



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NO.2 OF 2016

E M W.....APPLICANT

VERSUS

A R M.....RESPONDENT

RULING

INTRODUCTION:

1. The notice of motion the subject of this ruling is the one dated 3rd February, 2016 in which E M W (hereinafter the applicant) seeks orders:

(a) Spent

(b) Spent

(c) That this honourable court be pleased to order that motor vehicle registration No.KBM [particulars withheld] be released to the plaintiff/applicant forthwith pending the hearing and determination of the case.

(d) That in the alternative the said motor vehicle registration No.KBA [particulars withheld] and KBM [particulars withheld] be kept with the OCS Nakuru for safe keeping pending the hearing and determination of the case.

(e) 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 two (2) plots to be hived from NAKURU/RARE/GICHOBO/[particulars withheld] measuring 50 X 100 each, motor vehicles registration No.KBM [particulars withheld] and motor vehicle registration No.KBA [particulars withheld].

(f) That the honourable court be pleased to order that the income derived from motor vehicle registration No.KBA [particulars withheld] be deposited in court or in a joint account between the plaintiff/applicant and the defendant/respondent pending the hearing and determination of this case.

(g) That costs of this application be provided for.

2. The application is supported by the applicant's affidavit sworn on 3rd February, 2016 and grounds as listed on the face of the application viz.:

a) That the plaintiff/applicant is a wife to the defendant/respondent since 2012.

b) That during the subsistence of the marriage, the plaintiff/applicant and the defendant/respondent acquired several assets to wit:

i. Two (2) plots to be hived from NAKURU/RARE/GICHOBO/[particulars withheld] measuring 50 X 100 each.

ii. Motor vehicle registration No.KBM [particulars withheld]

iii. Motor vehicle registration No.KBA [particulars withheld]

iv. Household goods, utensils and electronics

c) That the defendant/applicant has the possession of motor vehicles registration Nos.KBA [particulars withheld] and KBM [particulars withheld] Nissan.

d) That unfortunately, the defendant/respondent had tampered with the motor vehicle in question by removing the car track and the cut out respectively hence the plaintiff/applicant cannot make a follow up on the same or access the same.

e) That the motor vehicle registration No. KBA [particulars withheld] generates income as the same is a matatu plying Nakuru–Kisumu road under Transline sacco.

f) That there is an adverse dealing on the assets herein.

g) That she thus pray that preservatory orders do issue in favour of the assets herein.

3. The application is opposed and A R M (hereinafter the respondent) has sworn a replying affidavit on the 17th March, 2016.

4. The replying affidavit elicited a supplementary affidavit from the applicant.

THE APPLICANT'S CASE

5. The applicant's case is that she got married to the respondent in 2012. The two (2) have since acquired several properties together namely:

i) Two (2) plots to be hived from NAKURU/RARE/GICHOBO/[particulars withheld] measuring 50 X 100 each.

ii) Motor vehicle registration No.KBM [particulars withheld]

iii) Motor vehicle registration No.KBA [particulars withheld]

iv) Household goods, utensils and electronics

Sale agreements were written in the joint names of the applicant and the respondent but it is the applicant's case that for properties LR. NO.Nakuru/Rare/Gichobo/[particulars withheld] and motor vehicle registration No.KBM [particulars withheld], the respondent did not contribute anything. The applicant avers that she contributed to the acquisition of motor vehicle Registration No.KBA [particulars withheld] where she paid for the replacement of the wheels.

6. It is the applicant's case that they have since separated and she is disadvantaged as the respondent enjoys exclusive use of the motor vehicles together with the income derived from motor vehicle Registration No.KBA [particulars withheld].

7. She denies coercing the respondent to enter into the sale agreements for the purchase of the matrimonial properties. She adds that the respondent admits cohabitation and she retaliates she was decently married under the Kikuyu Customary Law. She has since filed a divorce in Nakuru C.M.C. Divorce Cause No.6 of 2016.

8.The respondent avers that he bought all the properties save that the applicant unduly influenced him to include her in the agreements for sale with the intention that the respondent would marry her (the applicant). He denies being married to the applicant stating that in a Kikuyu Customary Marriage there are several stages to be undertaken which never happened between him and the applicant.

