

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ORIGINATING SUMMONS NO.14 OF 2020

MILLICENT MUTHONI KIGIRA.....APPLICANT

VERSUS

JOSHUA OTIENO NDERE.....RESPONDENT

RULING

1. Before me for determination is a Notice of Motion dated 22nd June, 2021 and filed on the same day pursuant to Order 40 Rules 1,2,4 and 10 (1) of the Civil Procedure Rules, Article 159 of the Constitution, Sections 1A ,1B, 3A, and 6 3 (c) of the Civil Procedure Act and Section 17 of the Matrimonial Property Act seeking orders as follows;

1) **THAT** this application be certified as urgent and be heard exparte in the first instance.

2) **THAT** a temporary injunction do issue restraining the Respondent, his servants and/or agents from evicting the Applicant and the issue of marriage from the Suit Properties and/or selling, alienating, wasting, charging, damaging and/or otherwise interfering with and the preservation of the following properties pending inter-parties hearing, namely;

NAME

ASSETS

| | |
|---|---|
| | · 25 PIGS |
| 1 ACRE UNSURVEYED PIECE OF LAND AT (i) MWAKIRUNGE. | · Plant and Equipment on the Farm |
| RESPONDENT'S NAME | · Sheds & Buildings at the Farm; |
| | · Trees and vegetables at the Farm. |
| (ii) NONICO LTD(700 shares) | · Land at Bububu Settlement scheme originally known as MOMBASA/BUBUBU 'A'/9 and later subdivided into the following parcels:- |
| RESPONDENT'S NAME | · Mombasa/Bububu(A)/1232 |
| | · Mombasa/Bububu(A)/1233 |
| | · Mombasa/Bububu (A)/1234 |
| | · Mombasa/ Bububu(A)/1235 |
| | · Mombasa/ Bububu(A)/1236 |
| | · Mombasa/Bububu(A)/1237 |
| | · Mombasa/Bububu(A)/1238 |
| | · Mombasa/Bububu(A)/1239 |
| | · Mombasa/Bububu(A)/1240 |
| | · Mombasa/Bububu(A)/1241 |

- Mombasa/Bububu(A)/1242
- Mombasa/Bububu(A)/1243
- Mombasa/Bububu (A)/1244
- Mombasa/ Bububu(A)/1245
- Mombasa/Bububu(A)/1246
- Mombasa/Bububu(A)/1247
- Mombasa/Bububu (A)/1248
- Mombasa/ Bububu(A)/1249
- Mombasa/ Bububu(A)/1250
- Mombasa/Bububu(A)/1251
- Mombasa/Bububu(A)/1252

- Bank Account(s)

- Property in Kilifi County

(iii) LR.NO. Gongoni Settlement Scheme/2335-
RESPONDENT'S NAME

(iii) KCC 427A - RESPONDENT'S NAME

(iv) KCR 628E-APPLICANT'S NAME

(v) PROWAY TRADING LTD- RESPONDENT'S NAME

(vi) WINTOUCH LTD- RESPONDENT'S NAME

(vii) BAZOOKA FAST FOODS LTD- RESPONDENT'S
NAME

(viii) SHORELINE PROPERTIES LTD-RESPONDENT'S
) NAME

(ix) EDAFOS PROERTIES LTD- RESPONDENT'S NAME

(x) EDUCATION INSURANCE POLICY NUMBER
026/CEA/071306 - RESPONDENT'S NAME

(xii) SHARES IN LEGAL FIRMS HELD BY THE
RESPONDENT

- Family Car

- Family Car

- 50 shares

- 200 shares

- 500 shares

- 500 shares

SHARES

- ICEA LION assurance Company amounting to Kshs 302,686.00

- CJ LAW & ASSOCIATES LLP

- GM GAMMA ADVOCATES LTD

- NDERE & COMPANY ADVOCATES

3) **THAT** a temporary injunction do issue restraining the Respondent his servants and/or agents from evicting the Applicant and the issue of marriage from the Suit Properties and/or selling, alienating, wasting, charging, damaging and/or otherwise interfering with and the preservation of the following properties pending hearing and determination of the originating summons herein:-

NAME

ASSETS

(i) 1 ACRE UNSURVEYED PIECE OF LAND AT MWAKIRUNGE.

