



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO. 64 OF 2018 (O.S.)

RNM.....APPLICANT

VERSUS

FM.....RESPONDENT

RULING

1. On 22nd October, 2018, the Applicant herein filed an Originating Summons seeking among other orders a declaration that the properties named therein registered in the name of the respondent and he hold the same in trust for the applicant and that the trust be terminated.
2. At the same time, the Applicant filed the instant Notice of Motion brought under Order 40 rules 1 and Order 50 rule 1 of the Civil Procedure rules and section 1A, 1B, and 63 of the Civil Procedure Act and all other enabling provisions of the laws of Kenya. In the application the Applicant seeks an injunction against the respondent of the 5 properties namely L.R Nos. Kajiado/Kipeto/[Particulars Withheld] apartments in Mombasa which are the subject of the Originating Summons. Her application is supported by an affidavit he swore on 22nd October, 2018 and the attachments thereto. When the Applicant first came to court, she succeeded at the *ex-parte* stage in obtaining injunctive orders to preserve the properties in question.
3. The Respondent opposed the application through his affidavit sworn on 6th November, 2018 and the documents annexed thereto.
4. A perusal of the affidavits sworn by the Applicant and the Respondent disclose that they got married to each other on 19th November, 1988 at [Particulars Withheld], Church in Nairobi and have been husband and wife for 30 years. Their marriage was dissolved on 1st October, 2018 vide Milimani divorce cause 692 of 2016.
5. It is also not disputed that the properties are registered in the name of the respondent and other individuals/entities and were acquired during the subsistence of the marriage.
6. The parties are also in agreement that the Respondent was in the process of selling some of the properties when the Applicant moved to court and obtained a temporary order stopping the disposal of the property by the Respondent.
7. The applicant on one hand alleges that the properties are held in trust on her behalf by the respondent. The sale of the properties will be prejudicial considering that one is their matrimonial home where they have been residing during the subsistence of their marriage. The applicant discloses that she claims a beneficial right in the properties registered in the name of the respondent.
8. The respondent's case is that he is the one who acquired all the properties, whether jointly, in his name or in the various companies name, during the subsistence of the marriage. He listed the properties, the dates of acquisition and the proprietorship of each one of them. His case is that the properties which he is in the process of selling were solely acquired by him without any contribution from the applicant. He does not hold them in trust for the applicant. He therefore urges the court to bar the Respondent from interfere with the sale. He goes on to argue that the applicant was well aware of disposition of the properties even before the application was maliciously filed. He avers that he purchased one of the properties using his retirement benefits and the other through a mortgage which was solely serviced. The Respondent accuses the Applicant of being dishonest and dismisses her application for being an abuse of the court process.
9. Through oral submissions made by learned counsel for the respective parties, the court has considered the arguments and will determine as follows:
10. The applicant seeks injunctive orders and it is now settled in law that an applicant has to establish:
 - i. that she has a prima facie case with a probability of success;

ii. that if the orders sought are not granted he will suffer irreparable loss which would not be adequately compensated by an award of damages and

iii. If the court is in doubt it will decided the case on balance of convenience (Geilla vs. Cassman Brown Ltd E. A 1973 pg. 358).

11. The Respondent does not deny being married to the applicant until 1st October 2018 when the marriage was dissolved. It is her claim that she contributed to the purchase of the said properties. The issue of who owns what in my view cannot be determined at this interlocutory stage and it is also important to note it amongst the orders sought in the originating summons. She claims that the Respondent is in the process of selling, disposing the said properties; the respondent has not refuted this allegation, claiming that the disposition of property is his only source of income now that he has retired from gainful employment. The respondent claims that the properties she has mentioned are not matrimonial property or owned either jointly or beneficially by the applicant. Again it is opinion view that this can only be resolved at the hearing of the Originating Summons. The main issue for determination is whether she has fulfilled the conditions set out for the grant of an injunction.

In my view, the applicant has demonstrated that she has a prima facie case with a probability of success, and if the orders sought is not granted she is at risk of losing any interest claimed in the property which cannot be compensated by an award of damages. As such the application for injunction is granted pending the hearing of the hearing of the Originating Summons.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 7TH DAY OF DECEMBER, 2018

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI

IN THE PRESENCE OF:

Mr. Botany Holding brief for Gathongo for the Applicant

Mr. Kiptoo holding Brief for Mr. Kamotho for the Respondent

Court: The Originating Summons to proceed for hearing on 29th January, 2019.

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI