



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

MATRIMONIAL CAUSE NO 3 OF 2016

I J T.....PLAINTIFF

VERSUS

L K T.....DEFENDANT

RULING

BACKGROUND

I J T (herewith after the applicant) moved this court vide a notice of motion dated 12th February, 2016. The prayers sought are;

i. Spent

ii. Spent

iii. That pending the hearing and determination of this suit this Honourable court does order that Kenya Commercial Bank Eldama Ravine branch does furnish this court with the statement of account *particulars withheld* Kenya Commercial Bank (KCB) Eldama Ravine in the names of L K T *Particulars withheld* from July, 2015 to date.

iv. That pending the hearing and determination of this suit, this Honourable court be pleased to freeze the operations of account No. *particulars withheld* in the names of L K T from July, to date.

v. That pending hearing and determination of the Originating Summons the defendant/Respondent be restrained by way of an injunction by himself, his agents and or servants from selling, disposing off and/or in any other way adversely dealing with the following items:-

i. All household good in the matrimonial home at Kaptim village

ii. Plot No.498/654 at Ravine stage

iii. Lembus/Kabonony/Moringwo plot No.453

iv. Lembus/poror/plot No.368

v. **Moringw/Arama plot No.1**

vi. **Eldama Ravine Mlimani Plot no.498/472**

vii. **Plot No.26 shauri "B"**

That costs of this application be provided for.

2. She has sworn an affidavit in support and raised 8 grounds namely;

a. **That the plaintiff /Applicant is a wife of the registered owner of the above quote parcels of lands and Motor vehicle.**

b. **That the respondent is currently in possession of all the household goods and effects together with all the Motor vehicles and parcels of land .**

c. **That the said household good and effects, motor vehicle and parcels of lands were bought and /or acquired during the subsistence of the marriage.**

d. **That the respondent unceremoniously chased away the applicant from the matrimonial home sometimes around July , 2015.**

e. **That the plaintiff and the defendant are directors of Tetra Enterprises Limited which continues running even as of now. However, the defendant/respondent has barred the plaintiff from accessing or being involved anyhow in the operations of the said Tetra Enterprises limited.**

f. **That the applicant is apprehensive that the Respondent may adversely deal with the suit property herein unless the orders sought are granted to the detriment of the plaintiff noting that he is the registered owner of all the properties and also the on in possession of the household goods and effect.**

g. **That the plaintiff has a prima facie case with high chances of success**

h. **That NO prejudice would be suffered as the orders sought would merely preserve the properties herein until the real issues in the Originating Summons are heard and determined.**

3. The gist of the affidavit and the grounds raised is that the applicant is wife to the respondent. She was married under Kalenjin customary law in 1999. The respondent chased the applicant away from home on 3rd July, 2015.

4. Beforehand, the 2 were jointly running *particulars withheld* A CR.12 from the Registrar of Companies is annexed.

5. Together they managed to acquire :-

(i) **Household goods and effects to wit sofa set, television, beds, wardrobes, utensils, clothes, radio among others.**

(ii) **We have built a three (3) roomed house as our matrimonial home at Kaptim village.**

(iii) **Acquired several Motor vehicles registration numbers**

a. **Wheel Tractor *particulars withheld* H New Holland.**

b. **Wheel Tractor *particulars withheld* New Holland**

(c) **Lorry/Tractor *particulars withheld* Mitsubishi fuso**

d. **Pickup *particulars withheld***

e. **Van *particulars withheld* TAT**

(iv) Acquired various parcels of land as hereunder

a. **Plot No.498/654 at Ravine stage**

b. **Lembus/Kabonony.Moringwo Plot No.453**

c. **Lembus/poror/plot No.368**

d. **Moringwo/Arama plot No.1**

e. **Eldama Ravine Mlimani Plot No.498/472**

f. **Plot No.26 shauri “B”**

(v) Acquired woodmiser and log loader machines.

6. In addition she raised their children and gave companionship to the respondent.

7. The earnings for the company are Ksh1,000,000 to 3,000,000 per month such proceeds were deposited in the respondents personal account at KCB Eldama Ravine branch. The applicant claims to have no access or control of Tetra Enterprises Ltd, household foods or bank account.

THE RESPONSE

8. The application is opposed. L K T (hereinafter the respondent)has sworn a replying affidavit in which he states that it is true he cohabited with the applicant.

However, the cohabitation was marked by challenges occasioned by the applicant since the beginning and she therefore offered no companionship that is only possible in happy unions.

9. The applicant is accused of being in the habit of deserting the matrimonial home for long durations eg. In 1997, 2008, 2011 and 2015.

In 2008 she is said to have left behind a 2 year old child for 2 months .