RESPONDENT'S NAME

- 25 PIGS
- Plant and Equipment on the Farm
- Sheds & Buildings at the Farm;
- Trees and vegetables at the Farm.

(ii) NONICO LTD(700 shares)

RESPONDENT'S NAME

· Land at Bububu Settlement scheme originally known as MOMBASA/BUBUBU 'A'/9 and later subdivided into the following parcels:-

- Mombasa/Bububu(A)/1232
- Mombasa/Bububu(A)/1233
- Mombasa/Bububu (A)/1234
- Mombasa/ Bububu(A)/1235
- Mombasa/ Bububu(A)/1236
- Mombasa/Bububu(A)/1237
- Mombasa/Bububu(A)/1238
- Mombasa/Bububu(A)/1239
- Mombasa/Bububu(A)/1240
- Mombasa/Bububu(A)/1241
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- Mombasa/Bububu (A)/1244
- Mombasa/ Bububu(A)/1245
- Mombasa/Bububu(A)/1246
- Mombasa/Bububu(A)/1247
- Mombasa/Bububu (A)/1248
- Mombasa/ Bububu(A)/1249
- Mombasa/ Bububu(A)/1250
- Mombasa/Bububu(A)/1251
- Mombasa/Bububu(A)/1252

| | | | | |
|--------|---|--|--------|--|
| | | | | · Bank Account(s) |
| (iii) | LR.NO. Gongoni Settlement Scheme/2335- RESPONDENT'S NAME | | | · Property in Kilifi County |
| (iii) | KCC 427A - RESPONDENT'S NAME | | | · Family Car |
| (iv) | KCR 628E-APPLICANT'S NAME | | | · Family Car |
| (v) | PROWAY TRADING LTD- RESPONDENT'S NAME | | | · 50 shares |
| (vi) | WINTOUCH LTD- RESPONDENT'S NAME | | | · 200 shares |
| (vii) | BAZOOKA FAST FOODS LTD- RESPONDENT'S NAME | | | · 500 shares |
| (viii) | SHORELINE PROPERTIES LTD-RESPONDENT'S) NAME | | | · 500 shares |
| (ix) | EDAFOS PROERTIES LTD- RESPONDENT'S NAME | | SHARES | |
| (x) | EDUCATION INSURANCE POLICY NUMBER 026/CEA/071306 - RESPONDENT'S NAME | | | · ICEA LION assurance Company amounting to Kshs 302,686.00 |
| | | | | · CJ LAW & ASSOCIATES LLP |
| (xii) | SHARES IN LEGAL FIRMS HELD BY THE RESPONDENT | | | · GM GAMMA ADVOCATES LTD |
| | | | | · NDERE & COMPANY ADVOCATES |

4) **THAT** the Respondent be restrained from withdrawing, transferring, pledging or borrowing against any sums standing in any and all banks accounts held with any of the following banks and the preservation of the bank accounts pending inter-parties hearing:-

a. Consolidated bank Joshua Otieno Ndere.....personal savings account

b. Any other Bank where funds may have been transferred to from prior existing accounts.

5) **THAT** the Respondent be restrained from withdrawing, transferring, pledging or borrowing against any sums standing in any and all banks accounts held with any of the following banks and the preservation of the bank accounts until the hearing and determination of these originating summons or until the Respondent secures the Applicant in terms of prayers (2), (3) and (4) above and such order be served upon the said banks:-

a. Consolidated bank Joshua Otieno Ndere.....personal savings account

b. Any other Bank where funds may have been transferred to from prior existing accounts.

6) **THAT** the Respondent be compelled to render a full and frank disclosure to the Applicant on all bank statements and financial records and/or reports of the Family Businesses detailing all credit and debit entries in those accounts from the year 2014 to date pending the hearing and determination of these proceedings.

7) **THAT** any order made in terms of prayer 4 and 5 above relating to the Respondent's personal bank accounts and Family Business Accounts be subject to such monthly amounts as may be certified by the Court as necessary to meet the Respondent's own expenses so that he is not rendered destitute.

