



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

FAMILY DIVISION

MATRIMONIAL CIVIL SUIT NO. 15 OF 2020

BETWEEN

ANW.....APPLICANT

VS

GWK.....RESPONDENT

RULING

1. **ANW**, the applicant has filed a Notice of Motion dated 19th May, 2020. She seeks by that application interlocutory injunction pending the hearing and determination of this matter to restrain her husband **GWK.**, the respondent, from wasting or alienating and/or interfering with here presumed 50% share of the property **KABETE/LOWER KABETE/XXX.**

BACKGROUND

2. It is the parties' common ground that the applicant and the respondent got married on 2nd December, 1987. They were blessed with four issues in that marriage. All those issues are adults. The applicant and the respondent are separated and there is pending determination of a divorce case before the Chief Magistrate's Court, Kikuyu that is Divorce Cause No. XX of 2018. The applicant filed this matter, through an Originating Summons. By that Originating Summons, the applicant seeks an order of declaration that the following properties registered in the respondent's name, are jointly owned by her and the respondent. Those properties are:-

- a) Kijabe/Kijabe/Block 1/XXXX and XXX.
- b) Kabete/Lower Kabete/XXX.
- c) Kabete/Lower Kabete/XXX.
- d) L.R. NO. Maela/Ndabibi/Block 2/XXX.
- e) L.R. No. Muguga/Gatura/XXX.
- f) (Particulars withheld) Farm 3 acres
- g) Wangige Market XXX.
- h) XXXX/Wangige.

NOTICE OF MOTION

3. The applicant supported her application for interlocutory injunction with her affidavit sworn on 19th May, 2020. The applicant deponed that the respondent has threatened during the pendency of their divorce proceedings to evict the applicant from the matrimonial home, that is at **KABETE/LOWER KABETE/XXX.** The applicant also deponed:-

“That I am reliably informed that the respondent has put some matrimonial properties on the market for sale thereby necessitating the need for this application.”

4. The applicant proceeded in her said affidavit to set out her contention on how she and the respondent acquired the matrimonial properties detailing her contribution to such acquisition. It is in that background the applicant seeks injunctive orders.

5. The application is opposed by the respondent. The respondent by his replying affidavit sworn on 12th February, 2021, stated that the property referred to by the applicant was his ancestral property which he inherited from his deceased’s father. The respondent denied being the registered owner of property KIJABE/KIJABE/ BLOCK 1/XXXX. The respondent deponed that he surrendered to the applicant possession of properties KABETE/LOWER KABETE/XXX, measuring 1 acre, KABETE/LOWER KABETE/XXX, measuring 2 acres and MAELA/NDABIBI/BLOCK XXX measuring 8 acres. That those properties are in the applicant’s sole possession, use and control and he had no intention of evicting the applicant thereof.

6. The respondent further deponed that he had been diagnosed with kidney failure and high blood pressure which has incapacitated him and he is therefore unable to run his businesses. That he relies on the rental income of two market stalls which income he uses to carter for his medical need which includes dialysis treatment.

ANALYSIS AND DETERMINATION

7. The applicant needs to satisfy the principles of granting an injunction set out in the case **GEILLA V. CASSMAN BROWN [1973]** where it was held:-

“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.”

8. The Court of Appeal in the case **NGURAMAN LIMITED VS. JAN BONDE NIELSON & 2 OTHERS 2014** held that the above principles of granting an injunction ought to be considered sequentially. This is what the Court of Appeal stated in that case:-

“It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. ... If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.

9. The respondent through his submission intimated that the applicant had not shown a *prima facie* case with probability of success because the Originating Summons cannot be entertained since their marriage had not been dissolved. The respondent relied on the High Court decision of **TMW VS FMC (2018) eKLR**. In that case, the court faced a very similar application to what is before me, for an interlocutory injunction pending determination of the suit. The main suit is on division of matrimonial property. The High Court held in that case that because the parties had not been divorced, the court could not determine the division of the matrimonial property.

10. As stated before, what is before me for consideration in this Ruling is application for an interlocutory injunction. At this stage, the court is not considering division of matrimonial property.

11. **Section 7 of the Matrimonial Property Act (MPA)**, indeed provides that the court cannot consider division of matrimonial property unless the parties are divorced or their marriage is otherwise dissolved. This is what **Section 7 MPA** provides:-

“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

12. Whereas **Section 7 of MPA** does not permit the division of matrimonial property during the subsistence of the marriage, **Section 17 of MPA** does permit the court to make declaration on matrimonial property even during the subsistence of marriage. **Section 17** provides:-

“(1) A person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.

