxx;**
- c) **Kiplombe/ Kiplombe/Block xx(Growel); and cars as follows;**
  - i. **Motor vehicle reg no. KBQ xxx H Nissan**
  - ii. **Motor vehicle reg no. KBE xxx U**
  - iii. **Motor vehicle reg no. KBC xxx Y**
  - iv. **Motor vehicle reg no. KCE xxx F**
  - v. **Motor vehicle reg no. KBQ xxx K**
  - vi. **Built house on plot no. Uasin Gishu/Kimumu /xxxx;**
  - vii. **Kitchen appliances, T.V, DSTV, etc.**

5. It is her contention that she acted in good faith in sending her income through the applicant's bank account at **Kenya Commercial Bank Eldoret** and that while she was away in diaspora participating in marathon activities, the applicant in his capacity as her husband filed divorce proceedings via Divorce **Cause No. 90 of 2018**, proceeded ex-parte and obtained a decree nisi on **4/3/2018**.

6. She further deposes that she has single handedly paid for food shelter, clothing and medication for her family including the applicant. She further states that the applicant has since re-married and enjoying her hard-earned cash and therefore doesn't deserve any equitable remedy. That the applicant has not contributed to the acquisition of the above-mentioned properties.

7. The application was canvassed by way of written submissions, where the applicant maintains that he acquired the subject properties and registered them in his names, yet the Respondent in total disregard of his right to ownership of property is intermeddling with the same with an intention to evict him and thereafter alienate the same to his detriment.

He submits that the main issue for determination by the court at this stage is whether the Applicant has satisfied the test for the grant of an injunction as was settled by the case of **Giella v Cassman Brown & Co Ltd (1973) EA 358** as follows; -

- a. *Whether the Applicants have made out a prima facie case with a probability of success*
- b. *Whether the Applicant might suffer irreparable injury if the injunction is not granted.*
- c. *If there is doubt, whether the balance of convenience favours the Applicant.*

**Prima Facie Case:** The applicant relies on the case of **Mrao Ltd V First American Bank of Kenya Ltd and 2 others (2003) KLR 125**

which explained what constitutes a prima facie case to argue that he has demonstrated that he has a prima facie case with high chances of success as;

a) The title to the land parcel **No. UASIN GISHU /KIMUMU [SETTLEMENT SCHEME / xxxx** herein is registered in the name of the Applicant as per annexure PEL 2 to the Applicant's supporting affidavit. That the Respondent attempted to deny the Applicant free access to the land parcel **No. UASIN GISHU /KIMUMU /SETTLEMENT SCHEME / xxxx** and has also been interfering with the Applicant's peaceful enjoyment of the suit same by trying to illegally evict the Applicant with the ulterior motives of alienating the same and render the Applicant homeless.

8. Further that land Parcel **No. PIONEER /NEGRIA BLOCK I(EATEC) xxxx** was acquired jointly by the Parties as well elaborated by the Applicant in the supplementary affidavit.

Counsel further submits that the **applicant will suffer irreparable injury if the injunction is not granted that** damages cannot be an adequate remedy in this case and that what the Applicant seeks transcends monetary value. It is contended that the Applicant has been in occupation of the suit properties since they were acquired, developed the same substantially and made other development plans for the suit property are underway and that If the injunction is not granted, the developments undertaken and which are underway by the Applicant and which are of a permanent nature will be interfered with and the suit herein will be of no consequence to the Applicant since the very act that the Applicant seeks to prevent by seeking this injunction will have happened and thus suit will be rendered nugatory in view of the prima facie case that the petitioner has herein.

9. In support of this argument the applicant relies on the case of; -

***Francis Githinji Karobia v Stephen Kageni Gitau Civil Case 53 of 2005 (unreported), where Kimaru J stated 'This court notes that land being unique in nature and' character, damages in certain instances would not constitute an adequate remedy.*** On the issue of **Balance of convenience**, counsel submits that the balance of convenience is in favour of the Plaintiff. He draws from the case of **Church of Christ of Latter-Day Saints-Kenya Registered Trustees v John Ndirangu & 2 Others Nairobi ELC Case No. 16 of 2011 (Unreported)** to urge this court to consider that both of them are in use of the suit property, and given that there is a dispute, it is desirable that this before the same is resolved there should be no interference. In addition, declining an injunction as prayed will deny him access to his matrimonial home and in the process the Respondent will eventually alienate the suit properties to his detriment. He reiterated that sufficient grounds for the grant of an injunction and orders sought have been demonstrated and has met the test for the grant of an injunction as was settled by the case of **Giella V Cassman Brown & Co Ltd (1973) EA 358**.

10. The respondent submits that the Respondent's contention that she and the four children of the said marriage reside on parcel **No. Uasin Gishu/Kimumu Settlement Scheme/xxxx has not been challenged**. Further, that the Applicant does not reside in the said property since his stay in the said property has not been peaceful because of their estranged relationship.

That at some point it has taken the intervention of the local Administration and the police to bring peace and sanity. He submits that all these times it was the Petitioner who has been physically violent against the Respondent even without considering the presence of their minor children who **are in dire need of protection from this Court in terms of** their right to shelter amongst other basic needs inclusive of protection of their emotional status.