8) **THAT** any order made in terms of prayer 4 and 5 above relating to the Respondent's personal bank accounts and Family Business Accounts be subject to such monthly amounts as may be certified by the Court as necessary to meet the Applicant's own expenses so that she is not rendered destitute.

9) **THAT** the Respondent be restrained from withdrawing, transferring, pledging or borrowing against any sums standing in the credit of NDERE & COMPANY ADVOCATES or JOSHUA OTIENO NDERE and the preservation of the bank accounts in any and all banks accounts held with any of the following banks pending inter-parties hearing and such order be served upon the said banks;

i. Family Bank Ndere & company 092000011214 main Office Account

ii. CFC Stanbic Joshua Otieno Ndere Sub Office Account

iii. ABSA Ltd; Johua Otieno - Sub Office Account.

iv. and or any other Bank where funds may have been transferred to from prior existing accounts.

10) **THAT** the Respondent be restrained from withdrawing, transferring, pledging or borrowing against any sums standing in the credit of NDERE & COMPANY ADVOCATES or JOSHUA OTIENO NDERE and the preservation of the bank accounts in any and all banks accounts held with any of the following banks until the hearing and determination of these proceedings or until the Respondent secures the Applicant in terms of prayers 2 and 3 above and such order be served upon the said banks:-

i) Family Bank Ndere & company 092000011214 main Office Account

ii) CFC Stanbic Joshua Otieno Ndere Sub Office Account

iii) ABSA Ltd; Johua Otieno - Sub Office Account.

iv) and or any other Bank where funds may have been transferred to from prior existing accounts.

11) **THAT** the Respondent be compelled to render a full and frank disclosure to the Applicant on all bank statements and financial records and/or reports of the Family Practice detailing all credit and debit entries in those accounts from the year 2016 to date pending the hearing and determination of these proceedings.

12) **THAT** the Respondent be compelled to make payments towards loan number LN02232 at the Law Society of Kenya Sacco.

13) **THAT** all the costs of the suit be awarded to the Applicant.

2. The application is based on grounds set out on the face of it and further amplified by the averments contained in an affidavit sworn on 22nd June, 2012 by the applicant. The applicant's case is that she is a practicing prosecution counsel engaged in gainful employment at the office of the Director Public Prosecutions while the respondent her former husband with whom they have since divorced is an advocate of the High court of Kenya practicing as a managing partner in the law firm of Ndere and Co. Advocates.

3. It is the applicant's claim that they started cohabiting with the applicant as husband and wife the year 2012 and finally formalized their marriage the year 2015. That the year 2013 she got employed at SGS Kenya and later 2014 she joined the ODPP while the respondent got employed at the law firm of Miller & Company Advocates the year 2014 at salary of Ksh. 80,000 per month.

4. She averred that sometime the year 2015, the respondent started experiencing challenges at his place of work thus necessitating establishment of a law firm in Mombasa as a side hustle after securing financial support from her. She further averred that in the year 2015, the respondent identified a piece of land for farming at Mwakirunge area which land she single handedly bought using funds from her cooperative bank and a loan from LSK Sacco.

5. That owing to financial constraints, the respondent opened a law firm office within their residential house whereby she (applicant) helped in setting up the office as well as playing the role of a secretary besides her daily office work at Kwale ODPP's.

6. She contended that with her financial support they started farming and chicken rearing at Mwakirunge farm besides planting trees. That to her surprise, she discovered that the respondent had registered the farm in his name alone.

7. She further claimed that the year 2017 they bought 11 acres of land at Kilifi Gongoni settlement scheme 12335 which again the respondent registered in his name. That the year 2018, they again bought land at Bububu Likoni for speculation purposes using funds from the law firm.

8. She deposed that the year 2019, she took a loan of kshs 800,000 and sent the same to the respondent which money was used to refund kshs 1,000,000 loan taken from shylocks for purposes of subdividing Bububu land.

9. It was deposed that she was shocked to learn that all the sub-divisions had been registered in the name of a company known as Nonico which was secretly registered by the respondent with his office assistant as co-directors having a shareholding of 300-700 shares respectively.

