



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. E009 OF 2021

IN THE MATTER OF SECTION 13 OF THE MATRIMONIAL PROPERTY ACT, 2013

AND

IN THE MATTER OF AN APPLICATION FOR DECLARATION OF PROPERTY RIGHTS

BETWEEN

MO.....APPLICANT

VERSUS

AJA.....RESPONDENT

RULING

1. The applicant MO and the respondent AJA got married in 1983. They solemnized their marriage on 16th August 1994 at the Registrar's Office in Nairobi. They have two adult children. The applicant has filed **Divorce Cause No. 4189 of 2021** at the Chief Magistrate's Court Milimani seeking the dissolution of the marriage.

2. The applicant filed originating summons dated 25th February 2021 seeking the declaration that the following properties which were registered in the name of the respondent were single handedly acquired by her and were held in trust for her:-

(a) Siaya/Mulaha/xxxx;

(b) Siaya/Mulaha/xxxx;

(c) East Alego/Mulaha/xxxx;

(d) Siaya/Mulaha/xxxx;

(e) Siaya/Mulaha/xxxx; and

(f) all those properties acquired during the marriage and which the respondent has transferred to his agents and/or servants.

It was further sought that it be declared that all the monies in non-resident Equity Bank, Siaya Branch, A/c No. xxxx in the name of the respondent is held for the benefit of both of them, and that the account is held in trust for the applicant.

3. With the summons was filed an application seeking that, pending the hearing and determination of the application *inter partes*, the Kshs. 287,990,664/= in the account should not be accessed, withdrawn or transferred; and that the respondent, his agents and/or servants, be restrained from selling or otherwise disposing of the lands and properties. On hearing this urgent application *ex parte*, the court granted the interlocutory injunction. The application was set down for *inter parte* hearing. This ruling is in regard to that hearing.

4. The respondent filed a replying affidavit to oppose the application, and also filed an application dated 24th March 2021 to discharge, set

aside and/or vary the injunction orders issued on 5th March 2021. The two applications were heard together.

5. The respondent's case was that the court was misled into granting the injunction. First, that the account at Equity was his own account for his daily expenses and that the money therein did not belong to the applicant. Secondly, the money in the account was not Kshs.287,990,664/61. Regarding the parcels of land, the respondent stated that he had no intention of disposing of any of them, and that they were jointly acquired during the marriage without any party keeping records of contribution. Nonetheless, he had no problem if the land parcels were preserved to await the hearing and determination of the originating summons.

6. In that case, the court confirms the temporary injunction in respect of Siaya/Mulaha/xxxx, Siaya/Mulaha/xxxx, Siaya/Mulaha/xxxx and East Alego/Mulaha/xxxx. The properties shall not be sold, transferred and or disposed of until the hearing and determination of the originating summons.

7. As for the money at Equity Bank, the applicant, when she came to court *ex parte* for the orders, was duty bound to be candid and to make the full possible disclosure (**Hussein Ali & 4 Others –v- Commission of Lands, Land Registrar & 7 Others [2013]eKLR**). I find that she did not. She swore that the account had Kshs.287,990,664/=. When the respondent swore that the account had only Kshs.1,313,066/61 she did not file any further affidavit to deny that, or to produce the bank statement to show the amount it had. It does appear that alleging that the account had Kshs.287,990,664/= was deliberately intended to influence the court in granting the *ex parte* orders.

8. An injunction is a discretionary and equitable remedy that can only be granted to a deserving party. Where the party has misled the court into giving him an injunction, the same has to be discharged immediately the truth comes to light.

9. Consequently, I discharge and set aside the temporary injunction in relation to A/c No. xxxx at Equity Bank, Siaya Branch, in the name of the respondent.

10. In any case, there has been no demonstration that the respondent cannot ultimately refund the Kshs.1,303,066/61 if at the end of the day it is found that it was the applicant's money.

11. I ask that the parties do bear their own costs as this is a family dispute.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2021.

A.O. MUCHELULE

JUDGE