



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO. 71 OF 2018 (OS)

IN THE MATTER OF THE MATRIMONIAL PROPERTIES ACT 2013

MJK.....APPLICANT

VERSUS

FML.....RESPONDENT

RULING

1. Through a notice of motion dated 13th December 2018 and filed on 17th December 2018 under certificate of urgency, the applicant herein moved the honourable court under Section 3A of the Civil Procedure Act, Order 40 rules 1, 2 and 3 of the Civil Procedure Rules, Sections 2, 6, 7, 8, 9, 12 and 17 of the Matrimonial Properties Act 2013, Section 93(3) of the Land Registration Act seeking orders as follows:

(1) That the application be certified urgent and be heard exparte in the first instance on account of its urgency.

(2) That pending the hearing and determination of this application, the respondent and/or his servants or agents be restrained from evicting and/or excluding the applicant and/or in any way interfering with the applicant's peaceful possession and living in the matrimonial home LR No. [.....] – MAUA and LR No. [.....] Villas No. [..] erected on LR No. [.....] IR No. [.....] Runda, Kiambu.

(3) That pending the hearing and determination of this suit, the respondent and/or his servants or agents be restrained from evicting and/or excluding the Applicant and/or in any way interfering with the applicant's peaceful living in the matrimonial homes in LR No.[.....] – MAUA and LR No. [.....] Villas No. [..] erected on LR No. [.....] IR No. [.....] Runda, Kiambu.

(4) That pending the hearing and determination of this application, an urgent temporary injunction do issue restraining the respondent, his servants and/or agents from wasting, damaging or alienating and/or otherwise interfering with the following matrimonial properties and or the applicant's possession therein:

- a) KAJIADO/KITENGELA/[.....]
- b) KAJIADO/KAPUTIEI NORTH/[.....]
- c) KAJIADO/KAPUTIEI NORTH/[.....]
- d) KAJIADO/KAPUTIEI NORTH/[.....]
- e) KAJIADO/KAPUTIEI NORTH/[.....]
- f) KAJIADO/KAPUTIEI NORTH/[.....]
- g) Assets and live contracts in [Particulars Withheld] Ltd.

(5) That pending the hearing and determination of this suit, an urgent temporary injunction do issue restraining the respondent, his servants and/or agents from wasting, damaging or alienating and/or otherwise interfering with the following

matrimonial properties:

- a) KAJIADO/KITENGELA/ [.....]
- b) KAJIADO/KAPUTIEI NORTH/[.....]
- c) KAJIADO/KAPUTIEI NORTH/[.....]
- d) KAJIADO/KAPUTIEI NORTH/[.....]
- e) KAJIADO/KAPUTIEI NORTH/[.....]
- f) KAJIADO/KAPUTIEI NORTH/[.....]

6. That pending the hearing and determination of this application, an urgent temporary injunction do issue restraining the respondent, his servants and/or agents from wasting, damaging or alienating and/or otherwise interfering with the following matrimonial vehicles and/or the applicant's possession therein:

- a) Range rover KCR [***]
- b) Toyota Land Cruiser V8 KCP [***]

7. That pending the hearing and determination of this application, an urgent temporary injunction do issue restraining the respondent, his servants and/or agents from wasting, damaging or alienating and/or otherwise interfering with the following matrimonial monies and/or the applicant's possession therein:

- a) Range rover KCR [***]
- b) Toyota Lexus KCP [***]

8. That pending the hearing and determination of this application, an urgent temporary injunction do issue restraining the respondent, his servants and/or agents from accessing, utilizing withdrawal or any other transaction or alienating and or otherwise interfering with monies held in the following bank accounts:

- a) Cooperative Bank, Account No. [.....]
- b) Family Bank Account No. [.....]
- c) Standard Chartered Bank, Account No. [Particulars Withheld]
- d) Credit Bank Account Number [.....]
- e) Equity Bank, Account Number [.....]

9. That pending the hearing and determination of this suit, an urgent temporary injunction do issue restraining the respondent, his servants and/or agents from accessing, utilizing withdrawal or any other transaction or alienating and or otherwise interfering with monies held in the following bank accounts:

- a) Cooperative Bank, Account No. [.....]
- b) Family Bank Account No. [.....]
- c) Standard Chartered Bank, Account No. [.....]
- d) Credit Bank Account Number [.....]
- e) Equity Bank, Account Number [.....]

