



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**FAMILY DIVISION**

**HCCC NO. 58 OF 2014 (OS)**

**AKN.....APPLICANT**

**VERSUS**

**JNM.....RESPONDENT**

**RULING**

**Introduction**

1. Through an Originating Summons dated 3<sup>rd</sup> September 2014, the applicant herein sought various declarations to the effect that; matrimonial properties acquired and held in trust by the respondent during the subsistence of their marriage be shared equally and that an injunction to issue against her eviction from their Mua home. Simultaneously filed with the said Originating Summons was a Chamber Summons of even date seeking injunctive orders against the respondent prohibiting him from evicting her from their Mua property and further restraining any disposition, sale, transfer or any dealings in respect of the subject properties.
2. Consequently, an ex parte order was made directing that the application be heard during vacation; the respondent be served with the application and lastly, the applicant not to be evicted from the matrimonial home at Mua between 4<sup>th</sup> September 2014 and 11<sup>th</sup> September 2014. The same orders were subsequently extended on 11<sup>th</sup> September 2014.
3. According to the Originating Summons as well as the Chamber Summons, the applicant averred that she got married to the respondent sometimes in 1975 but divorced in 1983 through judicial proceedings in Divorce Cause No. 5/1983. That they were blessed with 3 children before divorce all of whom are adults.
4. That in 1995, they reconciled and remarried in accordance with Kamba Customary Law. She claimed that their subsequent cohabitation gave birth to their fourth born child in 1996. She further stated that, after her giving birth, she was shifted from their Lavington home in Nairobi to Mua in Machakos a home she claims she has been staying in to date.
5. She further averred that, in the year 2014, the respondent without any apparent reason/s ordered her to move out of their Mua home. He allegedly withdrew all the necessary support he was giving to her and her children including disconnection of electricity and removal of household goods.
6. It is this development that triggered the instant suit. In his reply to the suit, the respondent filed a replying affidavit sworn on 10<sup>th</sup> September 2014 admitting the fact that he had married the applicant and later divorced. He also stated that in 1995, he had a brief intimate affair with the applicant giving rise to their fourth born. He denied ever remarrying the applicant as claimed and that his decision to move her to his Mua home was to enable her stay with her children but as licensee and not a wife.
7. Contemporaneously filed with his replying affidavit was a motion of even date seeking to strike out the Originating Summons and Chamber Summons on grounds that the court had no jurisdiction to hear the matter as the marriage between him and the applicant had long been dissolved and the parties were not husband and wife by dint of the Matrimonial Property Act and the 2010 Constitution which could not apply retrospectively. He also claimed that the suit herein was time barred under Section 6 of the Limitation of Actions Act. However, the issue of lack of jurisdiction was separately dealt with and dismissed vide a ruling dated 28<sup>th</sup> October 2014.
8. On 16<sup>th</sup> October 2016, the applicant lodged another application seeking orders restraining the respondent from harassing her or interfering with her quiet occupation of the Mua property pending the hearing and determination of the suit, restoration of water, electricity and other

household goods removed by the respondent

9. On 28<sup>th</sup> October 2014, the court gave directions for the matter to proceed by way of oral evidence to determine the applications by the applicant dated 3<sup>rd</sup> September 2014 and 16<sup>th</sup> October 2014 plus that of the respondent claiming that there was no marriage.

10. After hearing witnesses from both sides, the court delivered its ruling on 15<sup>th</sup> February 2019 declaring that the applicant was not remarried by the respondent after judicial separation and that her occupation of Mua property thereafter was not in her capacity as a wife but as licensee at will of the respondent. He therefore dismissed the applications dated 3<sup>rd</sup> September 2014 and 16<sup>th</sup> October 2014.

11. It is this order that triggered the filing of the instant application dated 22<sup>nd</sup> February 2019 seeking:

**1. Spent.**

**2. That pending the hearing and determination of this application, the respondent and/or his servants and/or agents be restrained from evicting and/or excluding the applicant from the matrimonial home being L.R. No. [particulars withheld] Mua in Machakos County and/or in any way interfering with the applicant's peaceful living.**

**3. That pending the hearing and determination of the intended appeal suit, the respondent and/or agents be restrained from evicting and/or excluding the applicant from the matrimonial home being L.R. No. [particulars withheld] Mua in Machakos County and/or in any way interfering with the applicant's peaceful living.**

**4. That pending the hearing and determination of this application, this honourable court be pleased to stay the ruling of honourable Justice W. Musyoka dated 15<sup>th</sup> February 2019, to the extent that it decides that the applicant is not a spouse of the respondent.**

**5. That pending the hearing and determination of the intended appeal to the court of appeal, this honourable court be pleased to stay the ruling of Honourable Justice W. Musyoka dated 15<sup>th</sup> February 2019, to the extent that it decides that the applicant is not a spouse of the respondent.**

**6. That pending the hearing and determination of this application, a 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. Matrimonial home in Mua Machakos**

**b. L.R. No. [particulars withheld] Machakos**

**7. That pending the hearing and determination of the intended appeal, a 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. Matrimonial home in Mua Machakos**

**b. L.R. No. [particulars withheld] Machakos**

**8. That pending the hearing and determination of this application, a temporary injunction do issue restraining the respondent, his servants and/or agents from wasting, damaging or alienating and/or otherwise interfering with the 50% of the shares held by the respondent in JNM Holdings Properties Limited and/or the properties owned by JNM Holdings Properties as follows:**

**i. LR No. [particulars withheld]**

**ii. LR No. [particulars withheld]**

**iii. LR No. [particulars withheld]**

**iv. LR No. [particulars withheld]**

**v. LR No. [particulars withheld]**

**vi. LR No. [particulars withheld]**

**vii. LR No. [particulars withheld]**

**viii. Machakos Block 1/XXX Kinyali House**

ix. Machakos Block 1/XXX Kinyali House

x. Machakos Block 1/XXX Kinyali House

xi. LR No. [particulars withheld]

xii. LR No. [particulars withheld]

**9. That pending the hearing and determination of the intended appeal, 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 50% of the shares held by the respondent in JNM Holdings Properties Limited and/or the properties owned by JNM Holdings Properties as follows:**

i. LR No. [particulars withheld]

ii. LR No. [particulars withheld]

iii. LR No. [particulars withheld]

iv. LR No. [particulars withheld]

v. LR No. [particulars withheld]

vi. LR No. [particulars withheld]

vii. LR No. [particulars withheld]

viii. Machakos Block 1/XXX Kinyali House

ix. Machakos Block 1/XXX Kinyali House

x. Machakos Block 1/XXX Kinyali House

xi. LR No. [particulars withheld]

**10. LR No. [particulars withheld]**

**11. That pending the hearing and determination of this application, a temporary injunction do issue restraining the respondent, his servants and/or agents from wasting, damaging or alienating and/or otherwise interfering with the 50% of the shares held by the respondent in Rockland Kenya Limited Properties and/or the properties owned by Rockland Kenya Limited Properties as follows:**

i. LR No. XX/X/X/XX – Roslyn Park

ii. LR No. XXXX/XX and 61: office Gigiri

**12. That pending the hearing and determination of the intended appeal, 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 50% of the shares held by the respondent in Rockland Kenya Limited Properties and/or the properties owned by Rockland Kenya Limited Properties as follows:**

i. LR No. XX/X/X/XX – Roslyn Park

ii. LR No. XXXX/XX and XX: office Gigiri

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

**14. That costs be reserved.**

12. The application is based on grounds set out on the face of it and affidavit in support sworn by the applicant on 22<sup>nd</sup> February 2019. It is the deponent's averment that she intends to file an appeal which may be rendered nugatory unless the orders sought are granted. She further stated that, she is likely to be evicted from her matrimonial home at Mua and that the rest of the properties might be alienated.

14. She further averred that her intended appeal has high chances of success considering that the court determined the main suit at an interlocutory stage. In support of the application Mrs. Thongori filed her submissions on 11<sup>th</sup> June 2019 reiterating the averments contained

in the affidavit in support of the application.

15. During the hearing, Mr. Gitonga Holding brief for M/s Thongori urged the court to exercise its inherent powers to grant an injunction pending appeal so as to sustain the substance of the appeal. In support of this position, counsel referred the court to the case of **Republic vs Public Procurement Complaints Review and Appeals Board and another exparte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** where the court held that it had inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the court maintain its character as a court of justice.

