



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**ORIGINATING SUMMONS NO. 3 of 2018**

**M M K.....APPLICANT**

**VERSUS**

**J M N.....RESPONDENT**

**RULING**

1. The Applicant has filed a chamber summons application dated 27<sup>th</sup> February, 2018 essentially seeking orders that:

- a) Pending the hearing and determination of the originating summons herein this court be pleased to issue a mandatory order compelling the respondent to deposit all proceeds of the Eight (8) Rental Flats Constructed in the matrimonial property located in plot no. 5 in Athi River in a joint account to be opened by the parties herein or as the court deems fit until further orders of this court.*
- b) Pending the hearing and determination of the originating summons herein this court be pleased to issue a mandatory order compelling the respondent to furnish this court with a detailed account of all Rental proceeds received by him from the eight (8) rental flats constructed in the matrimonial property located in plot no. 5 in Athi River beginning May, 2017 to date.*
- c) Pending the hearing and determination of the originating summons this court be pleased to issue an order by way of an injunction barring the respondent from selling, transferring or dealing in any manner detrimental to the applicant with the matrimonial property located in plot no. 5 in Athi River.*

2. The summons is based on grounds that the marriage between the applicant and the respondent has irretrievably broken down leading to the applicant filing a divorce petition at Mavoko Law Courts. That the applicant and the respondent have been living in their matrimonial home located in plot no. 5 within Mavoko Sub County since January, 2002. That the applicant contributed substantially towards the purchase and development of the said matrimonial home and eight rental flats located in the said matrimonial property. That the respondent fraudulently processed the ownership documents for the said matrimonial property in his sole names. That the respondent has been solely collecting proceeds from the rental flats located in the matrimonial property for his sole use to the exclusion of the applicant despite the parties having taken a loan of KShs. 6,000,000/- from Cooperative Bank of Kenya to construct the property. That the respondent failed to pay the loan used to construct the rental flats on the matrimonial property thus putting the said property in danger of being auctioned by the bank and that the respondent has expressed his intention to remove the applicant from the property leaving the same for his sole benefit and enjoyment.

3. In response thereto, the respondent filed grounds of opposition on 8<sup>th</sup> March, 2018 thus; that this application is premature and incompetent as it contravenes the clear provisions of section 7 of the Matrimonial Property Act which provides that ownership of matrimonial property vest in the spouses according to the contribution of either spouses towards its acquisition and shall be divided between the spouses if the divorce of their marriage is otherwise dissolved, that the application is misconceived, ill motivated and an abuse of the court process, that the application is frivolous, vexatious and bad in law and the application lacks merit and ought to be dismissed.

4. He further filed a replying affidavit on 19<sup>th</sup> March, 2018 and contended that he solely made financial payments to the purchase of Plot No. 5 Athi River and financed construction of eight residential flats thereon and took a loan of KShs. 6,000,000/- from Cooperative Bank of Kenya as a top up for finishing the apartments. That he involved the applicant in the process and purchase of the said plot out of love and affection despite her not making any financial contribution towards the same. That at the time of acquiring the said plot and carrying out the developments thereon, the applicant was fresh from college and unemployed and would not have been able to make any financial contribution. That he has not fraudulently processed ownership documents of plot no. 5 nor has he been charged in any court of law for the said offence and that the distribution of matrimonial property can only be determined after marriage has been dissolved hence the application is premature, ill motivated and an abuse of the court process and ought to be dismissed.

5. The application was canvassed by way of written submissions. The applicant's counsel cited Article 45(3) of the Constitution of Kenya

which provides that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage and cited the case of **Busia High Court Civil Suit No. 39 of 2012., UMM v. IMM** and submitted that the respondent's argument on proof of monetary contribution cannot hold. That as a matter of fact, the respondent has not demonstrated that he solely contributed towards the purchase and development of the matrimonial property. That the applicant herein has satisfied the conditions for grant of the interim reliefs sought since she has demonstrated her interest in the matrimonial property by virtue of the sale agreement for the purchase of the property, the bank loan taken jointly for the development of the property and the transfer form of the said matrimonial property with the parties' joint names. That the applicant has demonstrated that she purchased the matrimonial property jointly with the respondent as shown in the sale agreement which fact, it was submitted, that the respondent has not disputed. That having so demonstrated, the respondent should not continue to enjoy the proceeds of the said property solely to the exclusion of the applicant. On mandatory orders, the applicant cited **Nairobi High Court Civil Case No. 91 of 2015 Maher Unissa Karim v. Edward Oluoch, Sharriff Abdi Hassan v. Nadhif Jama Adan (2006) e KLR** and **Jaj Super Power Cash and Carry Ltd v. Nairobi City Council & 20 Others CA 111 of 2002** to illustrate the principles for grant of mandatory orders.