10. It was her contention that all financial proceeds were invested in Ndere & Company Limited in 2016 and Nonico Investment Limited 2018. It was her further contention that some financial efforts were directed and invested in the name of Proway Trading Co-50 shares, Wintouch Co-200 shares, Bazooka fast foods Ltd, shore-line properties 500 shares and Edafos properties Ltd all in the respondent's name.

11. Turning to family and domestic responsibility, she claimed that she was the primary care giver, paying rent for the matrimonial home, medical care for their child who is suffering from autism, paying school fees and speech therapy.

12. Besides her claim on landed property, she also laid claim over shares in various legal firms where the respondent is a shareholder namely; CJ Law and associates LLP, GM Gamma Advocates Ltd and Ndere and Company Advocates. She further claimed Motor vehicle KCC 427 A in the respondent's name and KCR 628E in her name.
13. She argued that she helped in establishing Ndere law firm with an office within their matrimonial house and also did refer several clients to the law firm besides buying office furniture as proof of her contribution. She relied on various documents attached to her Originating Summons filed on 30th July, 2020 and further affidavit filed on 5th February, 2020.
14. In response, the respondent filed a replying affidavit sworn on 27th September, 2021 and filed on 28th September, 2021 denying ever engaging in any joint investment venture with the applicant. He averred that the applicant is an employee in the office of the DPP earning a monthly salary while he is a practitioner of law with no guaranteed source of income. He stated that he started cohabiting with the applicant the year 2015 and not 2013.
15. Concerning the role of the applicant in the company (not specified), he averred that it was merely clerical. He deposed that he is the one taking charge of all family expenses contrary to the applicant's claim that he does not support the family.
16. He further stated that the applicant dedicated all her earnings to personal investments at LSK Sacco savings, Kuscco and unit trusts and not the family affairs. Regarding the insurance policy, he deposed that it was secured by him without any contribution from the applicant. Touching on a sum of kshs 300,000 allegedly given to him by the applicant, the same was refunded. That if any loan was taken by the applicant, the same was for her own farming activities and other investments to which he was not party to. It was his contention that he started his law firm alone without any support from the applicant.
17. He stated that he solely identified Mwakirunge farm and proceeded to pay for it without the applicant's contribution hence put her to strict proof. He further denied receiving any contribution towards farming activities at Mwakirunge farm nor his law firm. He averred that his legal firm is a personal legal entity and that the other legal entities were registered between willing parties to the exclusion of the applicant.
18. Regarding Proway trading limited and Wintouch Company Limited the same are start-up companies which have never taken off. That Bazooka fast foods limited is a family business which was started by him and his current wife after the applicant had left. (See JON- I incorporation certificate dated 17th February, 2020). As to Shore line properties limited, it is a company yet to take off and registered after they had separated (See JON 9 company Cr. 12) registration dated 5th July, 2020). As to Edafos properties limited, the same is a start-up company registered between him and two friends (See JON-10 company form Cr 12)
19. He stated that he was committed to the welfare of their son and that he has been paying school fees as evidenced by M-pesa statements (JON -14). As concerns Nonico investments limited, he averred that he is a co-director /shareholder of the company with his friend Muksan Odhiambo. He denied that the company was a family venture.
20. Concerning bank accounts, he deposed that they used to keep separate bank accounts hence nothing joint to disclose yet the applicant has retained her secret accounts. As to Title No Gongoni settlement scheme 12335, he claimed that, he acquired it solely after borrowing kshs 800,000 from the applicant which he is yet to refund as the applicant is still holding the title as security. Regarding motor vehicle KCC 437 A, he claimed that he obtained a loan from Barclays bank to purchase it. That motor vehicle KCR 628 E was bought by the applicant solely.
21. As to shares in CJ Law and associates LLP & G M Gamma, the same are dormant and he does not derive any profit from them. Touching on Ndere and company advocates, the same is a sole proprietorship to which the applicant has no role to play.
22. In her rejoinder, the applicant filed a further affidavit filed on 25th February, 2021 in which she introduced judgment for their divorce.
23. During the hearing, M/s Osino counsel for the applicant reiterated the averments contained in the affidavit in support of the Originating Summons, a further affidavit and an affidavit in support of the instant application plus annexures attached thereto. Learned counsel submitted that the court has jurisdiction to preserve the subject properties pending the outcome of the main suit.
24. Counsel contended that the properties in question were acquired during coverture and that the applicant did make both direct and indirect contribution. That property held in the name of companies constitutes matrimonial property. In support of that proposition, counsel placed reliance in the case of **PWK VS JKG (2015)** where the court recognized that where matrimonial property is intertwined with company property a court can intervene and share out the shares in a company.
25. The court was further referred to the holding in **HWM VS WNM (2015)**, **AKK VS PKW (2020)** and **PWN VS JWC (2017) e KLR** all espousing court's position on company shares against matrimonial property.
26. On his part, Mr Oduor appearing for the respondent, opposed the application. firstly, Mr Oduor adopted the content contained in the replying affidavit. He contended that an orders of injunction cannot apply where there is no substantive prayer for a permanent injunction. Learned counsel submitted that the applicant was not truthful as she did not disclose any other source of income other than that of the respondent. That the applicant has failed to prove the principles expressed in **Giella Vs Cassman Brown** on issuance of injunction.
27. He contended that a law firm cannot be a matrimonial property nor is property held by a company. In her rejoinder, M/s Osino opined that the replying affidavit is in response to the Originating Summons and not the application at hand hence the application is unopposed as an affidavit cannot be amended.

