



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL CASE NO 36 OF 2018

MMKK.....PLAINTIFF

VERSUS

KP.....1ST DEFENDANT

KFXK.....2ND DEFENDANT

RULING

1. The undisputed background to this cause can be briefly stated as follows. The Plaintiff **MMKK** (hereafter the Applicant) and **KFXK** (hereafter 2nd Respondent) were married under Samburu/Maasai custom in 1981 and have four adult issues, aged between 37 and 29 years. In the cause of coverture, they acquired some properties. It would appear that in recent years, relations between the couple have soured, especially after the 2nd Respondent got involved in a relationship with **KP**, the 1st Respondent, eventually leading to the estrangement of the couple.

2. On 23rd November 2018, the Applicant filed a suit against the two Respondents seeking orders *inter alia* to permanently restrain the 1st Respondent from trespassing upon six properties she identifies as matrimonial properties and to permanently restrain the 2nd Respondent from disposing of, selling, mortgaging or renting out the said matrimonial properties.

3. Contemporaneously filed with the suit was a motion brought under certificate of urgency, seeking respective interim orders of injunction against the Respondents, in connection with the stated matrimonial properties, namely:-

- a) Eden Ville House No.[xxxx] Court J, Jaborosa (LR No.[xxxx]) Nairobi;
- b) Home at Muthaiga estate Nanyuki Town LR No.[xxxx];
- c) Rural home at Doldol P & D and Kimanjo, Laikipia County;
- d) Owned or leased ranches at OlJogi, Ol Pejeta, Mpala, Naibor (P & D), Kimanjo & Doldol and domestic animals thereon;
- e) House No.3 at Langata [Particulars withheld] Estate Phase II Nairobi; and
- f) House No. 191, [Particulars withheld] Estate, Nairobi.

4. The above properties will hereinafter be referred to as the suit properties. This is the motion for determination. The motion is expressed to be brought *inter alia* under Order 40 Rules 1, 2 and 8 of the Civil Procedure Rules and Sections 4 and 12 of the Matrimonial Property Act, and is supported by the grounds on the face of the motion and supporting affidavit sworn by the Applicant.

5. To the effect that the suit properties comprise matrimonial properties the acquisition of which the Applicant made substantive contribution; that the two Respondents have without the Applicant's authority set up at the Eden Ville house which is the Nairobi matrimonial home between the Applicant and 2nd Respondent; that upon being challenged, the 2nd Respondent attempted to evict the Applicant from the matrimonial house at Muthaiga, Nanyuki and to intimidate the Applicant; that the 2nd Respondent has actively sabotaged the business at the Applicant's [Particulars withheld] Academy, Doldol through dissemination of adverse rumors; that the 2nd Respondent has committed waste in respect of matrimonial properties and sold the couple's cattle, goats and sheep kept at the ranches while preventing the Applicant access thereto; that the 1st Respondent has trespassed upon the listed matrimonial properties and hence the urgent need to protect the Applicant's interests in the properties and to protect the Applicant from further harassment and intimidation by the Respondent.

6. The 1st Respondent's Replying affidavit was filed on 5th December 2018. Therein the said Respondent asserts that she is, since 2011 lawfully wedded to the 2nd Respondent under Maasai customary law and that the two have one issue, aged 5 years; that she has not interfered in any way with the Applicant's matrimonial properties occupied or managed by the Applicant; that the Eden Ville house is matrimonial property between and occupied by the 2nd Respondent and herself and that the Applicant has never occupied the said house; and that she is a victim of the Applicant's constant attacks.

7. On his part, the 2nd Respondent filed a Replying affidavit on 5th December 2018, dismissing the Applicant's depositions as false, asserting that, while the Applicant is his wife under Samburu/Maasai custom, he also got married to the 1st Respondent under Maasai custom in 2011 and the union is blessed with a child aged five years.

That therefore, the 1st Respondent is not a trespasser, but is legitimately in occupation of the Eden Ville House which is the matrimonial home he shares with the 1st Respondent, exclusively of the Applicant who, has never occupied the said house. He deposes further that, he solely acquired all the suit properties, including the Eden Ville house, without any contribution by the Applicant, and has no intention of disposing of the said assets; that the 1st Respondent has the right to visit any of the properties he owns save the Doldol and Nanyuki houses occupied by the Applicant; that the house erected on L.R. No. [xxxx] Muthaiga Estate, Nanyuki is a rental property and not occupied by the Applicant as her matrimonial home is at Doldol, Nanyuki; and that she also manages [Particulars withheld] Academy at Doldol and collects rents from several properties in Nanyuki.

8. The 2nd Respondent further asserts that he has not interfered with the business of [Particulars withheld] Academy, has no beneficial interest in the Ol Jogi, Ole Pejeta and Mpala ranches, save the animals bred in the ranches and which business he has managed exclusively, and sometimes selling some of the animals in the normal course of business. The deponent pointed out that the houses at [Particulars withheld] estate and [Particulars withheld] Plains were acquired solely by him and that while the former is rented out to a tenant, the latter is occupied by the Applicant's second son. He denies any acts of harassment against the Applicant and asserts that the Applicant's case is based on falsehoods, and driven by malice and hostility, arising from the Applicant's refusal to accept the fact of the deponent's alleged marriage to the 1st Respondent.

9. On 6th December 2018, the Respondents filed a notice of preliminary objection challenging the jurisdiction of this court. Other grounds are that:

- a) the plaint and application as filed pursuant to Sections 4 and 12 of the Matrimonial Property Act are defective and incompetent;
- b) the suit does not disclose a cause of action;
- c) The suit offends Section 17 of the Matrimonial Property Act and Order 37 of the Civil Procedure Rules.

10. In apparent response to some of the grounds and the Replying affidavit, the Applicant filed a Supplementary affidavit on 9th April 2019. Therein she reiterates earlier depositions including that the suit properties are matrimonial properties. She also deposes that she has filed divorce proceedings in the **Kiambu CM's Court Divorce Case No. 10 of 2019**; that the Suguta Naibor P&D property is property in her name; that the respondent has since acquired a new house within the neighborhood of Eden Ville and therefore ought to vacate the house at Eden Ville which she contends to be her matrimonial home. The court directed that application and the preliminary objection be canvassed together by way written submissions.

11. Concerning the preliminary objection, the Respondents argue that the issues raised by the suit, including whether the suit properties are matrimonial property, can only be determined in a family Court and therefore the suit and motion are not properly before this court. I understood the next objection as to the propriety of the suit to be that no cause of action is disclosed by the suit and that the prayers in the suit and motion do not lie, more so as spousal consent is required before matrimonial property can be alienated. Other argumentation in regard to the suitability of the motion and suit raises matters of sufficiency of evidence and therefore merit of the motion or suit. No specific provision or legal authority was cited in demonstrating the arguments in submissions. The objection concerning the procedure applicable under section 17 of the Matrimonial Property Act and Order 37 of the Civil procedure Rules was apparently abandoned.

12. Counsel for the Applicant took the position that the applicant has invoked Sections 4 and 12 of the Matrimonial Property Act *inter alia* in approaching this Court. He submitted that the jurisdiction of this court flows from the Matrimonial Property Act (Section 12) and the provisions of Order 40 Rule 1 of the Civil Procedure Rules and that the instant cause is distinct from a cause for the division of matrimonial property, and that the Respondents' jurisdictional objection was apparently based on the assumption that this cause was one for division of matrimonial property. He asserted that this is a cause brought preserve the matrimonial properties and not for distribution thereof. Citing Sections 12 and 17 of the Matrimonial Property Act as considered in **BWK V EMG (2015) e KLR**, counsel reiterated the right of a party to a marriage to seek injunctive relief in relation to matrimonial property during the subsistence of marriage to protect her/his interest in such property, pending proceedings to establish each party's proprietary rights thereto.

13. Concerning the application itself, counsel for the Applicant contended that the Applicant has established a *prima facie* case and that she would suffer irreparable damage unless an injunction issues. He relied on the cases of **Giella v Cassman Brown Co. Ltd (1973) EA3 and Mrao v First American Bank of Kenya Limited and 2 others (2003) KLR 125**. Relying on the definition of matrimonial properties as found in Section 2 and 6 of the Matrimonial Properties Act, Counsel submitted that the properties which are the subject of the motion qualify as such. Further, that it had been demonstrated that the same were acquired during the subsistence of the marriage between the Applicant and the 2nd Respondent; that the Applicant was instrumental in the acquisition thereof, whereas the 2nd Respondent has not proved his assertions to have solely acquired the assets; that the assets are at risk of alienation or waste at the hands of the Respondents and that the applicant will suffer irreparable damage, incapable of being compensated through damages, if stay orders are not granted, more particularly the loss of use of the Applicant's matrimonial homes as evidenced by attempts to evict her from the matrimonial home in Nanyuki, in contravention of section 12 of the Matrimonial Properties Act. Reliance was further placed on the case of **JW v CWM (2017) e KLR** to

buttress the foregoing submissions and that the balance of convenience leans in favour of the Applicant. Counsel argued the court to grant the prayers in the motion.