10. That pending the hearing and determination of this application, an urgent temporary injunction do issue restraining the respondent, his servants and/or agents from wasting, damaging or alienating and/or otherwise interfering with the shares and assets including monies he holds in [Particulars Withheld] Limited, [Particulars Withheld] Investments Limited, [Particulars Withheld] Business Solutions Ltd, [Particulars Withheld] Insurance Brokers Limited, [Particulars Withheld] Pharmaceuticals [Particulars Withheld] Limited and [Particulars Withheld] Solutions Limited and/or the properties owned

by the same.

11. That pending the hearing and determination of this suit, an urgent temporary injunction do issue restraining the respondent, his servants and/or agents from wasting, damaging or alienating and/or otherwise interfering with the shares and assets including monies he holds in [Particulars Withheld] Limited, [Particulars Withheld] Investments Limited, [Particulars Withheld] Business Solutions Ltd, [Particulars Withheld] Insurance Brokers Limited, [Particulars Withheld] Pharmaceuticals Limited [Particulars Withheld] Limited and [Particulars Withheld] Solutions Limited and/or the properties owned by the same.

12. That this honourable court be pleased to make such other orders as may be appropriate to meet the ends of justice.

13. That the respondent be condemned to provide the costs of the summons.

2. The application which was originally filed before Meru High Court is premised upon grounds on the face of it and an affidavit in support deposed on 13th December 2018 by the applicant. It was certified urgent on 18th December 2018 by Justice Gikonyo then sitting at Meru High Court who directed that the application be served upon the respondent forthwith and interpartes hearing scheduled for 20th December 2018. On that day, Mr. Muriuki holding brief for the respondent's counsel informed the court that Mr. Muthomi appearing for the respondent was served the previous day hence was not ready to proceed. Mr. Muriuki sought for 14 days to enable Muthomi file a replying affidavit in response to the application.

3. However, counsel for the applicant drew the attention of the court to the fact that his client (the applicant) was the previous day violently evicted from the property in issue which the applicant claimed was her matrimonial home and the subject of the originating summons for division of matrimonial property filed contemporaneously with the instant application. In response to that allegation, Mr. Muriuki stated that the applicant was not residing in the Runda home being LR [Particulars Withheld] IR [Particulars Withheld] Nairobi hence there was no eviction carried out.

4. Faced with that scenario, the court directed that the Deputy Registrar Family Division Nairobi to visit the subject property the following day to ascertain the allegation of violent and forceful eviction of the applicant and her children from the premises and also confirm whether the applicant used to live in the said house which the respondent's counsel denied and opposed.

5. The court further directed the Deputy Registrar to compile a report and record any other relevant observation or finding and submit the same before the vacation duty judge Nairobi Family Division. Consequently, the honourable judge transferred the file to Nairobi High Court considering that there were other related matters pending before other courts within Nairobi.

6. When the file was placed before the duty Judge, the court certified it urgent and directed the respondent to file his response within two days and corresponding leave to apply to the applicant in case of need to file a further affidavit. Parties were advised to comply with the vacation rules which they subsequently did by seeking leave to be heard during vacation. The matter was then fixed for interpartes hearing on 24th December 2018 before the duty Judge.

7. On 24th December 2018, the respondent filed a replying affidavit sworn by himself on 23rd December 2018 challenging the application. On the same day, interpartes hearing proceeded with both counsel making oral submissions.

8. As directed, on 21st December 2018, two Deputy Registrars Hon. Kendagor and Kimani M. visited the subject property being Runda Villa House No. [Particulars Withheld] in company of the security personnel under the command of the OCS Runda police station. Present during the visit were the applicant and her four advocates namely Kihanga Mwangi, Neddie Akello, Albert Onchwati and Dorphin Awuor. The respondent who was absent had Mr. Muthomi his counsel present.

