



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA
MATRIMONIAL CAUSE NO. 2 OF 2019 (OS)
IN THE MATTER OF THE MARRIAGE ACT (2013)

AND

IN THE MATTER OF THE MATRIMONIAL PROPERTIES ACT NO. 49 OF 2013

AND

IN THE MATTER OF AN APPLICATION FOR DIVISION OF MATRIMONIAL PROPERTY

PW.....APPLICANT/PLAINTIFF

VERSUS

CMK.....RESPONDENT/DEFENANT

RULING

1. The Applicant in her Originating Summons dated 22nd October, 2019 sought the following orders:

1) Spent.

2) That pending the hearing and determination of the Originating Summons herein this court be pleased to issue a mandatory order compelling the Respondent to deposit all proceeds from the rent collected from leasing out the matrimonial home-built No. INOI/KERUGOYA/xxxx in a joint account to be opened by the parties herein or as the court deems fit until further orders of this court.

3) That pending the hearing and determination of the originating summons herein this court be pleased to issue a mandatory order compelling the Respondent to furnish the court with detailed account of the rental income collected from leasing matrimonial home INOI/KERUGOYA/xxxx.

4) That pending the hearing and determination of the originating summons herein this court be pleased to issue a mandatory order compelling the Respondent to deposit all proceeds and bonuses in relation to the tea bushes on land parcel MWERUA/MUKURE/xxxx from 2019 in a joint account to be opened by the parties herein or as the court deems fit until further orders of this court.

5) That pending hearing and determination of the originating summons herein, this court be pleased to issue mandatory order compelling the Respondents to furnish the court with a detailed account of all proceeds and bonuses received by him from the tea bushes on Land Parcel MWERUA/MUKURE/xxxx from 2006 to date.

6) That pending the hearing and determination of the Originating Summons herein, this court be pleased to issue a mandatory order compelling the Respondent to account for all proceeds from the sale of Land Parcel No. MUTIRA/KAGUYU/xxxx sold during the subsistence of the marriage in September 2005 without the knowledge and consent of the Applicant.

7) That pending the haring and determination of the Originating Summons herein this court be pleased to issue an injunction barring the Respondent from selling, transferring or dealing in any manner detrimental to the Applicant with the matrimonial property being plot No. INOI/KEROGOYA/xxxx, Land Parcel No. MWERUA/MUKURE/xxxx and motor vehicle Reg. No. KAM

xxxS.

8) That costs be in the cause.

2. The application is supported by the Applicant's affidavit sworn on 22nd October, 2019 and a supplementary affidavit dated 27th October, 2020. The Respondents opposed the application by a Replying Affidavit sworn on 18th February, 2020, in which he denied the Applicant's claim over any of the properties stated above.

3. The Applicant and the Respondent are both teachers in the employment of [Particulars Withheld] Commission who married in 1992 and thereafter solemnized their marriage in a Christian Marriage Ceremony in 1995. They were living together as husband and wife since the year 1992 to 2005 when the Respondent allegedly evicted the Applicant together with their three children from the matrimonial home. The Applicant and the Respondent claim to have contributed directly and indirectly to the acquisition of the matrimonial property, and others during the subsistence of their marriage, which they legally divorced in August, 2019.

4. The Respondent claims that the Applicant left the matrimonial home in October, 2005 and has never occupied the matrimonial home constructed on **LR INOI/KERUGOYA/xxxx** and which land measures 0.101 hectares and jointly registered in common undivided shares between the Respondent and a third party, one **SMK** since 13th November, 1998, but nevertheless, the property was acquired during the said marriage.

5. The Applicant further depones that together with the Respondent they bought LR. No. **MWERUA/MUKURE/xxxx** which was allegedly sold by the Respondent without knowledge and consent of the Applicant as per the sale agreement dated 13th December, 2005.

6. The Application hence claims that the following properties namely **LR. IINOI/KERGOYA/xxxx, MWERUA/MUKURE/xxxx and MWRUA/MUKURE/xxxx** and motor vehicle registration No. **KAM xxx S** form part of matrimonial property and is entitled to a share of each. The Applicant thus prays that, pending the hearing and determination of the originating summons herein this court be pleased to issue a mandatory order compelling the Respondent to furnish the court with detailed account of the rental income collected from leasing matrimonial home **INOI/KERUGOYA/xxxx** from 2006, proceeds and bonuses received by him from the tea bushes on **Land Parcel MWERUA/MUKURE/xxxx** from 2006 and sale proceeds from **MWERUA/MUKURE/xxxx** in 2005.