6. The respondent's counsel on the other hand cited **Civil Appeal No. 4 of 2015., between Lucy Wangui and Muindi Okemba Lore, Nguruman Limited v. Jan Bende Nielsen & another C.A. No. 7 of 2012** and **Elizabeth Nzenge v. Daniel Makau & another ELC No. 485 of 2013** in support of his assertion that the application lacks merit.

7. I have given due consideration to the application, the disposition and the submissions tendered herein. The issue for determination is whether or not the applicant has satisfied the principles for grant of the orders sought. The applicant has sought the grant of interlocutory mandatory injunction. It is observed in **Halsbury's Laws of England** 4<sup>th</sup> Ed. 1979 at paragraphs 946 p. 533 thus:

*"946. Power to grant mandatory Injunctions. It has been said that the power of granting mandatory injunctions must be exercised with the greatest possible care, but every injunction, whether restrictive or mandatory, ought to be granted with care and caution, and no more care or caution is required in the case of mandatory injunction than a restrictive injunction. The court has no more hesitation in granting a mandatory injunction in a proper case than any other injunction, and has frequently granted one in order, for instance, to remove obstructions to light. The court may grant a mandatory injunction upon trial of the action, or in certain circumstances upon an interlocutory injunction."*

8. The Court of Appeal discussed the factors to be considered in granting interlocutory mandatory injunction in the case of **Kenya Breweries Ltd & Another v. Washington O. Okeyo [2002] eKLR** thus:

*"The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury's Laws of England 4<sup>th</sup> Edition paragraph 948 which read:-*

*'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.'*"

The Court of Appeal quoted with approval the case of **Locabail International Finance Ltd vs Agroexport and others (1986) 1 ALLER 901** where it was stated:-

*"A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction."*

And in the case of **Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR** the Court of Appeal said:-

*"It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."*

9. It follows therefore that in considering an application for interlocutory mandatory injunction, a court must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear. From the documents annexed by the applicant i.e. the agreement dated 11<sup>th</sup> November, 1999, the letter of allotment, the loan form by Cooperative Bank of Kenya Limited, it is revealed that the property was bought in the joint names of the parties herein and that the loan of KShs. 6,000,000/- was advanced to Abweys Ltd to which both parties here are directors. *Prima facie* therefore I find that the applicant has demonstrated that the property was jointly acquired. The respondent has not disputed the applicant's allegations that he has changed the ownership documents solely to his name and that he is collecting proceeds from the rental flats. It is therefore in the interest of justice that the said property should be secured from alienation pending the hearing and determination of the originating summons. In my view the applicant has demonstrated special circumstances for granting the orders sought. In the end, I find merit in the Appellant's chamber summons dated 27/2/2018 and I make orders as follows:

**a) Pending the hearing and determination of the originating summons herein interlocutory mandatory order is hereby issued compelling the respondent to deposit all proceeds of the Eight (8) Rental Flats Constructed in the matrimonial property located**

*in plot no. 5 in Athi River in in court with effect from 5<sup>th</sup> September, 2018.*

*b) Pending the hearing and determination of the originating summons herein interlocutory mandatory order is hereby issued compelling the respondent to furnish this court with a detailed account of all Rental proceeds received by him from the eight (8) rental flats constructed in the matrimonial property located in plot no. 5 in Athi River beginning May, 2017 to date.*

*c) Pending the hearing and determination of the originating summons a temporary injunction is hereby issued barring the respondent from selling, transferring or dealing in any manner detrimental to the applicant with the matrimonial property located in plot no. 5 in Athi River.*

*d) The parties herein are directed to set down the Originating Summons for hearing as a matter of priority.*

*e) The costs hereof shall be in the cause.*

Orders accordingly.

Dated and Delivered at Machakos this 9<sup>th</sup> day of October, 2018.

D.K. KEMEI

JUDGE