9. The four page report was filed before the court confirming that at the time they visited the premises there were two policemen and two private security guards who had been contracted on 19th December 2018. That the applicant produced a set of her keys to the house although the front door lock had been replaced. A second door had been fastened with a chain link and the door lock removed. Upon gaining entry through the side door, the applicant pinpointed each bedroom and their occupants being her children. The kitchen had dirty utensils and some food leftovers with the fridge fully stocked. The officers managed to enter the master bed room using the keys in possession of the applicant. In that room they found her personal effects and documents in the side bed drawers. The applicant also opened a metallic safe which had her personal effects and documents. The Deputy Registrars took photographs showing the broken locks with wooden marks a pointer that they were forcefully removed. Parties having been supplied with their copies of the Deputy Registrar's report, the matter proceeded with the hearing.

Applicant's Case

10. It is the applicant's case that sometime on 16th April 2016, she underwent a customary marriage to the respondent in accordance with Meru customs and practices. That the same was followed by another ceremony conducted between 23rd and 26th December 2016 at Meru. She averred that, prior to their marriage, they had cohabited from the year 2014 as husband and wife then residing at her house within Kileleshwa She stated that their marriage has not been blessed with any biological child save for their children each with three from their previous failed marriages.

11. The applicant stated that, sometime the year 2015, they agreed to buy LR [Particulars Withheld] IR [Particulars Withheld] [Particulars Withheld] Country Villa now House No.[..]. She attached the drawings and architectural plan bearing her name (Annexure D1). She further attached building plan for their Meru home contending that she took part in its construction and that it is her rural home together with their children.

12. She claimed that after she lost her job, the respondent persuaded her not to look for any job as she was to be the manager and in charge of their family business spread across several companies and their farms.

13. She further stated that, jointly they again constructed another matrimonial house at Akachiu/Auki/ [.....] located within Maua with the sole purpose of receiving political figure heads and other guests (see confidential valuation report and architectural drawings marked D2). She claimed that, she made contributions towards their construction and also supervised the construction works.

14. She listed several companies allegedly formed and registered either in their joint names or their children's names. To prove that she was indeed a wife, the applicant attached several photographs marked exhibit F showing the two and their children participating and sharing functions in various forums. She also attached a photograph marked Ex. H showing her jointly with the respondent laying a wreath of flowers as a sign of paying last respect during the burial of the respondent's late brother one Chege. She further attached photographs marked Ex.G reflecting their happy moments with their children while visiting countries such as Australia, Mauritius, Tanzania and Zanzibar among other countries.

15. It is her contention that their love and relationship blossomed well till 2018 when the respondent turned against and threatened to kill her out of a domestic brawl. The said attack culminated to her reporting to the police (See her statement to the police marked Ex.J). Subsequently she filed Misc. Application No. 1044/2018 Milimani Commercial court against the respondent seeking protection against domestic violence and also granting her exclusive occupation of the said residence being [Particulars Withheld] Country Villa house No. [..] LR [Particulars Withheld] (I.R. No. [Particulars Withheld] thereby excluding the respondent from use of the same.

16. The applicant further attached an order issued before the High Court commercial division being Civil Case No. E138/2018 in which she obtained orders restraining the Registrar of Companies from any change of shareholding in which she is a shareholder or interested beneficiary in their various companies (see annexure M3). She further attached copies of title deeds in respect to LR Kajiado/Kitengela/[.....] and Kajiado/Kaputiei North/[.....] – [.....],[.....],[.....]and [.....] all registered in the respondent's names sometime 2014.

17. She stated that she had instructed her advocate to institute divorce proceedings before Meru Law Courts. She therefore claimed that the properties in question were acquired during the subsistence of their marriage and the same are held by the respondent in trust for their joint benefit.

18. In her submissions, M/s Kioko counsel appearing for the respondent basically adopted the detailed averments contained in the affidavit in support. Learned counsel argued that the applicant and respondent were married under Meru Customary Law after they both separated and divorced from their previous marriages. Counsel asserted that the construction of Meru and Runda houses was jointly funded and done under the supervision of the applicant. She urged the court to find that the act of violently evicting the applicant from her matrimonial home was unlawful bearing in mind that it was done during the pendency of these proceedings.

19. Mr. Onchwati assisting counsel for the applicant submitted that the respondent took advantage of the non extension of the restraining orders before Milimani Commercial Court and proceeded to hire goons who evicted the applicant together with her children. Counsel urged the court to reinstate the applicant to her premises pending the hearing and determination of the originating summons on division of matrimonial property.