(2) An application under subsection (1):-

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

13. The Court of Appeal had an occasion to discuss the ramifications of **Sections 7 and 17 of MPA** when considering an appeal where the High Court declined granting interlocutory injunction on the ground that the parties’ marriage had not been dissolved. This consideration by the Court of Appeal was in the case **AKK V. PKW (2020) eKLR** as follows:-

“34. A plain reading of Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in a matrimonial cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act. In PNN vs. ZWN [2017] eKLR, Waki, JA stated that:-

‘An inquiry may thus have made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in PETIT VS. PETIT [1970] AC 777:-

“One of the main purposes of the act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property the question for the court was whose is this? And not to whom shall it be given?”

35. The above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant’s prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of the Act.

36. In the persuasive case of N.C.K. vs. G.V.K [2015] eKLR, Muchelule, J. observed thus:-

“In England, under the Matrimonial Causes Act 1973, in instances where parties, for religious or other reasons, do not want to divorce, and if a couple chooses not to bring matrimonial proceedings, the court will resolve any questions about the beneficial entitlement to their property without using the divorce court’s adjustive power. The Family Law Act 1966 at Section 33 (4) provides for declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. In the case of ARIF VS. ANWAR [2015] EWHC 124 (FAM) the parties filed divorce proceedings but the same was yet to be determined. The court proceeded to declare each party’s beneficial interest in the matrimonial property without severing the same ...

It would appear to me that a spouse can, under section 17 of the Matrimonial Property Act 2013, either where there is a divorce matter pending, or where, for whatever reason, he can no longer live together with the other spouse but it is not seeking to divorce, come to court to resolve any questions about beneficial interest in the matrimonial property without severing the same.”
(Emphasis mine).

37. In our opinion, the trial court had jurisdiction to make declarations in so far as the interest in the property during the pendency of a marriage is concerned. The issues of distribution of the property would then only be determined upon dissolution of a marriage.”

14. A careful reading of that holding by the Court of Appeal shows that the applicant’s application does not fail because of the substance of the parties’ marriage. This is for the reason that the applicant does not at this stage, seek division of matrimonial property. She however seeks orders to restrain the respondent from alienating the properties and that application falls within the ambits of **Section 17 of the MPA**.

15. It is for the above reason that this Court rejects the submission that the application must fail because the applicant failed to show a prima facie case with probability of success. The applicant has shown prima facie case with probability of success in that she is entitled to seek for declaratory orders even without the marriage being dissolved.

16. The second test of **GEILLA VS. CASSMAN BROWN** (supra) is that the applicant has to show she will suffer irreparable injury if an injunction, as she seeks, is not granted. It is useful to consider the holding of **ROBERT MUGO WAKARANJA VS. ECOBANK (KENYA) LIMITED & ANOTHER** (2019) eKLR thus:-

“In determining whether an award of damages would be sufficient compensation, I am alive to the fact that land is not the same everywhere and more specifically when it comes to property, a matrimonial home sits because of its sentiment at value. This therefore cannot be said that the Plaintiff/Applicant won’t suffer irreparable loss or injury if the application for temporary injunction is not granted.”

17. Although I am persuaded by the above holding, however, in as far as this case is concerned, I am of the view that because the respondent has deponed he does not intend to evict the applicant the order that should issue is for status quo to be maintained in respect of the property surrendered to the applicant’s for her sole use. No reason has been shown by the applicant why orders should be made in respect of other properties the applicant alleges are matrimonial properties.

18. In view of the above conclusive finding, I shall not proceed to consider the third test of **GEILLA VS CASSMAN BROWN** (supra) case.

19. Accordingly, the order of the court are as follows:-

(a) Pending the hearing and determination of this case, *status quo* shall be maintained on occupation and use of **KABETE/LOWER KABETE/124, KABETE/LOWER KABETE/699** and **MAELA/NDABIBI/BLOCK 2/375**.

(b) The costs of the Notice of Motion dated 19th May, 2020 shall be in the cause.

RULING DATED AND DELIVERED AT KIAMBU THIS 5TH DAY OF OCTOBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Ndege

For the Applicant: Ms. Akendi

For the Respondent : Mr. Kamau

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE