



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**DIVORCE CASE NO. 1 OF 2019**

**GDM.....PETITIONER/APPLICANT**

**VERSUS**

**CMM.....RESPONDENT**

**RULING**

1. This matter emanates from a Notice of Motion dated 13<sup>th</sup> May 2019 brought pursuant to **Article 40 & 43 (3) of the Constitution of Kenya, Section 68 of the Land Registration Act 2012, Sections 1A, 1B and 3A of the Civil Procedure Act CAP 21, Order 40 Rules 1, 2 & 3 and Order 51 of the Civil Procedure Rules Laws of Kenya and all the other enabling provisions of the law.** The applicant seeks the following orders:

- 1.) *That this Honourable court be pleased to certify the application urgent and to hear it exparte in the first instance.*
- 2.) *That pending interparties hearing of this application the honourable court be pleased to issue an order of inhibition, inhibiting any dealings with LR NO. ABOTHUGUCHI/KITHIRUNE/[xxx]*
- 3.) *THAT pending the hearing and determination of this petition the honorable court be pleased to issue an order of inhibition, inhibiting any dealings with L. R. NO. ABOTHUGUCHI/KITHIRUNE/[xxx]*
- 4.) *THAT pending the inter parties hearing and determination of this petition the honorable court to issue an order of temporary injunction against the Respondent restraining the Respondent from selling, transferring, using as collateral or in any way dealing with any of motor vehicle Reg. Nos. KBH [...] C, KBR [...] S, KAP [...] R, KBJ [...] W, KBB [...] M, KAQ [...] P, KAV [...] X, KAP [...] G and KAT [...] U.*
- 5.) *THAT pending the hearing and determination of this petition the respondent be ordered to provide maintenance to the petitioner in the following terms:*
  - a) *A four bedroom mansion or apartment in a decent neighborhood or rent at Kshs. 100,000/- per month*
  - b) *Furniture, house ware and home necessities of Kshs. 1,000,000/- or thereabouts for purchase of such items*
  - c) *Kshs. 300,000/- per month for living expenses to cater for electricity, water, food, clothing and sundry expenses*
  - d) *KBR [...]S Toyota Hilux for personal use*
  - e) *The applicant also sought cost of the application to be granted to her.*

2. The grounds upon which the application is grounded upon are in the body of the Motion, supporting affidavit and further supporting affidavit of GDM sworn on 13<sup>th</sup> May and 28<sup>th</sup> June 2019. It is contended that the applicant and respondent were married for over 35 years with 4 issues and acquired matrimonial properties worth over Kshs. 200,000,000/- comprising *inter alia* real estate and motor vehicles.

3. In 2013, she discovered that the respondent had sold two plots and one motor vehicle around the time he started mistreating her. That on or about 1<sup>st</sup> May 2019 the Respondent kicked the applicant out of their home on LR NO. NKUENE/TAITA/[xxx] leaving her destitute and in suffering. That the respondent has fraudulently acquired loans with their matrimonial properties which loan proceeds he is squandering with third parties and women in adulterous relationships. That except for one land title all other titles have been fraudulently charged and the Respondent has turned to selling family motor vehicles. The applicant averred that it would be in the interest of justice that the properties are preserved.

4. The Respondent opposed this application through his Replying Affidavit sworn on 14<sup>th</sup> June 2019. He deponed that he did not chase the applicant but she was the one that walked out of their home on her own volition. She has refused to go back to the house despite having no issues on her going back. He denied that the applicant assisted him in acquiring the properties which he has charged to various banks solely and also using his companies which the applicant is not a director of.

5. He is not ready to pay rent of Kshs. 100,000/- and Kshs. 1,000,000/- for furniture as their home on parcel No. [xxx] is fully furnished. As for a vehicle, the applicant owns and uses her car reg. No. KBZ [...] L. Furthermore, he is not ready to pay Kshs. 300,000/- per month for living expenses and maintenance since the applicant is an adult who has her own money. Besides, he will be unable to pay any money to the petitioner as interim alimony as he is servicing several loans. He seeks that inhibition and injunction orders be lifted as all the properties are charged and mortgaged to various financial institutions.