Respondent's Case

20. In response to the application, the respondent filed a length and detailed replying affidavit deponed by the applicant on the 23rd December 2018. The respondent denied ever marrying the applicant as alleged. He alleged that at the material time, he was and still is engaged in a monogamous marriage to one Mrs. M K M. He attached a marriage certificate S/No. [.....](annexure FML.1).

21. He argued that the existence of a marriage is a condition precedent to instituting any matrimonial proceedings under the Matrimonial Property Act No. 49 of 2013. He contended that he had no capacity in law to engage in any marriage relationship before dissolving a statutory marriage celebrated under Cap 151 (now repealed). He therefore urged the court to find that it has no jurisdiction to issue the reliefs sought. The respondent went further to attach a judgment dated 3rd January 2016 (Ex. FML.2) divorcing the applicant from her former husband one Langat thus contending that the applicant had no capacity at the alleged time to marry the respondent before dissolving her previous marriage with her former husband.

22. The respondent denied ever taking or assuming parental responsibility over the applicant's children whom he referred to as being grownups with their father taking care of them. He further stated that it was the applicant who chased away his children from Runda Villa house No. [..] and not the other way round. He termed the applicant's move as malicious and orchestrated to deprive him of his property which he single handedly earned without the applicant's contribution.

23. The respondent averred that the applicant had concealed material facts from the court by not disclosing that her first born son A is now 22 years old, and that SL is being maintained by the biological father. He further stated that the child named as IK is a daughter to the applicant's sister hence he could not have assumed parental responsibility over her.

24. Regarding the Runda and Meru matrimonial houses, the respondent attached ownership documents showing that he was the sole registered proprietor thus denying any contribution from the applicant during their acquisition. He termed the claim contained in the Originating Summons as scandalous, frivolous and an abuse of the court process. That the applicant has failed to disclose her multiple millions properties held by her children and companies as proxies. He named such properties located at [Particulars Withheld] (one house) and four houses in [Particulars Withheld], among other properties.

25. Concerning [Particulars Withheld] property in Meru, the respondent claimed that it was ancestral land and the house thereon was built

many years ago even before the alleged marriage.

26. The respondent however stated that he met the applicant sometime 2013 while working at the office of [Particulars Withheld]. That around June 2015, the applicant requested him to temporarily accommodate her in one of his houses and also to establish a small office in one of the rooms at [Particulars Withheld] Company head offices.

27. That he allowed her to establish the office temporarily and later in 2017 he accommodated her at his Runda home on compassionate grounds having lost her job. That the occupation was subject to conditions of living harmoniously with his children then staying there, not to tamper with any furniture, fittings or documents therein, allow him unlimited access to the house and also to exit by 30th June 2018. He denied ever introducing the applicant to his family members as a wife. Although he admitted being accompanied by the applicant to various political rallies, he claimed that they had no connection with any marriage relationship.

28. That despite that good gesture, and in total breach of the conditions set out, the applicant brought in her children and chased away his children from that home.

29. As to the shareholding in the listed companies, the respondent alleged fraud on the part of the applicant who changed directorship and share holdings in the respondent's own companies in collusion with the Registrar of Companies.

30. He basically denied any contribution by the applicant or her children towards the acquisition of all the properties listed in the Originating Summons. Touching on funds held at Co-operative Bank account No. [Particulars Withheld], Family Bank account No. [Particulars Withheld], Standard Chartered Bank account [Particulars Withheld], Credit Bank account No. [Particulars Withheld], Equity Bank account [Particulars Withheld] the respondent denied contribution from the applicant nor her children.

31. The respondent informed the court that Misc Civil application No. 1044/2018 filed by the applicant against the respondent under the guise of protection against domestic violence with exclusive occupation of the house by the applicant was dismissed on 11th December 2018 for want of prosecution hence an abuse of the court process to seek similar orders in this court. Further, he averred that there is a pending divorce case at Meru Chief Magistrate's court being divorce cause No. 26/18 in which the applicant is seeking to dissolve a non-existing marriage. He listed several other cases between them in which a dispute over the company properties is involved.