14. Counsel for the Respondents took the position that the Applicant has failed to demonstrate that the suit properties are matrimonial properties, her contribution to acquisition thereof and therefore any rights to the same. That the motion is untenable as 2nd Respondent is the sole proprietor of the subject property and cannot be locked out of the quiet enjoyment thereof. Moreover, that no evidence has been tendered to demonstrate the alienation or wastage of the suit properties by the 2nd Respondent. Restating financial accommodations allegedly made by the 2nd Respondent to the Applicant in respect of rental properties Doldol, the 20-acre immovable asset in Nanyuki and a matrimonial home in Nanyuki, Counsel asserted that the house at

Eden Ville is the 2nd Respondent's current home and not the Applicant's matrimonial home.

15. He urged the court to balance the rights of the parties as was done in **FNK vs PKN (2014) e KLR**. Counsel argued that notwithstanding the pending divorce cause, the 2nd Respondent is entitled to own property individually during the subsistence of marriage under Article 45(3) of the Constitution, and as stated in **Agnes Nanjala William vs Jacob Petrus Nicholas Vander Goes (Civil Appeal No. 127 of 2011)**. He argued that the Applicant's evidence does not meet the threshold in **Giella's** case and in particular, has failed to establish that the Applicant's marriage to the 2nd Respondent was monogamous. Reiterating the 2nd Respondent's affidavit material concerning the occupation, control and management as well as intentions concerning the suit properties, Counsel asserted that the balance of convenience leans in favour of the Respondents and they would stand to suffer if the Applicant's motion is granted. The court was therefore urged to dismiss the motion.

16. Upon considering all the matters canvassed, the court takes the following view of the matter. Firstly, with regard to the preliminary objection, there can be no dispute that by her suit and motion the Applicant is asserting that the suit properties are matrimonial properties. Hence invoking sections 4 and 12 of the Matrimonial Property Act. It would seem from the pleadings that the Applicant does not recognize the 1st Respondent as a spouse to the 2nd Respondent, while asserting the subsistence of her own marriage to the 1st Respondent. The Applicant claims that the 2nd Respondent has attempted to evict her from her matrimonial home and that the suit assets are at risk of alienation.

17. The jurisdiction of this court to determine questions related to disputes between spouses in respect of matrimonial properties flows from the Matrimonial Property Act. The jurisdiction applies during the subsistence and after the dissolution of a monogamous or polygamous marriage. See Sections 4,6,7,8 and 12 of the Matrimonial Property Act. Section 12 in particular, protects matrimonial property during the subsistence of marriage it provides that;

12. (1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.

(2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

(3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.

(4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except—

(a) on the sale of any estate or interest in the matrimonial home in execution of a decree;

(b) by a trustee in bankruptcy; or

(c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.

18. The jurisdiction and procedure for the protection and enforcement of matrimonial property rights during the subsistence of marriage or pending division pursuant to dissolution of the marriage is found in section 17 of the Act. In the circumstances, the Respondents' objection to the jurisdiction of this court has no basis. Equally, in view of the foregoing and the pleadings on record, the court is unable to agree with the Respondents objection that the suit herein does not disclose a cause of action. However, there may be a question as to the viability of the nature of prayers sought in the plaint itself as against the 2nd Respondent and the Applicant ought to reconsider these. That deficit, however, does not render the suit fatally defective as the defect can be cured through an amendment introducing more appropriate prayers in the circumstances of the case. In light of all the foregoing, the court did not find any merit in the objections raised by the Respondents.

19. Turning now to the substance of the motion, the principles governing the grant of interim injunctive orders are settled. For the purposes of the motion, the court must determine whether the Applicant has brought her application to the required threshold for the grant of an interlocutory injunction under Order 40 Rule 1 of the Civil Procedure Rules which provides that:

“ Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise—

a) that any property in dispute is in danger of being wasted, damaged or wrongfully sold in execution of a decree ;or

b)..... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or

b) disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

20. What are the applicable principles? The decision of the Court of Appeal in **Nguruman Limited vs Jan Bonde Nielsen & 2 Others (2014) e KLR** is particularly illuminating as to the principles to be considered with respect to the granting of interlocutory injunctions. The Court described the role of the judge in such application to be merely to consider whether the principles for the grant of the interlocutory injunction were met. The court further observed that:

“...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since *Giella* case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:

- a) establish his case only at a *prima facie* level
- b) demonstrate irreparable injury if a temporary injunction is not granted.
- c) allay any doubts as to (b) by showing that the balance of convenience is in his favor.”

21. The Court further stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. Such that, it is not enough that the Applicant establishes a *prima facie* case, he must further successfully establish irreparable injury, that is, injury for which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the adequacy of damages, the court will consider the balance of convenience. Conversely, where no *prima facie* case is established, the court need not consider irreparable injury or balance of convenience. The Court of Appeal emphasized that the standard of proof is to *prima facie* standard.