7. On the other hand, and by his affidavit in response to the Originating Summons and the application, the Respondent denies that the Applicant made any financial contribution to the acquisition of any of the listed properties and therefore cannot lay any claim to any of them.

8. By the pleadings by both parties, the application is for a mandatory injunction to restrain the Respondent from selling and or interfering with the properties listed, and alleged to be matrimonial properties acquired during and before the brake up/divorce by joint effort of both parties. Both parties have filed written submissions.

9. The Applicant's submissions are dated 17th November, 2020 and filed on 3rd February, 2021 by her Advocates Machira & Muriuki Co. Advocates. Kuguru Kahigah & Co. Advocates filed the Respondent's submissions dated 1st February, 2021 on the 2nd February, 2021. I have carefully considered each of the submissions and the cited authorities.

10. Issue for Determination

Whether the Applicant has made out a prima facie case for the order of mandatory injunction to be granted pending hearing and determination of the Originating Summons

Analysis and Determination

11. The test whether to grant or not, a mandatory injunction is stated in **Vol. 24 Halsbury's Laws of England Para. 948**, cited in **Kenya Breweries Ltd vs Washington O. Okeyo [2003] eKLR**.

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the Plaintiff, ... a mandatory injunction will be granted on an interlocutory application."

12. See also **Giella -vs-Cassuan Brown & Co. 1973** which laid down the principles that govern an order for injunction, thus:

1) **An Applicant must establish a prima facie case with a probability of success.**

2) **An injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss.**

3) **When in doubt, the court will decide the application on a balance of probability.**

13. Further, in **Nguruman Ltd vs Jan Bonde Nielsen & 2 others and Kenya Commercial Finance Co. Ltd vs Afraha Education Society [2001] Vol. 1 EA 86**, the court held that all the three conditions and stages must be applied as separate distinct and logical hurdles which must be surmounted sequentially.

14. **The Matrimonial Property Act No. 49** governs division of matrimonial property. **Section 2** thereof defines contribution to mean monetary and non-monetary. **Section 7** stipulates that ownership of matrimonial property depends on each spouse's contribution. The Applicant claims to have contributed into the purchase of the listed properties through loans she obtained from her employer. The Respondent acknowledges existence of the said properties, and even the one he sold, though he states to have sold with the Applicant's consent. He does not claim to have acquired any of the properties before the marriage, or after the divorce, meaning, all were bought and registered in his names during the marriage.

15. **Section 14(a) and (b)** stipulates that where a rebuttable presumption is created that if registered in one spouse's names, it is held in trust for the other, and if registered in joint spouses' names, there is a rebuttable presumption that their beneficial interests in the matrimonial property are equal.

16. For the foregoing, it is evident that the Applicant has a beneficial interest in the listed properties, and if disposed off by the Respondent during the pendency of this matter, she will suffer loss and harm; because once sold, it would be impossible to recover them, should upon hearing of the cause, the court finds in the Applicant's favour.

17. If any income has been accruing from any of the listed properties, which the Respondent denies, then, the Respondent should be accountable for the income. Though the Applicant depones that the Respondent rents out and collects rent from the **Plot No. INOI/KERUGOYA/xxxx**, and also bonuses from tea bushes from **Plot MWERUA/MUKURE/xxxx**, nothing was placed before the Court to authenticate the allegations.

18. Indeed, the Applicant has in my view, established a case with good chances of success upon full hearing. There is no doubt that the said properties may be sold to 3rd parties by the Respondent and as I have stated, would be difficult if not impossible to recover should the case be successful.

19. To avoid hardship to either of the parties, and particularly the Applicant, this court having considered the probabilities, I shall decide the application on a balance of probability, which tilt in favour of the Applicant. By virtue of **Section 14 of the Act**, these properties are presumed to be held by the Respondent in trust for the Applicant –**Njoroge vs Ngara [1985] KLR 480**.

20. For the foregoing, I find and hold that the Applicant has satisfied this court that should the preservatory orders and injunction not be granted, she may suffer harm and damage as the properties may be sold out before the cause is heard and determined.

21. I am further satisfied that the Applicant has satisfied the principles stated in the **Giella Vs Cassman Brown (Supra)** and in the test in **Kenya Breweries Ltd & Another Vs Washington O. Okeyo (Supra)**.

22. The Applicant has not made out a case to persuade the court to grant prayers 2,3,4,5, and 6. Prayer No. 7 is hereby granted.

23. The application is thus allowed to the above extent with no order as to costs.

DATED AND SIGNED THIS.....DAY OF.....2021

HON. J. N. MULWA

JUDGE

DELIVERED AT KERUGOYA THIS 11TH DAY OF NOVEMBER 2021

HON. R. MWONGO

JUDGE