10. Tetra Ltd was not a going concern. There was no capital to run the business as the respondent had no capital and the applicant did not contribute startup capital to start any meaningful business.

11. It is asserted that the respondent has been doing his own business buying timber from saw millers and selling same at a profit. He attaches sale agreements in support.

12. It is denied that the 2 owns a house. The alleged matrimonial home is property that was offered to the respondent as a temporary and transitional home as he planned to acquire his own house and the same is not registered in his name.

13. It is denied that the respondent owners wheel tractor *particulars withheld* New Holland wheel tractor *particulars withheld* New Holland and lorry truck *particulars withheld* Mitsubishi Fusu. There are subject to clearance of bank loans.(See LKT3).

14. Motor vehicle **particulars withheld** was bought by respondent and is what he uses to fend for the issues of the marriage and the same is charged in a bank (**particulars withheld**). He denies owing van **particulars withheld** TATA.

15. Ownership of the following plots in also denied;

(a) Plot No.498/654 at Ravine stage

(b) Lembus/poror/plot No.368

(c) Moringwo/Arema plot No.1

(d) Eldama Ravine Mlimani Plot No.498/472

(e) Plot No.26 shauri "B"

(f) Kabanyony/Moringwo/453

(g) Wood Miser

(h) Log Loader Machine

16. It is the respondents case that the applicant ran down a business he set up for her, neglected grade cows brought for her and even siphoned monies for the respondents business when invited to work with the respondent depositing money in her personal account.

APPLICANT SUBMISSIONS

17. Directions were given that the application be disposed of by way of written submission.

Counsel for the applicant has summarized the issues for determination as follows:

(i) Does this court have Jurisdiction to hear and determine this application interim pending the hearing and determination of the originating summons (OS)

(ii) Has the plaintiff/applicant satisfied the conditions precedent for the grant of the prayers of interim injunction as set out in *Giella Vs Cassman Brown (1973) E.A 358*.

(iii) Has the plaintiff satisfied the court for the Grant of the mandatory orders of injunction?

(iv) Is the plaintiff entitled to costs of this application?

18. On jurisdiction it is submitted that this court has the jurisdiction to hear and determine this cause interim. Section 17 of the Matrimonial Property Act 2016 provides;

" A person may apply to a court from a declaration of rights to any property that is contested between that spouse and a person or a former spouse of the person.

An application under sub section (i) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes"

19. On the threshold set in *Giella Vs Cassman Brown (1973) EA, 358*, counsel submits that the applicant has established a *prima facie* case with a probability of success as set out in the *Giella* case.

It is urged that she is Co-director of Tetra Enterprises at 20:80% shareholding. The said company carried a business and though sale of timber was able to acquire the properties listed in the supporting affidavit.

20. It is also argued that it is not in dispute that the applicant was husband and wife. They have issues who the applicant has taken care of all along and she has given companionship to the respondent even standing by her when he was sick and running the business in his absence.

21. Reference is made to S.2 of the matrimonial property Act which defines contributions as follows;

“Monetary and non-monetary contribution and includes:

a. Domestic work and management of the matrimonial home.

b. Childcare

c. Companionship

d. Management of family business or property and

e. Work

“Family business is defined to mean any business which:

1. Is run for the benefit of the family by both spouse

2. Generates income or other resources wholly or part of which are for the benefit of the family.

Matrimonial property is defined under section 6 of the act to mean.

1. The matrimonial homes or homes

2. Households goods and effects in the matrimonial homes.

3. Any other immovable or movable property jointly owned and acquired during the subsistence of the marriage.

22. It is argued that the applicant stands to suffer substantial loss should the respondent adversely deal with the properties and it is in the interested of both parties for an order of injunction to issue on all matrimonial properties.

23. I am invited to note that motor vehicle registration numbers *particulars withheld* new Holand, Wheel Tractor, *particulars withheld*, and *particulars withheld* are jointly registered in the names of the respondents and Equity Bank Ltd. The plaintiff is not a party and as such should there be underhand dealings between the respondent and the bank, the plaintiff and her children would suffer irreparably. Moreover, should the respondent willfully default in meeting any pending installment, then the bank can exercise its statutory power of sale to the detriment of the plaintiff.

24. It is submitted that the balance of convenience tilts in favour of the plaintiff for reasons explained above.

Has the applicant achieved the threshold for a mandatory injunction to compel the bank to provide the court with the bank statement for account *particulars withheld*).

I am urged that, yes she has. It is stated that monies for the business were not banked in the

account of Tetra Enterprises account but into the defendants personal account.

