



**REPUBLIC OF KENYA**

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

**HCCC NO. 6 OF 2017**

**MUTHONI KINYUA.....PLAINTIFF/APPLICANT**

**VERSUS**

**KINYUA FREDRICK MUTEGLI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NANCY GATUNE KARERI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

1. Esther Muthoni, the Plaintiff/Applicant herein has moved this court vide a Notice of Motion dated 17<sup>th</sup> August, 2017 brought under Order 40 Rule 1 and 2, Order 51 of the Civil Procedure Rule, Section 1 A, 1B and 3 A of Civil Procedure Act, Sections 6, 12, 14, 17(1) and 17(2) of the Matrimonial Properties Act, 2013 Section 3(2), 9(a) and 11(c) of the Marriage Act, 2014, Section 28 and 93 (1) and 2 of the Land Registration Act 2012, Article 27(3) (4), 40 and 45 (3) of the Constitution of Kenya 2010. She has invoked the above provisions of law in seeking the following reliefs against Kinyua Fredrick Mutege, the 1<sup>st</sup> Defendant/ Respondent and Nancy Gatune Kareri the 2<sup>nd</sup> Defendant /Respondent namely;

(i) That the Applicant be certified as urgent and service of the Application be dispensed with in the first instance.

(ii) That the honourable court do issue an order granting the plaintiff full access, user, occupation and/or any other dealings in regard to proprietary interest and rights pertaining thereto over all her matrimonial properties known as Karingani/Muiru/4324, Karingani/Mugirirwa/2072, Karingani/Muiru/1653, Makao Holdings House No.G4 and No. H67 located at Ruaraka, Mbuguni Settlement Scheme Phase One Plot No.135, Located at Mombasa, Thika Town Plot No. 275, Kabarak Town plot, No.252, Nairobi/Mavoko/Cretum Limited plots No.3/36851 & 3/39023, and Motor Vehicle Registration No.KCJ 431T and any other property acquired and owned as joint proprietors during the substance of their marriage, in the interim basis pending interparty hearing and determination of the instance application.

(iii) That an order of temporary injunction do issue restraining the 1<sup>st</sup> defendant by himself, his agents/servants or anybody acting on his behest or instructions from disposing, transferring, alienating, giving out, evicting, denying access, entry, user and occupation or in any other way/manner whatsoever from interfering with the Plaintiff's peaceful user and occupation of their jointly acquired matrimonial properties known as Karingani/Muiru/4324, Karingani/Mugirirwa/2072, Karingani/Muiru/1653, Makao Holdings House No. G4 & No. H67 located at Ruaraka, Mbuguni Settlement Scheme Phase one plot No. 135, located at Mombasa, Thika Town Plot No. 275, Kabarak Town Plot No.252, Nairobi/Mavoko/Cretum Limited Plots No. 3/36851 & 3/39023, and Motor Vehicle Registration No. KCJ431 T and any other matrimonial properties jointly acquired during the subsistence of their marriage without the consent of the plaintiff, in the interim basis pending interparty hearing and determination of the instance application.

(iii) That an order temporary injunction do issue restraining the 2<sup>nd</sup> Defendant by herself or anybody acting on her behest or instructions from trespassing, damaging, occupying using any of the Plaintiff's matrimonial properties, denying and/or preventing the plaintiff from accessing, entering, using and occupying, or in any other nature/manner/form whatsoever from interfering with the plaintiff's peaceful user and occupation of her proprietary rights over her matrimonial properties known as Karingani/Muiru/4324, Karingani/Mugirirwa/2072, Karingani/Muiru/1653, Makao Holdings House No. G4 & No.H67 located at Ruaraka, Mbuguni Settlement Scheme Phase One Plot No.135, located at Mombasa, Thika Town Plot No. 275, Kabarak Town Plot No. 252, Nairobi/Mavoko/Cretum Limited Plots No.3/36851 & 3/39023, and Motor Vehicle Registration No.KCJ 431T and any other matrimonial properties jointly acquired by the plaintiff and the 1<sup>st</sup> defendant during the subsistence of their marriage without the consent of the plaintiff.

(iv) That orders 2, 3 and 4 above do issue as prayed for in the interim basis pending the hearing and determination of the Originating Summons/main suit herein.

(v) That the costs of the Application be in cause.

2. The grounds upon which this application is premised are as follows:-

- a) That the Plaintiff/Applicant is the legal wife of the 1<sup>st</sup> defendant having conducted a legal marriage on 8<sup>th</sup> August 1998 and have been living together as husband and wife since.**
- b) That the marriage still subsist.**
- c) That the union is blessed with two children; Kestine Kendi 18 years old and Grace Kathure now aged 14 years and that the couple has put up matrimonial homes at Kirige Location, Tharaka- Nithi County and in the state of Maryland in the U.S.A where they both work for gain.**
- d) That the Plaintiff and the 1<sup>st</sup> Defendant jointly contributed to the acquisition of all the matrimonial properties located in Kenya and Maryland.**
- e) That the 1<sup>st</sup> Defendant intends to marry the 2<sup>nd</sup> Defendant despite lacking capacity and intends to settle her in one of the matrimonial properties known as KARINGANI/MUIRU/4324.**
- f) That the Plaintiff avers that the 1<sup>st</sup> Defendant's intention to settle the 2<sup>nd</sup> Defendant and building a house for her is illegal irregular and arbitrary as he did not obtain a spousal consent to do so.**
- g) That the applicant is apprehensive that the 1<sup>st</sup> Defendant may transfer the property to the 2<sup>nd</sup> Defendant and encourage her to continue her illegal trespass on her property.**
- h) That the 1<sup>st</sup> Defendant has evicted the Plaintiff from her matrimonial property and employed workers to keep her at bay and deny her access to Land Parcel No. KARINGANI/MUIRU/4324 and use of Motor Vehicle Registration No. KCJ 431 T.**
- i) That unless the orders sought herein are granted the applicant stands to suffer great injustice.**