Analysis and Determination.

28. I have considered the application herein, response thereto and oral submissions by both counsel. Issues that emerge for consideration are;

(1) Whether the application has met the threshold for grant of injunction orders.

(2) Whether properties registered in a company name qualify to be matrimonial property.

29. The application herein is brought under order 40 rules 1,2,4, and 10(1) of the Civil Procedure Rules and Article 159 of the Constitution. Before I proceed to determine on the question whether the applicant has established the threshold for grant of an injunction, Mr. Oduor raised the question on whether a temporary injunction can issue without a substantive prayer of a permanent injunction. Ms. Osino asserted that that is a technicality which is curable under Article 159 of the Constitution which commands that courts should determine matters without undue regard to technicalities; It is trite law that a temporary injunction must be founded on a substantive suit. In this case Mr. Oduor submitted that a temporary injunction must issue from a substantive prayer of permanent injunction.

30. However, a perusal of the application at prayer 2 and 3, revealing that it is seeking a temporary injunction or a preservation order restraining any dealings on the subject property. The inclusion of the prayer for preservation order in conjunction with the temporary restraining order of injunction is sufficient enough for the court to seize the suit and grant or reject the prayers sought.

31. In my view, there is a substantive suit in place upon which preservation orders in the nature of a temporary injunction can issue. I do agree with Ms Osino that the prayer for injunction together with preservation orders is a technicality which is curable under Article 159 (2) of the Constitution.

32. Having clarified on the issue of competency of the suit, I will now turn to the crucial issue whether the applicant is entitled to the prayers sought. In the celebrated case of **Giella Vs Cassman Brown Co. Ltd(1973) E.A 358** , the court stated as follows;

“First, the 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 loss which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience”

33. Similar position was held in the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 others (2003) e KLR** where the court held that the principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled in *Giella vs Cassman Brown*.

34. It is worth noting that, to grant or not grant interlocutory injunction is a matter of judicial discretion judiciously exercised by the presiding court. See **Mirao Ltd V First American Bank of Kenya Ltd & 2 others (Supra)** where the court stated that;

“The power of the court in an application for interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of law and evidence”

35. The dispute before me is seeking a declaration that the subject properties are matrimonial property as defined under the Matrimonial Property Act and acquired during coverture and that they are subject to division as the court may determine. Several properties have been listed. Some are in the respondent's name, companies' names and in partnership deeds between the respondent and 3rd parties.