26. I am referred to the decision in ;

1. **BMK-Vs - EMG 2015 Eklr**

2. **Mohammed Bakhresa - Vs – Nasra Abdul Wahad (2006) eKLR.**

3. **Ann Wanjiru Mambo – Vs- Leonard Mamba Kuria Nkr HCCC No.45 of 2013.**

THE RESPONDENTS SUBMISSIONS

27. Counsel has listed the issues for determination raised by the applicant seriatim and purposed to address them as they flow .

On jurisdiction of the court counsel states that S7 of the matrimonial property Act provides

“subject to section 6 (3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved”

Am urged that the court has to determine if all the listed properties are owned by the parties jointly in order for the court to declare them matrimonial property. The question to be answered is when each property was acquired and what was each party’s contribution.

28. It is submitted that the respondent has deponed to lack of knowledge of some properties or even ownership of the same (paragraph 15 and 16). These averments are not controverted.

29. The applicant has not proven contribution to the acquisition of the properties or any profit incurred. I am referred to the decision in Civil appeal No.236 of 2009 (**Gacheche J**) where the court ruled that the contention that the plaintiff’s non-monetary contribution to the acquisition of the matrimonial property should be taken into account and a value put or it in support to her claim to a share of the other assets cannot therefore hold any water and therefore fails to prove her case on a balance of probability.

30. It is further submitted that the respondent does not own a home at Kaptim village. He does not own land there. The alleged matrimonial home is owned by a different person. It is urged that the matrimonial property Act, in its preliminary part clearly defines matrimonial home to mean 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.

31. It is the respondents submissions that the chattels (motor vehicles) listed are financed by banks. The defendant is currently servicing the loans.

32. On Tetra Enterprises Limited, I am referred to **Salmon Vs Salmon (1895) AL ER.33**. The said company is a separate legal entity and distinct from the individual members of the company and that it has rights an liabilities. None of the alleges properties are in the name of the company.

It is added that respondent has sworn that he transacted all his business in person. Tetra Ltd is a dominants company. It does not belong to the individuals(**see AjLimited & Another – Vs - Catering Levy Trustees and 3 others**) (**Nairobi HCCC No. 1488 of 2000**)

33. it is submitted that the applicant has not met the threshold set in **Giela - Vs- Cassman Brown.**

34. On the mandatory injunction, It is submitted for the respondent that the same is not available to the applicant. The defendant has clearly stated that he runs a timber business and he used to send the

applicant to do banking for him. That is how she retained some bank slips. That does not amount to her direct contribution to the company. The applicant has failed to answer the questions why Tetra Enterprise Ltd did not run its own account.

35. I am referred to the decision in international *Finance Ltd - Vs- Agro export and others (1 ALL ER 901)* where the court stated;

: a Mandatory injunction ought not be granted an interlocutory application in the absence of 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 has attempted to steal a march on the plaintiff”

36. Counsel also refers to the decisions in *Malindi Air Services - Vs - Halma Abdinoor Hassan* Civil Application No. 202 of 1998 where the Kenya Court of Appeal stated

“A mandatory injunction at an interlocutory stage is rarely granted; only where the plaintiff’s case is clear and incontrovertible”.

37. Reference is made to MSA HCCC No.26 of 2003 *Zakayo Kayombe Nderu -Vs- Kenya National Chamber of Commerce and Industry and Another.*

ANALYSIS AND DETERMINATION

38. I have had regard to the application, the supporting affidavit and grounds, and the further affidavit and the response as per the replying affidavit. I have taken time to consider the elaborate submissions by counsel.

39. I concur with counsel for the applicant in so far as the issues for determination are concerned and indeed I note the respondent too was satisfied with the issues flagged out for determination. These issues are;

(i) Does this court have Jurisdiction to hear and determine this application on the interim pending the hearing and determination of the originating summons (OS)?

(ii) Has the plaintiff/applicant satisfied the conditions precedent for the grant of the prayers of interim injunction as set out in *Giella Vs Cassman Brown (1973) E.A 358.*

(iii) Has the plaintiff satisfied the court for the Grant of the mandatory orders of injunction?

(iv) Is the plaintiff entitled to costs of this application?

40. On jurisdiction, I am satisfied from the wordings of S17 of the Matrimonial Property Act 2016 that this court has the power to entertain and determine an application like the one before court. I need not belabor this point.

41. Has the applicant met the threshold set in *Giella – Vs- Cassman Brown.*

The applicant seeks injunctive relief to preserve properties she claims are matrimonial property acquired through the respondent’s and her contribution as a director of Tetra Enterprises Limited and also the none Monetary contribution through the raising of the family’s children and giving companionship to the respondent.