9. The respondent states that he is a pharmacist and he was running a timber business from which he got money to buy the properties in question.

10. He reiterates that he is able to compensate the applicant should he be ordered to do so eventually.

11. Both parties filed submissions. Counsel for the applicant submits that the court has jurisdiction to hear and determine this application. It is further submitted that the applicant has established a *prima facie* case within the principles in **Giella V. Cassman Brown and Company Limited** (1973) EA 358.

12. The applicant has laid evidence of marriage and contribution to the acquisition of the property.

13. It is submitted that the applicant should have the costs of the present application.

14. The respondent's submission is that the application lacks merit. It is urged that the respondent was duped and under the madness of love, he was infatuated to include the applicant in the agreements that he made for purchase of the properties in question.

15. It is submitted that the respondent has admitted and conceded not part (sic) or dispose any of the properties in question until the originating summons is heard and determined. He has agreed to preservative orders till determination of the originating summons. The claim for release of the motor vehicle to the applicant is thus defeated. The prayer to place motor vehicles under the custody of the OCS should also be rejected. There is nothing criminal associated with this civil matter.

16. Of determination is whether the applicant has met the threshold for issue of temporary injunction pending the hearing and determination of the originating summons herein and for the issuance of a mandatory injunction for the release of motor vehicle registration No.KBM [particulars withheld] to the applicant or in the alternative ordering custody of the motor vehicles with the OCS Nakuru and the conservation of income derived from motor vehicle KBA 463E. The court has to determine the issue of costs too.

17. At this stage, the court has to interrogate whether the applicant has established a *prima facie* case with a probability of success, whether the applicant will suffer irreparable injury and where in doubt, the balance of convenience comes into play. All the while alive to the fact that the finality of the finding on the issues raised would have to be left to the trial judge.

18. My analysis of the affidavit evidence leads me to the unhesitating conclusion that the applicant has established a *prima facie* case with probability of success and the injury she may suffer is irreparable.

The applicant has *prima facie* shown existence of a Kikuyu Customary Marriage to the respondent. Even though it is denied, at least long cohabitation is acknowledged. She has also demonstrated through affidavit evidence her involvement is a joint purchase of land and motor vehicles in the sale agreements annexed.

19. Having demonstrated that she on the face of it bought two (2) plots to be hived from NAKURU/RARE/GICHOBO BLOCK [particulars withheld] measuring 50 X100 each, conservatory orders in respect of this property pending the hearing and determination of the originating summons should issue.

20. The applicant has also demonstrated participation in the purchase of the motor vehicles in question. The respondent blames being madly in love which made him vulnerable to manipulation by the applicant to put her in the sale agreements. While more light will be shed on this before the trial judge, the applicant having demonstrated that she participated in the purchase thereof, it would be unjust to allow continued use of the motor vehicles by the respondent alone. It is noteworthy that a motor vehicle is chattel that when exposed to the vagaries of the weather and use is likely to waste away.

21. In those circumstances, my considered view is that this is an apt case for a mandatory injunction. Vol. 24 Halsbury's Law of England 4th Edn paragraph 948 explains when a mandatory injunction should issue:

“ 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”

22. I am persuaded that the prayer for release of motor vehicle to the applicant based on affidavit evidence herein is a clear matter and which I think ought to be decided at once and it is a simple and summary one which can be easily remedied by the applicant paying off the respondent should she loose at the end.

23. In the same vein, since the applicant will now have exclusive use of the motor vehicle registration No.KBM [particulars withheld] and to strike a balance, the respondent should continue the use of motor vehicle KBA [particulars withheld] and have control of the proceeds arising therefrom.

24. To secure the interest of both parties based on the content of paragraph 22 and 23 hereinabove, each party is to give a written undertaking as to damages.

The applicant will have recourse to damages for loss of earnings and any other general damages should she emerge the winner of the main trial.

25. For the above stated reasons, I allow the application dated 3rd February, 2016 in terms of prayer (c) and (e). The applicant shall have the costs of the application.

Dated, Signed and Delivered at Nakuru this 9th day of February, 2017.

A. K. NDUNG'U

JUDGE