It is argued that there is no evidence to insinuate that the Respondent has ever attempted to sell the suit property and that if anything, the subject property is a safe haven for her and the children and the Respondent's wish to protect the same from the Petitioner, a person who has demonstrated his recklessness of selling properties without a second thought about the future of his family.

11. As for the claims that the Applicant single handedly purchased the subject property namely **Uasin Gishu/Kimumu Settlement Scheme/xxxx**, respondent submits that there is no evidence to support such claims allegations hence it remains uncontroverted that that the Respondent was and still remains the sole breadwinner.

The Respondent maintains that she has demonstrated her role in purchasing the property solely through her hard earned money as a professional athlete who participated in both local and international races (referred to annexure HL '5' being a copy of her bank statement). That the bank statement clearly indicates she was earning well and with her consent, she allowed her agents to transfer the money to the Petitioner whom she wholeheartedly trusted.

12. Further, that the Respondent because of the love she had for the Petitioner, she single-handedly provided for both her children and her husband by sending/transferring her income to the Respondents account held at **Kenya Commercial Bank** as demonstrated by a copy of the statement marked HI 2. However, the Petitioner selfishly opted to have the subject property transferred solely unto his name despite the fact that he knew well she was the one who purchased the suit property among other several assets/properties.

13. It is also pointed out that the dissolution of the marriage was done secretly and without the participation of the Respondent by dint of the Divorce **Cause No. 90 of 2018 he referred to Applicant's Annexure PEL '1')** and there can be no possibility that the two can live under the same roof together.

Counsel's submission was also that **prayer C** is practically untenable as the Petitioner /Applicant cannot be granted such prayers/orders as the present cause and that if the petitioner has any interest in respect to parcel **No. Uasin Gishu/Kimumu Settlement Scheme/xxxx** that is an issue that will be determined at a later stage during the substantive hearing of this petition. In support of this submission the respondent relies on the decision in the case of **Damaris Gathoni Ngunjiri-vs Elijah, where he quoted the case of Ngahu Ngunjiri (1998) eKLR in** which the court in a similar situation noted that;

**"...the relationship between the parties is acrimonious. The husband is convinced whether rightly or wrongly that the wife**

had colluded with other people to kill him and has referred to several robbery incidents. He also believes that the wife poisoned him. He also believes that if his wife gets an opportunity, he will kill him...The wife accuses the husband of adultery and extreme cruelty is it practicable that the two parties can live together under the same roof in the above circumstances? I do not think so... The court orders should not make orders in vain or which promotes breach of peace.....”

14. That the Petitioner in his Supplementary Affidavit, has not fully demonstrated the source of his income even though he purports to be an athlete and that the properties in question were acquired during the marriage hence matrimonial which property vests in the spouses according to each of their contributions and shall be divided between the spouses if the marriage is dissolved.

That under **Section 14(g) of the Matrimonial Property Act, 2013**, where matrimonial property is registered in the name of one spouse, it will be presumed that it is held in trust for the other spouse"

That the Respondent has prima facie shown her monetary contributions as opposed to the Petitioner. He therefore urged the court to disallow the orders being sought in the application as granting the same will cause more hardship to the Respondent and her children.

#### **ANALYSIS AND DETERMINATION**

15. The following issues arise for determination:

**1. Whether or not the applicant has presented sufficient reasons to warrant a grant of conservatory order of injunction pending the determination of the originating summons.**

**2. Whether the applicant should be allowed back into the matrimonial home**

#### **ISSUE NO. 1: WHETHER THE APPLICANT HAS PRESENTED SUFFICIENT REASONS TO WARRANT A GRANT OF CONSERVATORY ORDER OF INJUNCTION**

16. The Applicant herein has filed his Originating Summons under the Matrimonial Property Act 2013 seeking for the divisions of the suit property **Uasin Gishu/Kimumu Settlement Scheme/xxxx**. In his correspondences he alleges that he duly contributed towards the acquisition of the said property.in fact he claims to have bought the said parcel using his own money though he admits that the said property is their matrimonial home. He also averred that the Respondent who is his estranged wife, who might at any time embark on a selling spree to his detriment and those of his children. The respondents contest this allegation, pointing out that her matrimonial home is situate within the suit property.

**Matrimonial Property Act, 2013, Section 6(1)** provides;

*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.*

17. **Section 2** defines matrimonial home to mean *“...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...”*

The law regarding grant of interlocutory injunction 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.”*

The conditions for the grant of an interlocutory injunction were settled in the *locus classicus* case of **Giella Vs Cassman Brown [1973] EA 358** where the court held as follows: -

*“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 of the balance of convenience.”*

18. The principles on which the courts will grant an injunction were reiterated by the Court of Appeal restated those principles in Nguruman Limited V. Jan Bonde Nielsen & 2 Others, CA NO. 77 OF 2012, as follows:

***“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;***

***(a) establish his case only at a prima facie level,***

***(b) demonstrate irreparable injury if a temporary injunction is not granted, and***

***(c) in case of any doubts as to (b) show that the balance of convenience is in his favour.***

19. The Applicant must therefore satisfy all the above three conditions in order to secure a conservatory order at this stage of the proceedings.