32. In his submissions, Mr. Muthomi counsel appearing for the respondent basically adopted the averments contained in the replying affidavit which is so detailed. In a nut shell, counsel submitted that, the applicant has never been married to the respondent under any known law and that the respondent who is still under a monogamous (statutory) marriage which has never been dissolved could not have had capacity legally to contract any other lawful marriage be it customary or otherwise. He opined that this court cannot assume jurisdiction to determine a matrimonial dispute where the existence of a marriage has not been established.

33. He further urged the court to find that all the properties are registered in the name of the respondent and that there was no proof of any contribution by the applicant towards their acquisition. Learned counsel admitted that, the applicant was sometime 2017 accommodated by the respondent as a visitor on certain and clear terms which terms were violated hence her eviction without notice. He submitted that the applicant did not require any notice to exit having been accommodated as a visitor.

Analysis and Determination

34. I have considered the application herein, affidavit in support, replying affidavit and oral submissions by both counsel. It is however worthy noting that none of the learned counsel made reference to any authorities in support of their submissions. Nevertheless, the Issues that render for

determination are:

(a) Whether this court has jurisdiction to hear this application/suit.

(b) Whether there is a prima facie case established to grant the orders of injunction and preservation of property.

(c) Whether company properties can be a subject of division of matrimonial property in accordance with the Matrimonial Property Act 2013.

(d) Whether the eviction carried out against the applicant was lawful.

(a) Whether this court has the jurisdiction to entertain the suit herein.

35. The question of jurisdiction is a critical component in litigation process. For a court to make any order/s affecting parties in a dispute, it must ensure that it is properly seized of the authority to preside over such dispute. In the well celebrated case and most frequently referred to case of **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd. (1989) KLR Nyarangi JA, held as follows:**

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

36. Similar position was held in the case of John Mundia Njoroge and 9 others vs Cecilia Muthoni and Another (2016) e KLR where the court held that:

“...a preliminary objection can be raised on any of the following grounds:

(a) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper value or improper form or service of writ of summons or complaint.

(b) Failure of a pleading to conform to law or rule of court or inclusion of a scandalous or impertinent matter.

(c) Insufficiency of a pleading (demurrer).

(d) Lack of capacity to sue, non joinder of a necessary party or misjoinder of a cause of action.

(e) Pendency of prior action or agreement for alternative dispute resolution”.

See also Kalpana H. Rawal and 2 others vs Judicial Service Commission and 6 others (2016) eKLR.

37. In recognition of the significance and emphasizing on the essence of jurisdiction, the court in the case of John Kipng'eno Koech and 2 others vs Nakuru County Assembly and 2 others (2013) eKLR had this to say:

“Jurisdiction is the practical authority granted to formally constituted body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is a scope, validity, legitimacy or authority to persuade or adjudicate upon the matter.”

38. According to the applicant, she started cohabiting with the respondent sometime 2013 and thereafter in April 2016 formalized their marriage under Meru Customary Law. She claimed that during the subsistence of their marriage, she made both direct and indirect contribution towards the acquisition of various properties listed in the summons as well as the formation of various companies. She contended that the properties are held by the respondent in trust for her and that of his benefit. On the other hand, the respondent denied ever cohabiting or marrying the applicant claiming that he was and still is married to one M K under Cap 151 (now repealed). That despite their differences, the marriage is still subsisting hence he had no capacity to enter into any other marriage arrangement with the applicant.

39. It is on the basis of this argument that the respondent claims that although having accommodated the applicant at his [Particulars Withheld] home as a visitor on compassionate grounds, he cannot be held responsible of her children's needs nor be classified as a husband. He therefore maintained that in the absence of any lawful marriage, this court has no jurisdiction to preside over division of matrimonial property.

40. It is trite law that for a party to invoke the provisions of the Matrimonial Property Act 2013, there must be proof of a marriage and acquisition of property during the subsistence of the said marriage (See Section 7 of the Matrimonial Property Act 2013). It is also trite law that there can never be a lawful marriage by anybody during the subsistence of a binding statutory or monogamous marriage (See POM vs MWK (2017) eKLR).

41. According to the applicant, she lawfully got married to the respondent in April 2016 after divorcing her former husband. This was confirmed by the respondent's annexure FML-2 annexed to the replying affidavit being a judgment dated 4th December 2015 divorcing the applicant and her former husband J.K. To that extent, she had capacity to marry 30 days after the delivery of judgment when the decree nisi became absolute.

