



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**DIVORCE CAUSE NO. 4 OF 2019**

**LCS.....PETITIONER**

**VERSUS**

**SKS.....RESPONDENT**

**RULING**

[1] The Petitioner herein, **LCS**, is the applicant in respect of the Notice of Motion dated **23 May 2019**. She filed the Petition seeking the dissolution of her marriage with the Respondent, **SKS** on the grounds of adultery, among other grounds. She accordingly moved the Court for orders that:

[a] Spent

[b] That an interim injunction do issue restraining the Respondent, his servants, agents, employees, assigns or anybody acting for or through him from selling, entering into any agreement for sale wasting, or in any manner dealing with or alienating, transferring completing any conveyance whatsoever, charging, mortgaging, damaging or in any way disposing of any or all of the following properties:

[i] **Land Parcel No. Nairobi/Block xxxxx** and all developments thereon;

[ii] **Land Parcel No. LR No. xxxx** and all developments thereon;

[iii] **Land Parcel No. Eldoret Municipality/Block xxxx** and all developments thereon;

[iv] Land Parcel located within **Eldoret Municipality/Block xxxxxxxx** purchased from one **Simon Kipkorir Lamai**;

[v] **Land Parcel LR No. xxxx Chebarus Farm** and all developments thereon;

[c] An interim injunction do issue restraining the Respondent, his servants, agents, employees, assigns or anybody acting for or through him from selling, entering into an agreement for sale, wasting, or in any manner alienating, transferring, slaughtering, harming or removing several dozens of heads of cattle and other livestock reared at the matrimonial home and on the said parcels of land, pending the hearing and determination of this suit.

[d] That an interim injunction do issue restraining the Respondent, his servants, agents, employees, assigns or anybody acting for or through him from selling, entering into an agreement for sale, wasting, or in any manner alienating or transferring the following properties:

[i] The matrimonial home and all household goods therein situate at **Moi's Bridge**;

[ii] Several farm machinery including posho mills located at **Land Parcel No. LR No. xxxx** and Tunen Centre, baler machine and hay movers;

[iii] **Motor vehicles registration numbers KZH xxx, KLV xxx; KAC xxxx, KAD xxxx and KAV xxxx Land Parcel No. Eldoret Municipality/Block xxxx** and all developments thereon;

[e] That the costs of the application be in the cause.

[2] The application was filed under **Article 23** of the **Constitution of Kenya, 2010, Sections 7, 12, 14 and 17** of the **Matrimonial Property Act, No. 49 of 2013**, and **Order 40** of the **Civil Procedure Rules, 2010**. It is predicated on the grounds that the parties are husband and wife; and that the Respondent has chased away the Petitioner from the matrimonial home in **Moi's Bridge** and is in the process of alienating, selling and disposing of properties acquired by both of them as matrimonial property. It was accordingly the prayer of the Petitioner that, pending the hearing and determination of her petition for divorce, the said property be preserved by way of temporary injunction. The foregoing grounds are deposed to in the Petitioner's own affidavit, sworn on **23 May 2019**, to which she annexed copies of their Marriage Certificate; and of the Title Deeds for the property aforementioned. She also exhibited documents to buttress her assertion that the Respondent is intent on disposing of the Suit Property without her knowledge or consent; hence the need for the orders sought.

[3] The Respondent resisted the application vide his Replying Affidavit sworn on **10 June 2019** and filed herein on **14 June 2019**. While admitting that the Petitioner is his wife, the Respondent denied that he is the owner of all the properties mentioned in the Petition and the Supporting Affidavit. For instance, he denied that he is the owner of either **Land Parcel No. Nairobi/Block xxxx**, or Land Parcel located within **Eldoret Municipality/Block xxxxx** allegedly purchased from one **Simon Kipkorir Lamai**. He likewise denied being the owner of **Land Parcel No. Eldoret Municipality/Block xxxx**. The Respondent asserted that, other than **Land Parcel No. LR No. xxxxx** which he has no intention to sell, being his place of abode, he had no knowledge of the other properties alleged to be registered in his name. He further denied that he co-owns any property with the Petitioner.

