



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 75 OF 2019 (O.S)

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

LWM.....APPLICANT

VERSUS

NKM.....RESPONDENT

RULING

1. By an application brought by way of a Notice of Motion dated 27th November, 2018 pursuant to **Order 40, rule 1(a) and (b)** of the **Civil Procedure Rules 2010, section 3A** of the **Civil Procedure Act, section 12(1) and (3)** of the **Matrimonial Property Act, 2013** and all other enabling provisions of the law, the Applicant herein seeks for orders that:

a. *Spent.*

b. *Spent.*

c. The Respondent, his servant and/or agent be restrained from selling, alienating, transferring, subdividing, encumbering or in any way disposing the following properties pending the hearing and determination of this suit:

i. House No. xxx constructed on Title Number Nairobi/Block xxx/xxx and all the developments thereon.

ii. Title Number Kwale/Simba North/Kundutsi 'x'/xxxx and all the developments thereon.

iii. House No. xx MMI constructed on Title Number Nairobi/Block xxx/xxx and all the developments thereon.

iv. [Particulars Withheld] Park Parcel Cxxx being a portion of Title Number Naivasha/Maraigushu Block xx/xx (K) and all the developments thereon.

v. [Particulars Withheld] Hills Land measuring approximately seven (7) acres and all the developments thereon.

d. *Spent.*

e. The Respondent, his servant and/or agent be restrained from selling, encumbering or in any way disposing the following properties pending the hearing and determination of this suit:

i. Mercedes Benz C200, Model 2000, Motor Vehicle Registration No. KAU xxxL.

ii. Land Rover Discovery 3 S/Wagon Motor Vehicle Registration No. KBK xxxX.

iii. Pickup Nissan Hard Body Model 85 Motor Vehicle Registration No. KAV xxxM.

f. Spent.

g. That this Honourable Court be pleased to issue an interim order for injunction restraining the Respondent from evicting the Applicant from the matrimonial home on House NO. xxx Title No. Nairobi/Block xxx/xxx pending the hearing and determination of this suit.

h. That this Honourable Court be pleased to issue an interim order for injunction restraining the Respondent by himself, his agents, servants or workmen from doing any of the following acts that is to say, demolishing, removing, bringing down, wasting, damaging or in any manner whatsoever destroying any of the houses, buildings and/or structures erected on any of the matrimonial properties pending the hearing and determination of this suit.

i. That the Costs be borne by the Respondent.

2. The application is premised on the grounds on the face of it and supported by an affidavit sworn by the Applicant on 22nd November, 2019. According to the Applicant, the subject properties were acquired, developed and maintained by the joint efforts of the Applicant and the Respondent during the course of their marriage. Therefore, that if the properties are not preserved pending the hearing and determination of this suit, there is a likelihood that the properties will be sold, alienated, transferred, subdivided, encumbered or in any way disposed by the Respondents and/or his agents.

3. The parties herein got married under the Marriage Act (CAP 150) on 28th November, 1987 in a wedding solemnized in Nairobi. Their union bore three issues. The marriage was however fraught with irreconcilable difference culminating in divorce proceedings in CMDC xxx of 2017 in the Chief Magistrate's Court at Nairobi. The divorce proceedings have since been finalized.

4. According to the Applicant, the immovable and movable properties which are the subject of the application were acquired during the subsistence of their marriage. That despite the fact that the properties are registered in the name of the Respondent, they were acquired, developed and maintained through their joint efforts and contributions. She was apprehensive that if the properties are not preserved pending the determination of this suit, the properties would be prone to being sold, alienated, transferred, subdivided, encumbered or in any way disposed by the Respondent and/or his agents. She was also apprehensive that the Respondent would attempt to evict her from their matrimonial home.

5. In response thereto, the Respondent filed a replying affidavit dated 28th October, 2020 in which he denied the Applicant's statements and contended that he solely acquired the subject properties. That the Applicant did not contribute to the development and improvement of the immovable properties or the acquisition of the movable properties, financial or otherwise. He contended that the properties were registered in his name because he acquired them with his own efforts. Therefore, that the Applicant is undeserving of any orders pertinent to the said properties. He pointed out that his marriage to the Applicant was dissolved on 31st January, 2020 upon issuance of a *decree nisi* which was made absolute on 2nd March, 2020.