**a. Whether the applicant has demonstrated that he has a prima facie case with high chances of success**

Although the suit property is registered in the names of the Applicant, the Respondent has pleaded that the applicant herein holds the property in trust for her and their children, and that she had substantially contributed towards the purchase price of the suit land. In fact she deposes that in her replying affidavit the respondent has attached copies of bank statements showing that she sent money to the applicant out of her earnings from her athletics career towards the purchase of, the suit property and others for the benefit of the family. That the applicant however, bought the properties and transferred them all to his name. These are issues that can only be canvassed at the hearing of the main suit.

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.”***

The applicant’s case is hinged on the fact that the property in question is matrimonial property and that the same is likely to be sold without his consent.

In my view, as much as the applicant has demonstrated that he has a case on the distribution of the suit property, this is not the only factor that the court will consider in determining whether to grant an injunction or not.

**b. Whether the applicant has demonstrated that he is likely to suffer irreparable injury that cannot be compensated by award of damages**

*Irreparable injury was defined in the case of Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR 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.***

In the instant case the applicant is apprehensive that the respondent is likely to dispose of the matrimonial home that is registered in his own name and that he bought it using his own money a fact that has been vehemently denied by the respondent in her replying affidavit and submissions.

He states in his submissions that the title to the land parcel **No. UASIN GISHU /KIMUMU [SETTLEMENT SCHEM /xxxx** herein is registered in the name his as per annexure **PEL 2** to the Applicant's supporting affidavit. That the Respondent attempted to deny him free access to the land parcel **No. UASIN GISH/KIMUM/SETTLEMENT SCHEME/xxxx** and has also been interfering with the Applicant's peaceful enjoyment of the suit same by trying to illegally evict the Applicant with the ulterior motives of alienating the same and render the Applicant homeless.

If the property is registered in his name as he states, then what wily ways will the respondent use to dispose of the property? It is significant that he does not deny that some funds were transferred from the respondent’s account to his bank account.

The lament about being likely to **suffer irreparable injury** which damages cannot be an adequate remedy is in my view crying wolf, as no evidence whatsoever has been tendered demonstrate that there has been an attempt by the respondent to dispose of the suit property as alleged. No evidence has also been adduced to prove that it is the respondent who evicted the applicant from their matrimonial home, indeed, he does not deny having filed for and obtained divorce from the respondent. I hold and find that this condition has not been satisfied.

**c. Balance of convenience**

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 ill 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 ma)' be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.*

*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 which is likely to arise from granting"*

20. As regards the third condition, there is no evidence that the Respondent is currently engaged in selling portions of the land and hence in order to prevent further alienation, a conservatory order of temporary injunction is needed. The tilt the balance of convenience in his favour of the respondent who is in occupation of one of the properties along with the issues of the now dissipated union. It is therefore my opinion that the applicant has failed to satisfy the mandatory conditions precedent for the grant of an order of injunction.

In the case of **Robert Mugo wa Karanja v Ecobank (Kenya) Limited & Anor. [2019] eKLR** the court the court in deciding on an injunction application stated;

*'circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts...."*

**ISSUE NO.2: WHETHER AN ORDER TO ALLOW THE APPLICANT BACK INTO THE MATRIMONIAL HOME IS TENABLE.**

21. The applicant has urged the court to make an order that he be allowed back into the matrimonial home built on land parcel **No. Uasin Gishu/Kimumu Settlement Scheme/xxxx**. In his supporting affidavit he deposes that they have since divorced with the respondent via divorce proceedings in **Divorce Cause No.39/2018**

It is not disputed that both the respondent and applicant are already divorced. It is also not disputed the two have not been living together as a result of the hostility created by the respondent. Parties are also in agreement that at some point they had to involve the administrative police. That all these times it was the Petitioner who has been physically violent against the Respondent even without considering the presence of their children.

22. Indeed, the existing status quo is that the Applicant does not reside in the said property since his stay in the said property, that is why he wants to get back. I can do no better than to echo the words of **Githinji (J)** in the case of **Damaris Gathoni Nguniiri-vs Elijah, quoting the case of Ngahu Ngunjiri (1998) eKLR in which the court stated** that; -

*"...the relationship between the parties is acrimonious. The husband is convinced whether rightly or wrongly that the wife had colluded with other people to kill him and has referred to several robbery incidents. He also believes that the wife poisoned him. He also believes that if his wife gets an opportunity, he will kill him... The wife accuses the husband of adultery and extreme cruelty is it practicable that the two parties can live together under the same roof in the above circumstances? I do not think so... The court orders should not make orders in vain or which promotes breach of peace....."*

The upshot is that the plaintiff has not established a *prima facie* case with a probability of success case sufficient to warrant the grant of interlocutory reliefs. The same has no merit and is dismissed.

The costs of this application shall be borne by the Applicant. I also direct parties to proceed to set down the main suit for hearing on priority basis.

**Delivered and dated this 9<sup>th</sup> day of March 2021 virtually**

**H. A. OMONDI**

**JUDGE**