42. Concerning the legal capacity of the respondent, the applicant deposed that he too had divorced his former wife. Although there was no divorce certificate, this will be a matter of evidence during the hearing of the main suit. The applicant however attached several documents including photographs and travel documents outside the country showing the respondent and their children attending various activities allegedly as husband and wife. She also stated that she had occupied Runda house as a wife and not a visitor. To prove that fact, she submitted architectural drawings of the house processed in her name. The respondent does not deny accommodating the applicant. He only refers to her as a visitor. Although it does not sound convincing as to how a person he claims to be a multimillionaire with several houses would be accommodated as a visitor on compassionate grounds, it is subject to proof by way of evidence.

43. The fact of being married or not is also a subject of divorce proceedings pending before Meru Law Courts. To hold at this interlocutory stage that there was no marriage between the two without according them an opportunity to prove the alleged marriage would undermine the constitutional imperative under Article 50 that parties should be accorded a fair hearing before a court of law. Prima facie, there is a case capable of determination upon conducting substantive hearing. For those reasons and based on the material placed before court, this court has jurisdiction to hear and determine the suit.

44. Regarding the pending proceedings before the High Court Commercial Division touching on company affairs, those are independent suits to which this court cannot ventilate to determine ownership. Ownership in respect to the affected properties would be determined in accordance with the law governing disputes involving companies under the Companies Act. A company is a legal entity capable of suing or being sued (see Salmund vs Salmund and Co. Ltd (1897) A.C. If there is any dispute over company property, the correct forum is commercial division.

45. Concerning similar matters pending before Milimani Magistrate's Court being Misc Civil No. 1044/18 and 1260/2018 touching on

protection against domestic violence and exclusion of the respondent from the suit premises, the same are quite distinct in terms of the prayers sought. This court has no jurisdiction to entertain any prayers touching on claims of domestic violence and the issue of exclusive occupation by any one party in the suit premises within the meaning of Section 3 of the Protection against Domestic Violence Act. That is for the magistrate's court to determine under Section 24 of the said Act.

46. Section 15 of the Protection against Domestic Violence Act provides that a court shall not decline to make protection orders simply because of the existence of other proceedings relating to the parties. My mandate in this case is to preserve the property in question and also protect parties' beneficial and proprietary interest on the said property by giving them equal opportunity to prove their stake in the said property. It is not for me to dictate who should visit who or who should not stay in the house based on allegations of domestic violence. The proceedings pending before the magistrate's court do not affect the orders of this court in so far as preservation and division of matrimonial property is concerned.

47. It is trite that courts should sparingly dismiss a suit unless there is clear and absolute justification that indeed the court does not have jurisdiction. It is my finding that this court has jurisdiction to hear the matter and make a determination on merit after according both parties an opportunity to prove their case. It is a cardinal rule in law that nobody should be condemned unheard hence the need to hear both parties and decide the case on merit.

(b) Whether there is a prima facie case to grant the orders of injunction sought and preservation of the property in question.

48. In the celebrated case of Giella vs Cassman Brown (1973)EACA at pg 358-360, an injunction order can only issue upon proof of a prima facie case with a probability or likelihood of success, proof of irreparable damage that cannot be compensated in monetary terms and, assessment on a balance of convenience on which side does justice tilt in favour. See also Nguruman Ltd vs Jan Bonde Nielsen and 2 others CA No. 77/2012 and Kenya Commercial Finance Co. Ltd vs Afraha Education Society (2001) Vol 1 EA 86 where the court held that all the three conditions and stages must be applied as separate, distinct and logical hurdles which must be surmounted sequentially.

49. However, I am alive to the fact that exercise of such powers is a matter of judicial discretion which must be executed judicially and in a manner that promotes the integrity of the court bearing in mind that judicial power is donated by the people of Kenya through the Constitution. The court of appeal alluded to the application of discretionary powers by the courts while issuing injunctive orders in the case of Abel Salim & 4 others vs SF Okong'o & 2 others (1976)eKLR

50. As stated above, there is no dispute that the applicant has been staying at Runda residence Villa house No. [...] from where she was forcefully evicted allegedly on being a stubborn visitor who like the proverbial camel got accommodated but knocked out the owner. The applicant swore an elaborate supporting affidavit and attached several exhibits to demonstrate that she had been staying with the respondent as husband and wife. She attached photographs showing the two attend family functions and gatherings including burial of the respondent's brother. She also attached documents among them an architectural drawing of the Runda house bearing her name. All these information prima facie point at a probability that the two presented a lifestyle of a husband and wife before the eyes of an ordinary person subject to proof upon hearing the main suit.

