



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL CASE NO. 8 OF 2019

JM.....PLAINTIFF

VERSUS

CMM.....DEFENDANT

R U L I N G

1. By a plaint dated 27th May, 2019, the plaintiff sued the defendant claiming that they were married under customary law in the year 2016. That as man and wife, they have been living within Meru town and have bought and started several businesses, *inter alia*, 3 butcheries and an eatery known as *[Particulars Withheld] café*.
2. It was her contention that she contributed Kshs.80,000/- to the acquisition of *[Particulars Withheld] café* which she has been managing while the defendant runs the 3 butcheries. That due to differences that had arisen since April, 2019, the defendant had started to interfere with the plaintiff's quiet running of the *[Particulars Withheld] Café*.
3. The plaintiff further claimed that the aforesaid properties were acquired during their 4 years of marriage. She therefore prayed for a declaration that the said properties were matrimonial properties and belonged to both of them in equal shares.
4. Together with the plaint, the plaintiff took a Motion on Notice dated the same day under **sections 6 and 14 of Matrimonial Properties Act No. 49 of 2013 and Order 40 rules 1, 2, and 4 of the Civil Procedure Rules**. In the Motion, the plaintiff prayed for an injunction to restrain the defendant from interfering with her quiet possession and running of the restaurant known as *[Particulars Withheld] Café* in Meru Town pending the hearing and determination of the suit.
5. The grounds for the application were contained on the face of the Motion and her supporting affidavit sworn on 27th May, 2019. She contended that she had contributed Kshs.80,000/- and the defendant Kshs.50,000/- for the purchase of the business of *[Particulars Withheld] Café*; that she had been running the said business exclusively, that the defendant had on 24th May, 2019 came to the business and ordered her to vacate purporting to have sold the same to a 3rd party.
6. The plaintiff therefore claimed that unless the orders sought are granted she will lose her matrimonial property and in particular the business known as *[Particulars Withheld] Café*. She therefore prayed for the orders sought in the Motion.
7. The defendant opposed the Motion vide his replying affidavit sworn on 10th June, 2019 wherein he denied all the averments of the plaintiff. He denied having married the plaintiff and asserted that he was married to one **CK**.
8. The defendant contended that the plaintiff was an employee of one **TK** from whom he had purchased the *[Particulars Withheld] Café* in May, 2018. That after purchasing the said business, he had retained the defendant as an employee thereat. That due to losses that he was incurring in the said business, he had terminated the plaintiff's employment but she had refused to leave. That he had since sold the business to a 3rd party, one **RM** in May, 2019. He contended that the suit was incompetent and prayed that the application be dismissed.
9. Although the parties were each given 14 days from 11th June, 2019 to file and exchange written submissions, as at the time of writing the ruling, none of them had filed any. Since the application was to be determined by way of written submissions, the failure by the plaintiff to file any submissions technically meant that the plaintiff had failed to prosecute the application and the same is for dismissal. Be that as it may, I will consider on merit.
10. This is an application for an interim injunction. The principles applicable are well known as set out in the famous case of **Giella vs. Cassman Brown [1973] EA 358**. These are that; the plaintiff must establish a prima facie case with a probability of success; that he stands to suffer damage that cannot be compensated by any award of damages and that if the court is in doubt, it will rule on a balance of probability.
11. On prima facie, I note that the suit was commenced by way of a Plaint and not an Originating Summons. The plaintiff's contention is that

she was married to the defendant in 2016 under customary law; that they acquired together various properties including [Particulars Withheld] Café (“the suit property”). That she contributed in the acquisition of the suit property by contributing Kshs.80,000/-. That the defendant had now taken another woman and wants to kick her out of the suit property.

12. The defendant denied all these allegations. He denied having married the plaintiff or acquired any property with her. He produced an agreement dated 6th February, 2018 between him and one **TK** for the purchase of the suit property. That agreement shows that the business was purchased by the defendant for Kshs.140,000/- and not Kshs.130,000/- as alleged by the plaintiff.

13. It should be noted that the defendant had alleged on oath that the plaintiff was but an employee of the original owner of the property, namely **TK**. That the defendant had ‘inherited’ the plaintiff as such employee but she had now refused to leave when sacked and had turned around to claim the business. All the allegations by the defendant, which were made on oath, were not denied by the plaintiff way of a further affidavit or at all.

14. In view of the foregoing and the documentary evidence produced by the defendant, I am satisfied that the plaintiff has not established any prima facie case with any probability of success.

15. On irreparable damage, the plaintiff’s allegation were that she contributed Kshs.80,000/- to the business. She never stated how long she has run the business, if at all. Through audited accounts, the profits therefor can be gauged though the defendant alleged that the business has been in place for less than a year. To my mind whilst the plaintiff did not demonstrate the nature of damage she stands to suffer, I am not satisfied that such loss and damage, if any, cannot be compensated by an award of damages.

16. In any event, I am satisfied that since a 3rd party, **RM**, has now been involved by way of a sale agreement dated 23rd May, 2019, the balance of convenience tilts in favour of declining the injunction sought.

17. Accordingly, I find the application to be without merit and the same is hereby dismissed with costs. The order of status quo made herein on 28th May, 2019 is hereby vacated.

It is so ordered.

DATED and DELIVERED at Meru this 19th day of September, 2019.

A. MABEYA

JUDGE