15. As to whether this court has powers to grant injunction pending appeal, counsel made reference to the case of **Patricia Njeri and 3 others vs National Museum of Kenya (2004) eKLR** where the court stated that an injunction pending appeal is a discretion of the court which is exercised against an applicant whose appeal is frivolous; that discretion should be refused where it would inflict greater hardship than it would avoid; that an appeal will be rendered nugatory if the same is not allowed and that the court shall be guided by principles in **Giella vs Cassman Brown Ltd. (1973) EA 358**.

16. Ms Thongori submitted that the main suit was left intact and undetermined hence the appeal is not frivolous and if the application is not allowed, the appeal will be rendered nugatory. To bolster her position, counsel relied on the decision in the case of **Charter House Bank Ltd vs Central Bank of Kenya (2007) eKLR** where the court stated that the purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory.

17. In response, the respondent filed a replying affidavit sworn on 13<sup>th</sup> March 2019 and filed on 14<sup>th</sup> March 2019. It is the respondent's averment that he never remarried the applicant at any one point and that the appeal herein is not merited as it seeks injunctive orders against properties that belong to companies who are not parties to this suit and are separate legal entities from the respondent.

18. He further stated that some of the properties listed as matrimonial properties were not pleaded originally in the Originating Summons and that among them are properties charged to various financial institutions. He implored the court to apply its discretion by not granting orders that will cause great hardship against him and third parties.

19. He further averred that he was reliably informed by his son, his security guards and farm manager at Mua Farm that prior to 8<sup>th</sup> August 2017 national elections, the applicant on her own volition moved out of Mua home and has since been staying at Nairobi in Flat XX at Ebony Court Kileleshwa off Kangundo road. To substantiate this claim, the respondent attached the affidavits of the said guard and farm manager marked JNM-1a and JNM-1b respectively.

20. The respondent accused the applicant for coming to court with dirty hands on account of non-disclosure of material information thereby misleading the court to issue unwarranted orders. The respondent faulted the applicant's claim that Mua home is on LR XXXX/X which property is in occupation of his son. He further said that the property is not among those pleaded in the Originating Summons hence she should be bound by her own pleadings.

21. He expressed the view that the court is now functus officio as the orders sought amounts to seeking this court to sit over an appeal or a decision made by a court of concurrent jurisdiction. That the applicant is calling for this court to declare her as a spouse through the back door on a matter that is now resjudicata.

22. In their submission, the firm of Ochieng, Onyango, Kibet and Ohaga advocates appearing for the respondent, relied on skeleton written submissions filed on 4<sup>th</sup> June 2019 together with a list of authorities and case digest filed on 17<sup>th</sup> March 2019. During the hearing, Mr. Oduol adopted the contents contained in the replying affidavit and written submissions. It was submitted that this court cannot issue a stay on a negative order.

23. To persuade the court, reliance was placed on the decision in the case of **Catherine Njeri Maranga vs Sarah Chege and Seb Estate Ltd (2017) eKLR** where it was held that a court cannot stay a negative order. Counsel further submitted that the threshold under Order 42 rule 6 has not been satisfied to warrant grant of stay orders.

24. Learned counsel further invited the court to a decision in the case of **Lucia Abaja Otieno and 2 others vs Filgona Omogo Okoth (2018) eKLR** where the court refused to stay a lower court order dismissing an application for injunction on grounds that the order sought to be stayed was negative.

25. Turning on the issue of injunction pending appeal, counsel submitted that the orders against eviction expired on 11<sup>th</sup> September 2014 while the applicant was occupying the house. Mr. Oduol contended that there cannot be a stay or injunction in favour of a person who does not stay in the property in question.