3. This motion is supported by the Affidavit of the Plaintiff sworn on 17<sup>th</sup> August, 2017, where the Applicant has reiterated the grounds of her motion before court. The applicant has listed the following properties as comprising their matrimonial property with the 1<sup>st</sup> Respondent namely;

- (i) Karingani/Muiru/4324
- (ii) Karingani/Mugirirwa/2072
- (iii) Karingani/Muiru/1653
- (iv) Makao Holding House No. G4 and H67 at Ruaraka
- (v) Thika Town Plot No.275
- (vi) Kabarak Town Plot No. 252
- (vii) Nairobi/Mavoko/Cretum Ltd Plots 3/36851 and 3/39023
- (viii) Motor vehicle Registration No.KCJ 431T.

4. The applicant has deposed that she contributed to the purchase of the above properties and therefore has equal rights with the 1<sup>st</sup> Defendant over the properties and claims that she was evicted from her matrimonial home in May 2017 forcing her to stay in a hotel. She has further deposed that she was denied the use of motor vehicle Registration No.KCJ 431J forcing her to hire a car.

5. In her oral submissions made through learned counsel Ms Kaaria, the applicant stated that she has already filed for divorce both in Kenya and in the United State and that the divorce proceedings are pending in court. She further added that the couple for now are separated though the marriage still subsist. The Applicant's gist of her prayers from the oral submission is access and use of motor vehicle Registration No. KCJ 431 T. She has conceded that she is leaving out the prayer regarding L.R No.KARINGANI/MUIRU/4324 where the 2<sup>nd</sup> Respondent currently resides.

6. The 1<sup>st</sup> Defendant/ Respondent is opposed to this application and has relied on his Replying Affidavit sworn on 26<sup>th</sup> September, 2017 and a further affidavit sworn on 19<sup>th</sup> January, 2018. The Respondent has accused the applicant for turning hostile to him after he had taken her to the U.S.A and sponsored her in her education.

7. The 1<sup>st</sup> Defendant has further deposed that he has put up a matrimonial house in the US and has bought two vehicles to the applicant for her use here in Kenya. According to the 1<sup>st</sup> Defendant/Respondent, he bought Motor Vehicle Registration No.KCJ 431 T for his ailing and aging parents.

8. The 1<sup>st</sup> Defendant has further deposed that he single handedly contributed to most assets comprising matrimonial properties though he had some of them registered in their joint names. He has deposed that the applicant did not contribute anything towards acquisition of the said properties.

9. He has deposed that the applicant can continue utilizing and/or staying in their matrimonial home at **Karingani/Mugirirwa/2072** where he has deposed that there is a matrimonial home and that the motor vehicle Registration No. KCJ 431 T was bought for purposes of taking care of his aged and ailing father and for taking his daughter Joy Makena to school.

10. This court has considered this application and response made from the oral submissions made by both counsels what clearly came out was that both parties are in agreement that a status quo be maintained in respect to the properties listed in this application for the simple reason that there is a contest as to whether the properties listed are matrimonial properties or not.

I believe an order of status quo will preserve the properties or the subject matter in this suit. I was also made to understand, and this was not denied that the applicant has been given liberty to occupy the matrimonial home in **Karingani/Mugirirwa/2072** while the Respondents can occupy the matrimonial home at **Karingani/Muiru/4324** pending the determination of the suit herein. Again, that sort of arrangements is in order to avoid squabbles and unnecessary fights between the parties herein.

11. This court finds no basis to issue any order or relief against the 2<sup>nd</sup> Respondent because none has been laid before me.

12. The only bone of contention in this application in my view is the utility of that Motor Vehicle Registration No. KCJ 431 T. While there is a presumption of law that any property acquired during marriage is matrimonial property despite the same being registered in the name of a single spouse, this court has been told on oath that the 1st Defendant/Respondent bought two vehicles for exclusive use by the applicant. That averment was not denied by the applicant nor did she challenge the averment by the 1<sup>st</sup> Defendant that the Motor Vehicle in question was purchased solely to cater for his ailing father and his daughter.

This issue therefore requires further interrogations which shall be done during the main trial.

13. The court has further been told of strained relationship between the 1<sup>st</sup> Defendant and the Plaintiff which of course is not unexpected but considering that the squabbles have ended up in a criminal trial show that there is need for sobriety and timely resolution of dispute herein. In order to facilitate just expeditious and proportionate resolution of the dispute herein this court finds it proper and fit to order that a status quo be maintained in respect to Karingani/Muiru/4324, Karingani/Mugirirwa/2072, Karingani/Muiru/1653 and Motor Vehicle Registration No. KCJ 431 T. There is no evidence placed before me to show that the other properties listed are part of matrimonial proper ties. That issue should be left for trial.

The Plaintiff shall have access and use of the matrimonial home in Karingani/Mugirirwa/2072 while the 1<sup>st</sup> Defendant shall continue utilizing or occupying Karingani/Muiru/4324 and Motor vehicle Registration No. KCJ 431 T pending the hearing and determination of the suit herein.

The application dated 17<sup>th</sup> August, 2017 stands disallowed with no order as to costs.

**Dated signed and delivered at Chuka this 1<sup>st</sup> day of March 2018.**

**R.K. LIMO**

**JUDGE**

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Ruling signed, dated and delivered in presence of Kaaria for applicant and Kimathi for Respondent.

**R.K. LIMO**

**JUDGE**

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