22. Regarding the meaning of “*prima facie case*” the Court stated:

“Recently, this court in **Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others** [2003] KLR 125 fashioned a definition for “*prima facie case*” in civil cases in the following words:

“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.” (emphasis added)

23. A *prima facie* case is built upon evidence and the applicable law.

In this matter, the Applicant’s substantive case as found in the plaint is founded *inter alia* on the provisions of Sections 4 and 12 of the Matrimonial Property Act and the supporting affidavit evidence presently before the court. There is no dispute that the Applicant and the 2nd Respondent got married under custom in 1981. The marriage has not been dissolved. Further, there is no dispute that the suit properties comprise of assets acquired during coverture.

24. The definition of matrimonial property is found in Section 6(1) of the Matrimonial Property Act, which provides that:

“For the purposes of this act, matrimonial property means –

- a) The matrimonial home or homes;
- b) Household goods and effects in the matrimonial home or homes; or
- c) Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

25. Further Section 14 of the Act provides that:

“Where matrimonial property is acquired during marriage –

a) In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse...”

26. With regard to the suit properties herein, the Applicant asserts that she contributed to the acquisition thereof, while the 2nd Respondent asserts to have acquired the properties through his own singular efforts. The tangible and intangible efforts of either spouse in the acquisition of the properties in dispute will be determined during the main hearing. What is not in dispute is that the disputed assets were acquired during the subsistence of the marriage between the feuding spouses. While the Applicant has tendered two annexures **MKI, MK2** as evidence of her role in some of the acquisitions, for his part, the 2nd Respondent did not, despite his assertions tender any evidence in proof of his alleged sole contribution in the acquisition of the properties. At the same time, the 2nd Respondent while admitting that his current home with the 1st Respondent was procured pursuant to a charge to which the Applicant gave consent (see **annexure MK2**) he is vehement that the subject property (**Eden Ville house**) is not matrimonial property between him and the Applicant but the matrimonial house of the 1st Respondent, his disputed second wife. Whether or not this house is the matrimonial property of the Applicant and 2nd Respondent will be determined on evidence.

27. With regard to this and other properties however, he asserts that he has no intention of disposing of the properties, or evicting the Applicant from her matrimonial home in Doldol. He is however emphatic that the Applicant has no viable claim to the **Eden ville** house, the two other Nairobi houses at Eagle Plains and Uhuru Estate, the house at Muthaiga estate Nanyuki, and ranches and ranch business in Laikipia. He asserts the 1st Respondent’s right to visit his properties save the matrimonial home of the Applicant in Doldol. Suffice that currently, the couple (the Applicant and 2nd Respondent) is estranged and while it seems that the Applicant is primarily resident at the Doldol home, the 2nd Respondent is living at the **Eden Ville** Home. The Applicant has expressed apprehension that the 2nd Respondent might alienate this and other properties acquired by the parties during the subsistence of the marriage. Given the strident assertions to sole proprietorship of the properties by the 2nd Respondent and his alleged marriage to the 1st Respondent, the Applicant’s fears may not be far-fetched. On the undisputed facts surrounding this case, and the Applicant’s material, the court is satisfied that a prima facie case has been made out.

28. Secondly, it is self-evident that the Applicant would suffer irreparable damage if the properties in question were to be alienated before the parties’ respective rights thereto are fully determined. The position with regard to the 1st Respondent is none too clear. While the Applicant views her as a trespasser to the alleged matrimonial properties, the 2nd Respondent asserts that she is his second wife, having been married in 2011. Her status can only be determined on evidence. That said, it seems that majority of the assets listed in the motion were acquired prior to 2011. Except in so far as the 1st Respondent is admittedly “cohabiting” with the 2nd Respondent at the Eden Ville home, her alleged involvement in the other assets appears to be limited to visiting and giving instructions to workers at the ranches, which the 1st Respondent denies. In the circumstances, this court is not persuaded that the prayer sought against the 1st Respondent ought to be granted.

29. With regard to the 2nd Respondent, I note that prayer 5 erroneously repeats prayer (3) of the motion by stating that the orders prayed for are to apply pending the *inter partes* hearing of the application. This is clearly a typing error and the court deems prayer 5 to be one for interim injunctive orders pending the hearing and determination of the suit. The court, for all the reasons given herein is persuaded, and hereby grants as against the 2nd Respondent, prayer 5 of the motion, pending the hearing and determination of the suit.

However, the order will be limited to restraining the 2nd Respondent from disposing of, selling, or mortgaging the subject assets.

30. For the avoidance of doubt, the 2nd Respondent and the Applicant will continue to occupy their current respective houses/homes at Nairobi (**Eden Ville**) and **Doldol** , **Nanyuki** , respectively. Equally, the management of the rental houses and businesses in Nairobi and Nanyuki will continue as was the case at the time of the filing of this suit and as deposed to in the respective affidavits to this motion. Parties will bear own costs in view of the nature of this dispute.

SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 12TH DAY OF MAY 2020

C. MEOLI

JUDGE