6. Thereafter, the Applicant filed a further affidavit dated 15th June, 2020 in which she maintained that she participated fully in the acquisition, development and maintenance of the subject properties. She asserted that while the Respondent had access to loan facilities by virtue of his work, she took care of all the family expenses, thereby freeing up the Respondent's resources to cater for the repayment of the loans, which repayments she too contributed towards in cash. Further that while the Respondent was away, she singlehandedly ran the household and provided for the children's material and emotional needs. She maintained that the Respondent had willfully and maliciously defaulted on the loan charged to their matrimonial home in order to have her and the children evicted from the home.

7. The application was disposed of by way of written submissions. Learned Counsel Ms. Kiguatha filed written submissions dated 9th July, 2021 on behalf of the Applicant in which she asked the Court to allow the application as prayed. Counsel proposed two issues for determination: whether the Applicant has a legitimate claim to the properties and whether the interim orders are justified.

8. Ms. Kiguatha submitted that from the evidence on record, it was undisputed that the suit properties were acquired during the subsistence of the parties' marriage. Counsel asserted that even though the properties were registered in the Respondent's name, **section 14** of the **Matrimonial Property Act** states that where property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse. She urged that the Respondent had not rebutted this presumption to the required degree of proof.

9. Ms. Kiguatha asserted that the Applicant had proved by evidence that she contributed substantially to the acquisition and development of the suit properties in both monetary and non-monetary terms. Therefore, that the Applicant has a legitimate claim to the suit properties and that on this basis, the properties should be preserved pending the hearing and determination of the suit.

10. On the interim preservation orders sought, Ms. Kiguatha submitted that this Court is empowered by **Order 40** of the **Civil Procedure Rules** to issue the orders. Counsel asserted that at this interlocutory stage, the Court ought to satisfy itself that the Applicant has established a *prima facie* case against the Respondent. To this end, Counsel relied on the decision in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**. She urged that the evidence had shown that the Applicant has an arguable case and a legitimate claim to the suit properties which meets the standard of proof. She cited the decisions in **Giella vs. Cassman Brown & Co. Ltd (1973) EA 358** and **CKS vs. JSHS & Another [2019] eKLR** to buttress her arguments.

11. Counsel asserted that the evidence presented by the Applicant had shown that the Respondent had repeatedly threatened to evict the Applicant from what was her matrimonial home and in which she currently resides. That this resulted in the Court granting orders for preservation of the property House No. xxx on Title Number Nairobi/Block xxx/xxx on 17th June, 2021. She urged that the Applicant was apprehensive that the Respondent would continue to threaten her and would alienate, encumber or waste the property in order to defeat the

Applicant's claim to it and that she would suffer irreparable harm.

12. In opposition, learned Counsel Mr. Kimathi filed written submissions dated 14th July, 2021 on behalf of the Respondent in which he submitted that the application is incompetent as the Complaint filed herein does not contain a prayer for a permanent injunction. That the interlocutory injunctive reliefs sought in the application cannot therefore issue as to grant them would be to grant them *in vacuo*.

13. Mr. Kimathi contended that while the application is expressed to be grounded under **Order 40, rule 1(a)** of the **Civil Procedure Rules**, the subject matter of the injunction is not in danger of alienation to defeat any decree. That the application therefore falls squarely under rule 2 which requires that an application be made in a suit wherein the relief of a permanent injunction is sought as held in **Paul Muhoro Kihara vs. Barclays Bank (K) Ltd HCCC 13 of 2002**.

14. According to Mr. Kimathi, the instant application is riddled with lies and unsubstantiated and scandalous accusations and is only meant to delay these proceedings. Counsel stated that it was curious that the application was dated 27th November, 2018 but the supporting affidavit was attested on 22nd November, 2019; that the application was filed under Certificate of Urgency on 28th November, 2019 but only served upon the Respondent on 22nd September, 2020; that the matter was first listed for directions on 25th February, 2021 but the Applicant was not in court on that date and that the Applicant did not take any steps to prosecute the application until 17th June, 2021.