6. This matter was argued by way of written submissions. The applicant submitted by reiterating what she had stated. She affirmed that the court is lawfully clothed with jurisdiction to entertain this application as per **Section 77 (1) of the Marriage Act (No. 4 of 2014)**. She supported her case by relying on the case of **CYC vs KSY [2014] eKLR**.

7. The respondent submitted that the applicant has not met the threshold for an injunction. What's more that the applicant has not evidenced the allegations of assault by the petitioner or justified the financial maintenance. He relied on the case of **P. K. M v R. P. M [2017] eKLR** to support his case.

8. The issues of determination are: **whether to issue an order of inhibition with regards to L. R. NO. ABOTHUGUCHI/KITHIRUNE/[xxx], whether to issue a temporary injunction against any dealings concerning the listed motor vehicles, and whether to grant the applicant the maintenance sort?**

9. The first issue to be determined is whether an order of inhibition can be issued with respect to **L. R. NO. ABOTHUGUCHI/KITHIRUNE/[xxx]**. **Section 68 of the Land Registration Act of 2012** provides that:

**“1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.**

**(2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.**

**(3) An inhibition shall not bind or affect the land, lease or charge until it has been registered.”**

An order of inhibition is a discretionary order given by the court that bars further dealings and transactions with the property for a temporary period of time. Before issuing such an order the court must be satisfied that the applicant has good grounds to warrant the issuance. According to P. Nyamweya J in the case of **Mary Watiri Kirumba v Rose Nyokabi Ndungu [2014] eKLR** stated as follows:

**“It is clear from these provisions that the powers granted to the court are discretionary, and are to be exercised when there is good reason to preserve, or stay the registration of dealings, with respect to a particular parcel of land for a temporary period. There is no requirement that the applicant must show a prima facie case before an inhibition can issue, and the general principle that will apply is that the discretion is exercised judicially by being exercised in good faith, for a proper purpose, taking into account all relevant factors and is reasonable in the circumstances of the case.”**

Also, in the case of **Shivabhai Nathabai Patel Vs Manibhai Hatibhai Patel [1959] EA 907**, it was held, *inter alia*, that;

**“In my opinion it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so. If the Plaintiff succeeds in this suit (and part of his claim is based on this cheque) there might be a barren result; and that it is the duty of the court to avoid.”**

The said property is under the name of the Respondent of which the Applicant attests that they acquired together. Even though the Respondent claimed that he acquired the property alone, it is apparent that it was acquired during the subsistence of the marriage and it would be fitting to preserve the property so as to avoid a barren result upon completion of the suit.

10. The second issue relates to a temporary injunction restraining the Respondent from selling, transferring, using as collateral or in any way dealing of the listed motor vehicles. The requirements that an Applicant needs to establish the three requirements as stipulated in the case of **Giella vs Cassman Brown & Co. Ltd [1973] E. A. 358** at p. 360 it was started:-

**“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience (E.A. INDUSTRIES VS. TRUFOODS [1972] E.A. 420.)”**

The Application of these three was elaborated by the Court of Appeal in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** where it held:

**“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is**

**established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”**

11. The Respondent stated that he acquired the vehicles without the help of the Applicant. However, the Applicant stated that the Respondent would have been a pauper if she had not contributed the seed money. The extent of contribution whether direct or indirect of the properties herein will be dealt with during trial. However, it will be safe to preserve both the real properties and moveable properties to safeguard the interest of both parties as irreparable damage might be suffered if the court eventually makes a finding in favour of the applicant. The Respondent may have acquired loans or facilities with these properties but the issuance of an injunction does not interfere with his repayment of them. Hence, I am of the view that an injunction be issued.

12. The third issue concerns maintenance which the Court of Appeal richly explained in the case of **P K M v R P M [2017] eKLR** where it held:

***“We venture to suggest that whenever a court is faced with an application for maintenance, whether seeking interim relief or upon dissolution of the marriage, it must direct the parties to furnish the court with comprehensive information by way of affidavit relating to their respective financial circumstances. The affidavits should detail the assets, income, expenditure and liabilities of each party over the relevant period and should be supported by necessary evidence.”***

The applicant seeks a four bedroom mansion or apartment or rent at Kshs. 100,000/- per month and Kshs. 1,000,000/- for furnishing the house. The applicant affirmed that the respondent violently kicked her out of their matrimonial home. Even before this he made it impossible for her to live there as he had stationed his brother who was always violent to her. According to the Respondent, the Applicant walked out of their matrimonial home on her own and that he has no issue if she goes back. The applicant declined to resume occupation in the matrimonial home on the ground that the Respondent and his brother have threatened her life. She has particularized demands to be met by the Respondent in terms of maintenance, shelter and sundry expenses at the cost of Ksh. 1.4 M but she has not given the breakdown on how she arrived at those figures or even quotations of the rental houses which rent amounts to Ksh. 100,000/- per month in Meru County. It was incumbent upon the applicant to prove to the court that she is entitled to live in a house whose rent is Ksh. 100,000/- and particularize the expenses amounting to Ksh. 300,000/= per month. Although, it is not in dispute that she is not currently in the matrimonial home this court is of the opinion that the demand for rent and upkeep amounting to Ksh. 400,000/- is on the higher side. This court hereby orders that the Respondent pays out to the applicant Ksh. 150,000/= per month with effect from the time the suit was filed for rent, electricity, water, food, fuel and sundry expenses. The Respondent is also hereby ordered to surrender to the applicant motor vehicle KBR XXX S Toyota Hilux for her personal use. These orders shall obtain pending the hearing and determination of the divorce cause and the matrimonial cause or the settlement the dispute between the parties.

The Application dated 13<sup>th</sup> May 2019, is therefore allowed save for prayer no. 6 which is made as follows:-

- a) The Respondent to pay Ksh. 150,000/- per month with effect from the date of this suit for the upkeep, shelter, fuel, electricity, water and sundry expenses to the applicant pending the hearing and determination of this petition.
- b) An order of inhibition is hereby issued, inhibiting any dealings with L. R. NO. ABOTHUGUCHI/KITHIRUNE/[xxx]
- c) THAT pending the inter parties hearing and determination of this petition an order of temporary injunction be and is hereby issued against the Respondent restraining the Respondent from selling, transferring, using as collateral or in any way dealing with any of motor vehicle Reg. Nos. KBH [...] C, KBR [...] S, KAP [...] R, KBJ [...] W, KBB [...] M, KAQ [...] P, KAV [...] X, KAP [...] G and KAT [...] U.
- d) THAT the Respondent should give the applicant access to furniture of her choice in the matrimonial home to furnish her rental house pending the pending the hearing and determination of this petition. In the alternative the Respondent to pay Ksh. 500,000/- to the applicant to buy suitable furniture to furnish her rental house.
- e) The OCS Nkubu Police Station to give security to the applicant while she removes the furniture of her choice from the matrimonial home.
- f) Each party to bear their own cost of the application.

**HON. A. ONG'INJO J**

**JUDGE**

**JUDGMENT DELIVERED, DATED, AND SIGNED IN COURT THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2019**

**In the presence of:**

**C/A: KINOTI**

Mr Atheru Advocate for Petitioner– present

Mr Thangicia Advocate holding brief for Mwirigi for Respondent.

Petitioner – Present in person

Respondent – Present in person

**Mr Thangicia:**

We pray that we be provided with copy of Ruling.

**Order:** Copies of Ruling to be supplied to advocates upon payment of copying charges.

M. 24.10.2019 to confirm compliance with order 11 of CPR.

**HON A.ONGINJO**

**JUDGE**