26. Counsel submitted that the applicant had not controverted the respondent's evidence that she is no longer staying in the property in question. In support of this submission counsel referred the court to the decision in the case of **Mount Elgon Hardware vs United Millers Ltd (1996) eKLR CA No. 19/1996** where it was held:

**“.....the applicant wholly failed to traverse by any further pleadings the particulars of negligence alleged in the respondent's defence. In those circumstances, the learned judge was perfectly entitled to conclude that the appellant had admitted the negligence alleged in the defence, in terms of order VI rule 9 (1) of the Civil Procedure Rules”.**

27. Further learned counsel submitted that the orders of injunction sought in respect of LR 1414/2 which is occupied by her children cannot apply. That the applicant has not satisfied the requirements for grant of an injunction as stipulated in the case of **Medhupaper International**

Ltd vs Kerr (1985) eKLR where the court held that where the appeal is frivolous or to grant it would inflict greater hardship than, the court should avoid granting an injunction.

28. Regarding grant of injunction as an equitable relief, it was argued that the applicant has come to court with dirty hands having not disclosed that she was no longer residing in the Mua property a fact she has not disputed. In support of that proposition, the court was referred to the case of Kyangavo vs Kenya Commercial Bank Ltd and another (2014) eKLR.

29. Lastly, Mr. Oduol urged the court to find that property belonging to a company cannot be a subject of matrimonial property dispute. To buttress this position, the court was referred to a decision in the case of AKK vs PKW (2018) eKLR.

### **Determination**

30. I have considered the application herein and the response thereto plus the illuminating submissions.

Issues that arise for determination are:

**a. Whether the prayer for stay amounts to staying a negative order.**

**b. Whether the applicant has met the requisite threshold for grant of an injunction pending appeal.**

**a. Whether the prayer for stay amounts to staying a negative order.**

31. The principles governing grant of stay pending appeal are anchored under Order 42 rule (6) of Civil Procedure Rules which provides that no order for stay of execution shall be made unless the court is satisfied that substantive loss may result to the applicant unless the order is granted, the application is filed without unreasonable delay and that security for due performance of the decree has been deposited.

32. It is incumbent upon the applicant to discharge this burden to warrant the court to exercise its unfettered discretion to grant the order which is an equitable remedy. It is not enough for one to walk to court and seek for an equitable remedy without proof that such remedy is appropriate in the circumstances.

33. The applicant must also prove that the appeal is arguable and that unless the orders sought are granted his appeal may be rendered nugatory. In the case of Nairobi Women's Hospital vs Purity Kemunto (2018) eKLR the court of appeal had this to say:

**“To entitle the applicant to the order of stay of execution that it has sought, the applicant is obliged to satisfy us that its intended appeal is arguable and that if we do not grant stay of execution and the appeal succeeds, it will be rendered nugatory”.**

See also Chris Munga Bichage vs Richard Nyagaka Tongi and 2 others (2013) eKLR.

34. A cursory look at the impugned ruling, reveals that there were no specific orders made by the court to warrant extraction of a decree order for execution. In other words there is no positive order made to call for this court's intervention to forestall its execution pending appeal. It is trite that a negative order is not a positive order capable of execution.

35. This position is clearly captured in the case of Co-operative Bank of Kenya vs Banking, Insurance and Finance Union (2015) eKLR where the court held that:

**“An order for stay of execution (pending) appeal is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called as “positive order”.....”.**

Similar position was held in the case of Electro Watts Ltd vs Alios Reliance Kenya Ltd (2018) eKLR and Milcah Jeruto vs Fina Bank Ltd (2013) eKLR.

36. I do note that the applicant did not make any comment with regard to the negative status of the dismissal order. It is not in dispute that the court did not make any positive order capable of implementation or execution to warrant court's intervention. Order 42 rule 6 cannot therefore apply in the circumstances. On that ground, the appeal cannot be said to be arguable or rendered nugatory. Accordingly the prayer for stay of execution must fail and therefore prayers 4 and 5 cannot issue.

**b. Whether an order for injunction can issue pending appeal**

37. As stated in the case of Co-operative Bank of Kenya vs Banker, Insurance Union (Supra) the applicant has an onerous duty to show that her appeal is not frivolous, it is arguable and that it may be rendered nugatory if the orders are not granted. This position has been upheld in numerous decisions by superior courts. The applicant must also prove that she will suffer irreparable damage should the order be denied and that to the convenience of both parties she is entitled to the remedy (See James Ndege Nyakundi vs Barclays Bank of Kenya on Civil appeal No. 174/2009 Nairobi Court of Appeal) and Bilha Mideva Buluku vs Everlyne Kanyere (2016) eKLR.

