



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 5 OF 2017 (OS)

IN THE MATTER OF MATRIMONIAL PROPERTY ACT, 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA (CHAPTER 4 ART. 45(3))

P L M.....PLAINTIFF/APPLICANT

VERSUS

A M N..... DEFENDANT/RESPONDENT

R U L I N G

1. The application dated 20/04/2017 is grounded on the affidavit of the applicant. It is deposed that the parties are husband and wife having solemnized their marriage on 12/04/2008 and are blessed with two children aged 21 and 19 years.
2. The applicant further states that the parties established their matrimonial home on L.R. Mbeti/Gachuriri/[particulars withheld] registered in the name of the respondent and have extensively developed (9) acres of *khat* (miraa). The applicant avers that the respondent incited his relatives to evicted her from their matrimonial home.
3. The respondent has attempted to settle another woman in the matrimonial home and has granted her access to the farm including harvesting of the *khat*. As a result the applicant has been denied access to the matrimonial home and to the farm including harvesting and disposing of the cash crop.
4. The applicant further avers that the respondent no longer provides financial or social support to the applicant and to the issues of marriage. The children are in school and have been denied educational support by the respondent who does not pay their school fees. He is said to be using the income from the farm all by himself. The applicant fears that pending the hearing and disposal of this case, the respondent may dispose off the matrimonial properties which include Mbeti/Gachuriri/[particulars withheld].
5. It is further deposed that the income from the *khat* crop on the land is between Kshs.45,000/= and Kshs.15,000/= depending on the season. The parties extended their business to commercially transporting miraa from Mbeere to Mombasa earning an average of Kshs.25,000/= per day. The income was previously used to repay the loans borrowed by the parties to fund their business and farming enterprise. This no longer happens as the respondent solely runs the business and utilizes the income by himself. The applicant says she stays in a rented house in Mombasa where she works as a [particulars withheld] whose rent is Kshs.30,000/= a month. It is further stated that the respondent has failed to pay the rent which has attracted arrears of Kshs.120,000/=.
6. The applicant states that the respondent later absconded the matrimonial home and now cohabits with another woman. He carried with him the original professional certificates of the applicant.
7. In his replying affidavit, the respondent denies allegations by the applicant terming them malicious and brought in bad faith. He states that he pays school fees for his two children and only failed to do so at one time for the eldest child E N who changed her course in her third year at [particulars withheld] University without informing him. He denies that he has any intention of selling L.R. Mbeti/Gachuriri/[particulars withheld] for it is a collateral for a loan.
8. It is also denied that the applicant has ever financially or otherwise supported the family business. The respondent states that is the one who runs and funds the businesses and had to resign from his job to be on the course full time. The respondent has borrowed loans for the various family business enterprises. He is currently repaying over Kshs.150,000/= monthly to the financiers. It is alleged that the applicant misused the family income by putting it to construction of a home for her parents and advancing soft loans to her relatives.
9. From the heavy responsibilities the respondent has, he says he has only Kshs.10,000/= left for his personal use and is therefore not in a position to pay maintenance to the applicant who is earning her own income. He complains that the applicants continues to occupy an

expensive house in Mombasa and has refused to vacate it for a cheaper one. The house now has outstanding rent which the respondent is unable to pay. He alleges that there is a lot of animosity between the parties which has led to criminal cases that are pending in court. The applicant has caused the respondent and his family considerable embarrassment.

10. The applicant filed a supplementary affidavit and the respondent a further affidavit in answer to issues raised by the opposite party which this court has perused.

11. Both parties filed submissions for disposal of this application which have been considered in this ruling. The applicant was represented by Messrs R. Njeru & Co. advocates while Messrs Kamunda Njue & Co. appeared for the respondent.

12. The issues arising from this application are as follows:-

(1) *Whether the applicant has satisfied this court as to the granting of injunctive orders in her favour.*

(2) *Whether the applicant has established her case on maintenance for herself.*

(3) *Whether the order for return of the applicant's original academic certificates should be granted.*

13. The law applicable is Order 40 Rule 1 and 3 of the Civil Procedure Rules and Section 2 of the Matrimonial Property Act which provides:-

14. Section 2 Matrimonial Property Act

In this Act, unless the context otherwise requires—

"contribution" means monetary and non-monetary contribution and includes—

(a) *domestic work and management of the matrimonial home;*

(b) *child care;*

(c) *companionship;*

(d) *management of family business or property; and*

(e) *farm work;*

"family business" means any business which —

(a) *is run for the benefit of the family by both spouses or either spouse; and*

(b) *generates income or other resources wholly or part of which are for the benefit of the family;*

"matrimonial home" means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;

"matrimonial property" has the meaning assigned to it in section 6;

"spouse" means a husband or a wife.

15. Order 40

Rule 1

Where in any suit it is proved by affidavit or otherwise—

(a) *that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or*

(b) *that the defendant threatens or intends to remove or dispose of his property in circumstance affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, 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.*

Rule 3

(1) *In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.*

(2) *No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.*

(3) *An application under this rule shall be made by notice of motion in the same suit.*

16. The applicant produced a marriage certificate which establishes that the parties are husband and wife having solemnized their marriage in 2008. Prior to that, they were married under African Customary law this being the period when their two issues of marriage were born. The birth certificates show that the first child was born in 1995 and the second one in 1999. The respondent does not dispute the existence of the marriage and that they have two issues of the marriage.