[4] In a Further Affidavit filed on **24 July 2019**, the Petitioner countered the Respondents assertions and reiterated her contention that the Suit Properties are indeed matrimonial property and therefore ought to be preserved pending the hearing and determination of the divorce petition herein. She further averred that the same formed the subject of **Eldoret High Court Civil Case No. 15 of 2008 (OS)** wherein temporary injunctive orders were made pending hearing; but that the suit was dismissed at a preliminary stage for the reasons that she was seeking division of matrimonial property without having instituted divorce proceedings. She further averred that the Respondent never raised any issues in that suit challenging his ownership of the properties. She annexed to the Further Affidavit copies of the Ruling and Order issued in **Eldoret High Court Civil Case No. 15 of 2008 (OS)** to support her assertions.

[5] The application was disposed of by way of written submissions in terms of the directions issued herein on **25 June 2019**. Counsel for the Petitioner cited the case of **Giella vs. Cassman Brown [1973] EA 358** to support his argument that the Plaintiff has made out a *prima facie* case with probability of success by demonstrating the existence of a marriage between her and the Respondent and the acquisition of property during coverture. Counsel further urged the Court to find that the Respondent admittedly proceeded to dispose of some of the properties without the Petitioner's knowledge or consent; and therefore, that her apprehensions are justified.

[6] It was also the contention of Counsel that, such disposal notwithstanding, justice can still be done by way of a restraining order to prevent further disposal or wasting of the properties. It was thus posited that unless the orders sought are granted, the Petitioner risks suffering irreparable harm. Counsel relied on **JWC vs. LKM [2017] eKLR** to support his argument as to the applicability of the doctrine of tracing and restitution; and urged the Court to find that even the balance of convenience tilts in favour of the Petitioner.

[7] Counsel for the Respondent, on the other hand, submitted that it was upon the Petitioner to demonstrate her allegation that the Suit Properties fall in the category of matrimonial property. He submitted that since the issuance of an interlocutory injunction is discretionary, it was imperative for the Petitioner to satisfy the conditions laid down in **the Giella Case** (supra); which in his view has not been done herein. He, accordingly, urged for the dismissal of the Petitioner's application.

[8] The Court has given careful consideration to the application, its Supporting Affidavit and the annexure thereto, as well as the responses filed herein by the Defendants. Consideration has also been given to the parties' written submissions and the authorities relied on therein. One of the enabling provisions cited in support of the application is **Order 40 of the Civil Procedure Rules. Rule 1(a)** of thereof provides that:

**"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... 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 disposition of the property as the court thinks fit until the disposal of the suit or until further orders."**

[9] In the premises, the key issue for the Court's determination is whether the Petitioner has satisfied the conditions for granting a temporary injunction for purposes of **Order 40 Rule 1** of the **Civil Procedure Rules**; and the yardstick in this regard was aptly set out in the case of **Giella vs. Cassman Brown & Co. Ltd** (supra), thus:

**"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. 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."**

[10] As to what amount to a *prima facie* case, the Court of Appeal, in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123** furnished the following helpful definition:

**"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It 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 as to call for an explanation or rebuttal from the latter."**

[11] There is no dispute that the parties hereto are husband and wife. A Certificate of Marriage annexed to the Supporting Affidavit and marked **Annexure 'LCS 1'** shows that they got married on **9 August 1975**. Indeed, these are some of the facts expressly admitted by the

Respondent at paragraph 3 of his Replying Affidavit. There appears to be no dispute that the couple acquired some property during coverture, including the property known as **LR No. xxxx** which they used as their matrimonial home. The parties are further in agreement that their marriage ran into headwinds, resulting in a parting of ways sometime in **2007**; and while each appears to blame the other for their separation, there is no dispute that cohabitation thereby ceased, though the marriage is yet to be dissolved.