38. According to the applicant, unless the orders for injunction are granted, she is likely to be evicted from her Mua house and that the respondent will most likely dispose of the matrimonial property.

39. As stated elsewhere in this ruling, the application dated 3<sup>rd</sup> September 2014 seeking an injunction restraining any sale, disposal, alienation or any dealings with the properties listed as matrimonial property was certified urgent and some interim orders issued as follows:

**1. That the application dated 3<sup>rd</sup> September 2014 is certified urgent and the same shall be heard during court vacation and specifically on 11<sup>th</sup> September 2014.**

**2. That the application shall be served on the respondent.**

**3. That the applicant shall not be evicted from the matrimonial home at Mua between now and 11<sup>th</sup> September 2014.**

40. The same orders were extended from time to time to secure the respondent's quiet and peaceful occupation of the premises.

41. From the handwritten proceedings, I have not come across any interim order of injunction issued in respect of the application of 3<sup>rd</sup> September 2014 restraining any transaction, sale, disposition, alienation or any dealing on the listed properties against the respondent. Even the applicant did not attach any such order to the application.

42. What does that mean? It implies that since 2014 September the properties have been exposed all along save for the Mua home. What stopped the respondent from dealing or doing whatever he wanted in all those properties? In my view there has never been any danger or reasonable apprehension that those properties were at risk of alienation or disposal.

43. Therefore, the applicant will not be prejudiced even if an order of injunction does not issue at this stage as there is no likelihood or fear that the property will be wasted or alienated.

44. As to whether the properties registered in the company's name can be enjoined, the answer is in the negative. In the case of **AKK vs PKW (2018) (Supra)** the court stated that:

**“Thirdly, the 3 properties owned by Upper Hill Springs Restaurant Ltd, are owned by a separate legal entity, the company which is a separate legal person and therefore cannot be part of these proceedings. The respondent's claim/share/interest is not established in the absence of which this court acted in vain in issuing interim orders”.**

45. It will be inappropriate for this court to issue injunctive orders against limited liability companies which are distinct legal entities in a matter to which they are not parties. With that holding prayers 8 – 11 cannot apply.

46. Having held as above, I am left with prayers 2, 3 and 6 which are seeking orders restraining the respondent from evicting her from the LR No. XXXX/X Mua. According to the respondent, that property is occupied by their son and that he has since developed it for him. That the property in which the applicant has been staying is LR XXXX/X and not XXXX/X.

47. However, at prayer 4 and 5 of the application dated 3<sup>rd</sup> September 2014 which was dismissed, the applicant had sought an injunction for both properties. However, in the instant application she has sought an injunction against LR No. XXXX/X which the respondent claims is the property of their son although not officially transferred.

48. The respondent claimed that, even if the applicant had claimed LR XXXX/X, she has not been in occupation of that house since she shifted to Nairobi in August 2017. He attached photographs showing that the building is in bad shape and has even commenced renovation since it was abandoned. He attached two affidavits from his security guards and farm hand (annexure JNM 1(A) sworn by JMM and JNM 1(b) sworn by JMM who confirmed that the applicant shifted for Nairobi sometime August 2017. He even gave details and particulars of the apartments she is staying in.

49. This evidence was not controverted at all by way of further evidence where evidence which is particularised as a fact is not controverted, the presumption is that it is true and therefore correct (**See Mount Elgon Hardware vs United Nations (Supra)**).

50. With this kind of information and evidence which remains uncontroverted, an order to restrain eviction cannot apply as there is nobody to evict or injunct against. To that extent, prayers 2, 3 and 6 fails.

51. Concerning whether this matter is resjudicata and that the court is functus officio, I hold that I have not been invited to determine the suit nor the applications determined by my colleague. The matter before me is totally new and distinct from what Hon. Musyoka heard and determined. The same cannot amount to resjudicata nor is this court functus officio. In the same vein, I am not in any way sitting in an appellate capacity on the decision of my brother.

52. For the above reasons stated, it is my finding that the application herein is not merited and the same is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF JULY, 2019.**

**J.N. ONYIEGO**

**JUDGE**