36. The landed properties include; 1acre unregistered land at Mwakirunge which was acquired 2015 and currently registered in the respondent's name. The applicant claimed that she took a loan from LSK Sacco and cash from her cooperative bank to finance purchase of the said property. The respondent similarly claimed to have bought the same alone using funds from Barclays bank. This is a property bought during the subsistence of marriage. As to who made monetary or non-monetary contribution is a matter of evidence. Before that would happen, the property should be preserved to avoid sale to 3rd parties does prejudicing the other party and the likelihood that the applicant may not be adequately compensated in monetary terms given the extensive development done there and also the cost of recovery should she succeed.

37. She has also attached bank statements and LSK Sacco loans to justify the source of income. There is also the claim of indirect contribution in the form of taking care of the family and funding family expenses. I find all this to be prima facie evidence subject to cross examination.

38. Regarding Nonico Limited (700 shares), the applicant claimed that they jointly bought land at Bububu settlement scheme originally Known as Mombasa/ Bububu “A”19 and later subdivided it into several plots listed in prayer 2 and 3 of the application. She claimed to have contributed kshs 800,000 the year 2019 and that after subdivision, she was shocked that all the plots were registered in a company known as Nonico.

39. According to her, she was short changed. On his part, the respondent stated that he bought the property alone and that the company is owned by himself and one Odhiambo. He argued that company property cannot be matrimonial property.

40. I am alive to the fact that as a general rule a company is a legal entity and its property can only be distributed under company law. This position has for years been applied since the case of **Salomon V Salomon (1897) AC 22**. However, in recent times, the court of appeal has held that in circumstances where matrimonial property is intertwined with company property, the shares of a spouse in such company can be shared out to a co-spouse. See **SNK VS MSK & 5 others (2015) e KLR, AKKV PKW (supra) and PWK v JKG (supra)**.

41. Since there is competing interest in the original land before sub-division and registration as Nonica Company, the court is duty bound to preserve the property pending determination of the main suit. This will avert the possibility of several properties changing hand to 3rd parties which will be costly and expensive to be compensated in monetary terms.
42. Touching on Gongoni property in Kilifi, similar position as above shall abide. This is property bought during the subsistence of the marriage hence the need to preserve it pending hearing and determination of the suit.
43. Regarding Proway trading limited company, Wintouch company Limited, Bazooka, Shoreline properties and Edafos property limited, the applicant did not endeavor to explain any contribution in those companies and whether they are going concerns. To properly address the applicant's interest, they have to await determination of the main suit.
44. The respondent attached evidence that Proway is a startup company which has never taken off. It has 4 shareholders who are not parties in this case and who are majority shareholders. This fact was not rebutted hence no prima facie evidence that it should be enjoined. Similar position applies to Edafos properties limited, Bazooka and Shoreline which were incorporated after the parties had separated. See (JON 8).
45. As to motor vehicle KCC 427 A owned by the respondent and KCR 628E by the applicant, they shall each continue using the car in their possession pending hearing and determination of the suit.
46. As concerns shares in legal firms including Ndere and company advocates, I do not find any prima facie proof nor damage likely to be suffered by the applicant not capable of monetary compensation nor any proof of convenience in her favour. Regarding the life insurance policy, it will be a matter of evidence during the main hearing.
47. As to the question of accounts for various income generating activities since 2014 to the period of separation, the applicant should specify the property that qualifies as matrimonial property for distribution. That aspect will await adduction of evidence. Touching on prayer 4 restraining withdraw of funds from personal consolidated bank held in the name of Joshua Otieno Ndere, the applicant did not specify the bank Account.
48. Touching on the law firm office accounts, it will paralyze operations of the respondent's office to which the applicant is not a practitioner or partner being a civil servant.
49. In a nutshell, I am persuaded that the applicant has established a prima facie case with a probability of success that she may have made direct or indirect contribution towards the acquisition of some properties and that if not preserved they might change hands to 3rd parties thus making it difficult to recover should the suit succeed hence irreparable damage. Even on a balance of convenience, it is only just and fair that parties be given an opportunity to ventilate their case which is quite emotive.
50. Accordingly, the application is allowed in terms of prayer three (i) (ii) and (iii) pending hearing and determination of the main suit; as to costs, the same shall be in the cause.

Dated, signed and delivered virtually at Mombasa this 5th day of November, 2021.

J. N. ONYIEGO

JUDGE