17. The parties are in agreement that they do farming and continue to cultivate *khat* crop on L.R. No. Mbeti/Gachuriri/ [particulars withheld] covering nine (9) acres of the land as estimated by the applicant. The crop is sold commercially in the market thus creating a source of income for the family. The business of commercial transport of *khat* to Mombasa which has grown considerably over the years is in existence. The applicant says it is family business and that the income has always been used for the benefit of the family until 2016 when the respondent started cohabiting with another woman.

18. The respondent does not deny that the business belongs to the family. He states in paragraph 10 of his further affidavit that the business was set up exclusively by money “we took” from KWFT bank using title for L.R. Mbeti/Gachuriri/[particulars withheld] as security. He then accused the applicant of not meeting her obligation of the loan repayment. The other disputed fact by the respondent is that the applicant has ever run the business. He did not explain how the applicant accessed the money that he alleges she misused by giving it to other people to spend.

19. That notwithstanding, the transport business and the farming in Mbeti/Gachuriri/[particulars withheld] both of which generate income fall under the description of family business under Section 2 of the Matrimonial Property Act. It has not been disputed that the business has always been run for the benefit of the family up to 2016 when differences started between the parties. I find that the applicant has shown that the transport business and farming on the family land are matrimonial property for purposes of this application.

20. The principles guiding the granting of injunctive orders were established in the case of **EAST AFRICAN DEVELOPMENT BANK VS HYUNDAI MORTORS (K) LTD [2006] 2 KCLR page 100** where the case of **GIELLA VS CASSMAN BROWN & CO.** was cited with approval. The court held that the applicant must:-

(i) *show a prima facie case with a possibility of success;*

(ii) *That he is likely to suffer irreparable loss or injury in which would not be adequately compensated in way of damages;*

(iii) *If the court is in doubt, it will decide the application on the balance of convenience.*

21. The same principles were replicated in the case of **ALBERT MARIO CORDEIRO & ANOTHER VS VISHRAM SHAMJI [2015] eKLR** where the court granted injunctive orders on grounds among others that the plaintiff had made a *prima facie* case.

22. The applicant has annexed copies of certificates of official searches for Mbeti/Gachuriri/[particulars withheld] which are registered in the names of the respondent. There was no evidence to controvert that of the applicant that the two parcels of land belong and are utilized by the family. The applicant has also shown that the businesses are family businesses and form part of the family income.

23. The applicant fears that there is a great risk that the properties may be disposed of during the pendency of this case. If this happens, the applicant will of course, suffer irreparable loss which in my considered opinion cannot be compensated in way of damages. The respondent has not denied that he is already cohabiting with another woman which fact enhances the risk of disposing of the matrimonial property. If the properties is sold, th applicant will definitely suffer irreparable loss.

24. The respondent did not dispute that the three motor vehicles registration number KCG [particulars withheld], KBX [particulars withheld] and KCG [particulars withheld] belong to the family business in which the applicant has a stake.

25. It is alleged that the respondent carried with him the original academic certificates of the applicant. This allegation was not denied by the respondent. The uncontroverted evidence of the applicant on oath is sufficient to show that the applicant is telling the truth. She would have no reason to lie to the court that the respondent is keeping her original certificates which he does not need. The applicant is likely to suffer loss in her career progression in the absence of her certificates.

26. The applicant seeks for orders that the respondent be compelled to pay school fees of the children. The respondent states that he has always paid the fees except in the case of the first child who changed her course and moved to another university without the respondent being informed. The child is still pursuing her studies as much as the respondent was not consulted on the change of the course and of the institution.

27. It was wrong for the applicant not to consult the respondent on the issue for he is the father of the child and funds the child's education. However, the duty of the parent to pay fees cannot be removed by the parent's differences. The respondent must meet his legal obligations as required by the law.

28. The applicant seeks for Kshs.10,000/= daily as her maintenance based on the fact that the family business is quite lucrative. The respondent says he cannot afford the maintenance sought because he is educating the children and paying loans related to the family business.

29. The applicant is a parent and both parents have parental responsibility to offer their children. It is fair and just that she takes up part of the responsibility of bringing up the children by at least providing food, shelter and clothing considering that her earnings are limited. The applicant should also meet her own maintenance which she is in a position to do. I find no basis for prayer 5 of the application.

30. The applicant is running the transport business and the farming which also produces income. It would be contrary to the interests of justice to allow a third party access the family land and to the matrimonial home which the respondent and the applicant have build over the years.

31. In view of the foregoing, I hereby make the following orders:-

(1) Prayer 2, 3, 4 and 7 are hereby allowed pending the disposal of this case.

(2) cost of this application to be in the cause.

32. It is hereby so ordered.

DATED, DELIVERED AND SIGNED THIS 10TH DAY OF APRIL, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

The applicant

Mr. Odhiambo for Kamunda for respondent