51. The evidence presented and the conduct of the two parties prima facie presents and makes a revelation of some form of husband and wife relationship which will only be proved or disapproved upon hearing the case. On that account, there is prima facie evidence with a probability of success especially upon proof that the respondent had divorced his wife before contracting a customary marriage with the applicant.

52. Will the applicant suffer irreparable damage if the orders sought are not granted? It is common knowledge that if the property is not preserved, the applicant will definitely suffer irreparable damage should the same change hands to 3rd parties. The injunction and preservation order sought is therefore necessary. On a balance of convenience, justice demands that the applicant be given an opportunity to ventilate her case in court without being dismissed at the interlocutory stage. This is a sensitive matter which cannot be wished away casually.

53. For those reasons, the applicant has satisfied the threshold for grant of preservation orders as well as an injunction.

(c) Whether company property can be a subject of division as matrimonial property under the Matrimonial Property Act 2013.

54. Regarding company properties, I have already alluded to the same above. The properties are governed by a separate legal regime under the Companies Act. Any aggrieved party in the manner in which the affairs of a company are being conducted including change of shareholding, directorship or ownership is not the business of the Family Division under the Matrimonial Property Act. The jurisdiction lies with the Commercial Division to aptly consider and determine the dispute. This court will not interfere with that mandate to entertain division of company properties.

(d) Whether the eviction was lawful

55. It is admitted that the applicant was forcefully evicted from house No. [...] Runda which she claimed she jointly built with the respondent and that she has been staying there since 2016-17. The respondent does not deny evicting her. He termed the eviction as lawful and justified as the applicant was a visitor requiring no notice to vacate. Curiously, this eviction was conducted on 19th December 2018 while this application was still pending. In fact, it took place after service of the application upon the respondent on 18th December 2018 pending interpartes hearing on 20th December 2018.

56. It was obviously intended to defeat the possible outcome of the hearing of this application. Even when the issue of violent and unlawful eviction was raised on 20th December 2018, Mr. Muriuki holding brief for the respondent's counsel denied that there was such an eviction.

This action culminated to the court directing the Deputy Registrar to visit the premises to verify if it was true that such eviction had taken place. True to the applicant's word, the Deputy Registrar visited the premises on 21st December 2018 and confirmed the truth that there was an eviction carried out.

57. Was the eviction justified? From the material placed before court by both parties, the stay of the applicant in that residence could not have been that of an ordinary visitor as the respondent would want this court to believe. There is more than meets the eye. Whether this court will eventually make a finding on ownership and division of the property in question or not, one should not be violently evicted in the manner the applicant was evicted while the dispute was pending before court. There are other legal, sober, humane, lawful and procedural civil way of moving out even a 'visitor' from one's residence. It was by all standards an impetuous decision.

58. As stated elsewhere in this ruling, the applicant was not an ordinary visitor in the ordinary sense of the word 'visitor'. Her eviction was unlawful and in bad faith even before determining the issue of marriage and ownership of property. This court cannot sanction such actions in a democratic society where due process and the rule of law should apply and fly high. For those reasons, the applicant is entitled to resume back to the disputed residence pending the hearing and determination of the suit herein.

59. Accordingly, the application herein is allowed in terms of prayers 3, 5, 7 and 9. For avoidance of doubt, the motor vehicles in question as mentioned in prayer 7 shall continue being used by their current users but without changing ownership. To execute this orders, the OCS Runda Police Station is hereby directed to ensure compliance by providing security to the applicant during her return to the premises at Runda Villa house No. [...] and the security currently manning the premises under the instructions of the respondent be withdrawn and the two to make mutually agreed joint security arrangements. Regarding costs, this is an issue bordering on alleged family affairs, each party shall bear his or her own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JANUARY, 2019.

J.N. ONYIEGO

JUDGE