42. The respondent denies that there is any contribution by the applicant. He states that Tetra Enterprises is a dormant company that never took off and that he has been doing personal business selling timber

without any contribution from the applicant. He denies knowledge or ownership of some of the listed properties and indicates that the motor vehicles mentioned are under financing arrangements with the banks. He tenders evidence to that effect.

43. At this stage, I am alive to the fact that the determination to finality of these issues will have to be left to the trial Judge. For now, the question to answer is whether the applicant has established a prima facie case with a probability of success, whether the applicant will suffer irreparable injury and where the court is in doubt, it will decide the application on a balance of convenience.

44. As aptly put by Lord Diplock in the case of *American Cyanamid Co. VS Ethicon (1975)1 ER 505*, the object of an interlocutory injunction is to protect the plaintiff against injury by violation of his right which he could not adequately compensate in damages recoverable in the action if the uncertainty has resolved in his favour at the trial. But the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he would not be adequately compensated under the plaintiff's undertaking.

45. In our instant suit any claim(s) the applicant may have over the entity known as **particulars withheld** are firmly secured under the company's Act Cap 486 Laws of Kenya. There has not been an iota of evidence to show any property owned by **particulars withheld** which the respondent is likely to use to the detriment of the applicant. There are no shown cash balances in bank. There are no assets demonstrated.

46. Secondly, the ownership of all the listed items remains hazy based on the evidence on record. The assertion of ownership by the respondent is met with denial on oath. It has been stated and indeed shown that the vehicles in question are facilitated through financing by banks. The respondent is servicing the loans alone. There is no evidence of contribution by the applicant neither is there an offer to henceforth participate in the payment of the loans. Any injunction targeting these chattels may as well lead to damaging all the parties herein.

47. No title (s) were exhibited to show ownership of the real property listed. With the denial by the respondent of ownership thereof, this issue is better left to determination at the main trial. An injunction would not be appropriate in a litigation where ownership or control is not ascertained .

48. As stated earlier on, it is not the court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide on difficult questions of law which call for detailed arguments and mature considerations .

What is clear in my mind is that the applicant has not established a prima facie case with a probability of success.

49. Even if she has, the injury that may arise is not irreparable. Damages would be an adequate remedy . To quote **Lord Diplock in the American Cyanamid Co. case; (supra)**

“ The governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of the application and the time of trial. If damages in the measure recoverable under the common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strongly the plaintiff's claim appeared to be at the stage .

If on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial, in establishing his

right to do that which was sought to be enjoined he would be adequately be compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial.

If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason to refuse an interlocutory injunction”

50. In our case the respondent has shown financial capability through his trading. The applicant has shown none and indeed has not given any undertaking as to damages. I am persuaded that damages would be adequate compensation to the applicant and hold that she is unlikely to be able to remedy any loss the respondent may suffer as a result of the injunction between the time of the application and the main trial.

51. Again, the balance of convenience tilts in allowing the respondents to continue running his (not Tetra's) business unhindered. There is evidence of sale agreements and bankings that the applicant was doing personal business. At some point, the applicant is also shown to run her personal account meaning she was also doing business and engaging in a personal income generating activities independent of the respondent.

52. To quote Lord Diplock again in the case of *American Cyanamid (Supra)*, where other factors appear evenly balanced it is counsel of prudence to take such measures as are calculated to preserve the status quo. I hold the view that to interrupt the respondent in the conduct of an established enterprise would cause much greater inconveniences to him. It may affect his relationship with the financier who have facilitated the chattels. Injunction in respect of the said property which he denies to be his and with no rebuttal to that denial, could affect other parties. The balance of convenience is against granting an injunction.

53. Whether to grant mandatory injunction or not is correctly stated in **Vol 24 Halsbury's law of England 4th Edn Paragraph 948** which reads:-

“ A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstance, it will not normally be granted. However , if the case is clear and one which the court thinks it 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 march on the plaintiff..... A mandatory injunction will be granted on an interlocutory application”

54. This principle is well enunciated in the court of appeal decision in *Kenya Breweries Ltd and Another - Vs- Washington O Okeyo C.A No. 332 of 2000*.

55. I have applied my mind to the facts of this case. The applicant seeks to freeze account no. **particulars withheld** held in the name of the respondent. On the material before me and based on earlier analysis of the evidence earlier on, I find no justification to grant a mandatory injunction at this interlocutory stage.

56. With the results that all the issues for determination herein answer in the negative save for issue no. 1. Consequently the application dated 12th February, 2016 must fail. Same is dismissed. .

57.As regards costs, I direct that costs abide the outcome of the main trial.

Dated, Signed and Delivered at Nakuru this 19TH day of January 2017.

A. K. NDUNG'U

JUDGE