[12] Thus, the Petitioner annexed to her Supporting Affidavit copies of title deeds to demonstrate that the properties in question were acquired during the subsistence of their marriage; and therefore, that she is entitled to a share thereof upon divorce. Although it was the averment of the Respondent that he **"...acquired some properties on his own without any contributions from the Applicant as he was working and earning some income..."** the law is that property acquired during coverture would qualify as matrimonial property unless proved otherwise; and such proof can only be availed at the hearing. It is at the hearing that the Court will be in a position to determine whether or not the Petitioner contributed to the acquisition of the properties for purposes of **Section 2 of the Matrimonial Property Act, 2013**. In the same vein, it is at the hearing that it will come to light whether the said properties have since changed hands and whether they are traceable for purposes of division.

[13] In **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others: Civil Appeal No. 77 of 2012**, the Court of Appeal made this point thus:

*"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."*

[14] In the premises, I am satisfied that the Plaintiff has indeed demonstrated, on a *prima facie* basis, that she has a right in connection with the Suit Property **which has apparently been infringed by the Defendants** "...as to call for an explanation or rebuttal from the latter..." **within the definition of a prima facie case provided in the Mrao Ltd Case** above; and that in the circumstances, she risks suffering irreparable damage unless the orders sought are granted in the interim.

[15] As to whether the balance of convenience is in favour of the Plaintiff, the decision of the Court of Appeal in **Charter House Investments Ltd vs. Simon K. Sang and Others Civil Appeal No. 315 of 2004** is instructive that:

**"Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and to third parties.**

[16] Moreover, it is imperative that the Court opts for the lower rather than the higher risk of injustice. This was held to be so in the case of **Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589** in which **Ojwang Ag. J** (as he then was) quoted the following words of **Justice Hoffmann** in the English case of **Films Rover International vs. Cannon Film Sales Ltd (1986) 3 All ER 772**:

**"The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeed (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' ..."**

[17] In the instant matter, the path leading to the lower risk of injustice would be to sustain the *status quo* pending the hearing and determination of the Plaintiff's case. I note too that the Petitioner was given similar orders in **Eldoret High Court Civil Case No.15 of 2008 (OS)** which were only discharged upon that suit being dismissed on a technicality on **28 November 2018**. I am therefore convinced that no prejudice will be suffered by the Respondent if the orders sought are granted pending the hearing and determination of this Divorce Petition.

[18] Accordingly, I find merit in the Petitioner's application and would grant orders in her favour in the following terms:

[a] That, pending the hearing and determination of the Petition herein, a temporary injunction be and is hereby issued restraining the Respondent, his servants, agents, employees, assigns or anybody acting for or through him from selling, entering into any agreement for sale wasting, or in any manner dealing with or alienating, transferring completing any conveyance whatsoever, charging, mortgaging, damaging or in any way disposing of any or all of the following properties:

[i] Land Parcel No. Nairobi/Block xxxxx and all developments thereon;

[ii] Land Parcel No. LR No. xxxx and all developments thereon;

[iii] Land Parcel No. Eldoret Municipality/Block xxxx and all developments thereon;

[iv] Land Parcel located within Eldoret Municipality/Block xxxx purchased from one **Simon Kipkorir Lamai**;

**[v] Land Parcel LR No. xxxx Chebarus Farm** and all developments thereon;

**[b]** That pending the hearing and determination of the Petition herein, a temporary injunction be and is hereby issued restraining the Respondent, his servants, agents, employees, assigns or anybody acting for or through him from selling, entering into an agreement for sale, wasting, or in any manner alienating, transferring, slaughtering, harming or removing several dozens of heads of cattle and other livestock reared at the matrimonial home and on the said parcels of land.

**[c]** That, pending the hearing and determination of this Petition, a temporary injunction be and is hereby issued restraining the Respondent, his servants, agents, employees, assigns or anybody acting for or through him from selling, entering into an agreement for sale, wasting, or in any manner alienating or transferring the following properties:

**[i]** The matrimonial home and all household goods therein situate at **Moi's Bridge**;

**[ii]** Several farm machinery including posho mills located at **Land Parcel No. LR No. xxxx** and Tunen Centre, baler machine and hay movers;

**[iii]** Motor vehicles registration numbers KZH xxx, KLV xxx; KAC xxx, KAD xxx and KAV xxx.

**[d]** That the costs of the application be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 9<sup>TH</sup> DAY OF OCTOBER, 2019**

**OLGA SEWE**

**JUDGE**