15. Mr. Kimathi contended that the Applicant had not demonstrated a *prima facie* case, and that even if she had, she had not shown that she stands to suffer any irreparable injury that would not be adequately compensated by damages. That the Respondent had been in occupation of the premises in which she alleged possible eviction since the filing of this suit. Further that none of the properties or chattels that the Applicant claimed apprehension of disposal had been disposed of since. Counsel urged that even if the Applicant were to suffer any injury, the same would be readily quantifiable and the suit property does not have any unique quality that would render damages an inadequate remedy. To this end, Counsel cited the decision in **Nyanza Fish Processors Ltd. vs. Barclays Bank of Kenya Ltd [2009] eKLR**.

16. It was Mr. Kimathi's submission that the balance of convenience in this matter tilts in favour of the Respondent for reasons that the Applicant has been indolent in prosecuting this application filed under Certificate of Urgency way back in November 2018. Further that the Applicant had riddled the application with irrelevant considerations and falsehoods and the Applicant had not demonstrated any legal basis for the grant of an injunction.

17. In Mr. Kimathi's view, the Applicant had not satisfied the requirements for the grant of an interlocutory injunction as she had failed to demonstrate that her rights are being violated and or in danger of being violated to justify the need for an explanation from the Respondent. That the Applicant had also failed to demonstrate a *prima facie* case with a probability of success to entitle her to the prayers sought. Therefore, that the Court should dismiss the application with costs to the Respondent. Counsel further urged that the prayers sought are in the nature of equitable reliefs yet the Applicant by her conduct and false allegations had come before Court with tainted hands. That it would therefore be unjust to grant the Applicant the orders sought when she had dragged this matter for years only to now claim that the matter is urgent to warrant the grant of interim orders.

18. The principles for the grant of injunctions were set out in the celebrated case of **Giella vs. Cassman Brown & Co. (1973) E.A 358** as follows:

- i. The Plaintiff must establish that he has a *prima facie* case with high chances of success.
- ii. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.
- iii. If the court is in doubt, it will decide on a balance of probabilities.

In an application for an interim injunction, the onus is therefore on the Applicant to satisfy the court that it should grant the injunction.

19. What constitutes a *prima facie* case was defined in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others [2003] KLR 125** where the Court observed thus:

“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.

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate 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.”

20. The interlocutory orders sought in the instant application are anchored on the main application which is for division of matrimonial property. According to the Applicant, the suit properties qualify as matrimonial property, an argument which the Respondent vehemently denies.

21. Matrimonial property is defined under **section 6(1)** of the **Matrimonial Property Act, 2013** to mean the matrimonial home or homes; household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of marriage.

22. In the instant case, it is commonly accepted that the suit properties were acquired and developed during the pendency of the marriage between the parties, what is controverted is whether the properties constitute matrimonial properties and whether the orders sought can be issued in pertinence to these properties. This is especially so since the properties are registered solely in the name of the Respondent. Speaking to this, **section 14** of the **Matrimonial Property Act** stipulates that where matrimonial property is acquired during the marriage in the name of one spouse, there is a rebuttable presumption that their beneficial interests in the matrimonial property are equal.

23. In view of the provisions of **section 14** and the evidence on record, it therefore follows that the Applicant has established a *prima facie* case. This is so because it is only upon adducing evidence to the contrary that the presumption under **section 14** can be rebutted. Additionally, it is evident that it is the Applicant and the children of the union who currently reside in the matrimonial home, a fact which reinforces the case in favour of the Applicant. As such, I am satisfied that there is a serious question to be tried and therefore that the Applicant made out a *prima facie* case.

24. Whereas the Respondent contended that if the Applicant were to suffer any harm, it was remediable by damages, I am not convinced by this argument. One of the suit properties is what is stated to have been the matrimonial home and it is there that the Applicant and the parties' children reside. It is therefore the Applicant and the parties' children who would suffer greater harm were the matrimonial home to be disposed of or otherwise alienated. To my mind, this qualifies as irreparable harm. On the face of it, it appears that the Applicant has a beneficial interest in the suit properties and it is therefore upon this court to ensure that until and unless this is controverted by evidence, the Applicant's interest is protected.

25. At a cursory glance of the record, I am of the considered view that the balance of convenience tilts in favour of the Applicant. It is not disputed that the suit properties were acquired during the subsistence of the Respondent's union to the Applicant. The circumstances surrounding the acquisition and development of the properties are yet to be ascertained, and the contribution of the parties determined. Therefore, the injunctive orders sought must issue to protect any rights that the Applicant may have in the suit properties. In any event, it has not been demonstrated that to grant the orders sought would prejudice the Respondent.

26. I find guidance in the decision in **Films Rover International Ltd vs. Cannon Film Sales Ltd (1987) 1 WLR 670** at 680 in which Lord Hoffman opined thus:

“The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the “wrong” decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong” in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.”

27. In advancing their respective arguments for and against the injunctive reliefs sought, both parties made averments with respect to their contributions towards the acquisition of the properties. It is noteworthy that these are issues that can only be put to rest once the main application is set down for hearing whereupon each of the parties can advance arguments in support of their respective claims. At this stage, the court only needs to be satisfied that the Applicant has made out a case to warrant the grant of the injunctive orders sought. It is noteworthy that **Order 40, rule 1** of the **Civil Procedure Rules** empowers this court to issue a temporary injunction in circumstances such as these.

28. The Respondent raised an issue of indolence on the part of the Applicant in prosecuting the instant application urging that on this basis, the Applicant was undeserving of the orders sought. It is curious however that this issue was raised in the Respondent's submissions but was never raised in the Replying Affidavit to afford the Applicant a chance to explain the said indolence. Be that as it may, the grant of an injunction is a discretionary remedy and to disallow the orders sought on this basis, when the Applicant has not been afforded an opportunity to offer an explanation for the delay would be against the right to a fair hearing. In any case, as I have demonstrated above, it appears that in this case, there is a much greater risk of causing an injustice by withholding the injunction than by granting it.

29. Having carefully analyzed the pleadings on record, the written submissions filed by the respective Counsels on record and the pertinent law, it is my finding that the application dated 27th November, 2018 is merited. Consequently, I allow it in the following terms:

a. The Respondent, his servant and/or agent be restrained from selling, alienating, transferring, subdividing, encumbering or in any way disposing the following properties pending the hearing and determination of this suit:

i. House No. xxx constructed on Title Number Nairobi/Block xxx/xxx and all the developments thereon.

ii. Title Number Kwale/Simba North/Kundutsi 'x'/xxxx and all the developments thereon.

iii. House No. xx MMI constructed on Title Number Nairobi/Block xxx/xxx and all the developments thereon.

iv. [Particulars Withheld] Park Parcel Cxxx being a portion of Title Number Naivasha/Maraigushu Block xx/xx (K) and all the developments thereon.

v. [Particulars Withheld] Hills Land measuring approximately seven (7) acres and all the developments thereon.

b. The Respondent, his servant and/or agent be restrained from selling, encumbering or in any way disposing the following properties pending the hearing and determination of this suit:

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ii. Land Rover Discovery 3 S/Wagon Motor Vehicle Registration No. KBK xxxX.

iii. Pickup Nissan Hard Body Model 85 Motor Vehicle Registration No. KAV xxxM.

c. The Respondent be and is hereby restrained from evicting the Applicant from the matrimonial home in House No. xxx Title No. Nairobi/Block xxx/xxx pending the hearing and determination of this suit.

d. The Respondent be and is hereby restrained by himself, his agents, servants or workmen from doing any of the following acts that is to say, demolishing, removing, bringing down, wasting, damaging or in any manner whatsoever destroying any of the houses, buildings and/or structures erected on any of the matrimonial properties pending the hearing and determination of this suit.

e. The matter shall be fixed for hearing of the main suit on priority basis within the new term.

f. There shall be no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 7TH DAY OF OCTOBER, 2021.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Applicant.

In the presence of.....Advocate for the Respondent.