



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**HCC (O.S) NO. 4 OF 2016**

**IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY**

**AND**

**IN THE MATTER OF SECTION 3(2) OF THE MARRIAGE ACT 2014**

**AND**

**IN THE MATTER OF SECTIONS 6 & 7 OF THE MATRIMONIAL PROPERTY ACT 2013**

**AND**

**IN THE MATTER OF ARTICLES 45(3) AND 68 (C) (111) OF THE CONSTITUTION OF  
KENYA 2010**

**BETWEEN**

**J W.....APPLICANT**

**AND**

**C W M.....RESPONDENT**

**RULING**

The Applicant filed under certificate of urgency Notice of Motion dated 31<sup>st</sup> March 2016 under **Order 40 Rules 1 and 2 of the Civil Procedure Rules** and sought Orders that:

- a) The Respondent and/or his agents and servants be restrained by way of temporary injunction pending the *interpartes* hearing and determination of the Application from evicting or interfering with the Applicant's quiet enjoyment and occupation of the suit property known as Land Parcel LOC 16/GATURA/1249 which is registered jointly under the names of both parties.
- b) The O.C.S Kiraura Police Station do ensure compliance with the Orders issued in this matter.
- c) Costs of this Application be provided for.

The Applicant relied on the following grounds in support of that Application:

- a) That the Applicant and the Respondent are husband and wife and the suit property was acquired through their joint effort and is now registered jointly in the names of the parties herein.**
- b) The Respondent has now chased the Applicant away from their matrimonial home together with the Issues of the marriage and has married another woman and is now residing with her on the suit property that is the matrimonial home of the parties herein.**
- c) That the Applicant together with the Issues of marriage have now been forced to seek accommodation elsewhere due to the actions of the Respondent who is even threatening to sell the suit property.**
- d) That the Applicant is the one who provides for the Issues and she has been threatened to be evicted from their rental house due to rent arrears.**

The Application was supported by an Affidavit sworn by the Applicant. She averred that she had been married to the Respondent under the Kikuyu Customary Law and were blessed with 4 issues from the marriage. She deposed that prior to the solemnization of the marriage; they were already blessed with two issues W.N and A.M whose birth certificates were produced as evidence before this Court. She further deposed that during the subsistence of the said marriage, they acquired Land Parcel [particulars withheld] through their joint efforts and contributions and that the said property is registered under their joint names as evidenced by the copy of the Application for Official Search.

The Applicant further stated that she stands to suffer irreparable loss if the Respondent continues to deny her access to the property and if he is not prevented from disposing off the property since he is the one holding the original title deed of the matrimonial property. She also stated that she had been advised by her Advocate that her consent ought to be obtained before the property can be disposed off.

She prayed that the Court grants orders that she is equally entitled to the suit property Land Parcel [particulars withheld] and that the same be sold and the proceeds thereof be distributed equally between her and the Respondent.

The Respondent herein failed to enter appearance despite service of the application on him through the Court as evidenced by an Affidavit of Service of the Process Server dated 17<sup>th</sup> November 2016. The Respondent did not file a Replying Affidavit or any document in relation to the matter and there was no circumstances or explanation provided for the Court to consider. The Respondent did not appear in Court and he was not represented in Court.

### **ANALYSIS AND DETERMINATION**

From the above, this Court should determine whether the parties are married; if the suit property Land Parcel [particulars withheld] is matrimonial property and whether the Applicant contributed directly and/or indirectly to its acquisition.

The Court should consider whether the principles for granting temporary injunctions have been complied with.

The Applicant deposed that she and the Respondent were married in 1990 under Kikuyu customary law and have 4 issues of the marriage. This assertion is not controverted by any evidence on record by the Respondent.

### **Is the Suit Property Matrimonial Property and was there Contribution?**

**Section 6(1) of the Matrimonial Property Act, 2013** provides,

*“For the purposes of this Act, matrimonial property means—*

*a) The matrimonial home or homes;*

*b) Household goods and effects in the matrimonial home or homes; or*

*c) Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”*

From the facts adduced and pleadings from the main Cause, it is not in contention that the Applicant and the Respondent indeed got married in 1990, that is, before the acquisition of the suit property. Guided by that statutory definition of what constitutes Matrimonial Property and from the Affidavit evidence which has not been rebutted, this Court holds that the suit property indeed is Matrimonial Property.

**Section 2 of the Matrimonial Property Act, 2013** defines ‘contribution’ to include monetary and non-monetary contribution. This includes domestic work and management of the matrimonial home, child care and companionship; management of family business or property and farmwork; among others.

According to the Applicant, it is her case that the suit property was acquired through their joint efforts and contribution. Although the Respondent did not enter an appearance, his position as per his Replying Affidavit in the main Cause was that the Applicant did not contribute directly and in monetary terms to the acquisition of the property and that he only co-registered her for the benefit of their children.

From this Section, it is clear that contribution towards the acquisition of Matrimonial Property includes non monetary contribution. This means that the Applicant contributed towards acquiring property during the subsistence of the marriage domestic work and management of the matrimonial home, child care and companionship; without having necessarily contributing financially. In this regard, the Applicant contributed towards the acquisition of the suit property. This Court finds that the suit property is matrimonial property and that there was contribution by the Applicant.

**Section 7 Matrimonial Property Act provides:**

*“...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.”*

It follows that since the Applicant and Respondent are married and there is no evidence of divorce or dissolution of marriage division of matrimonial property at this stage would be premature. Therefore the Applicant's request for grant of orders to sell the matrimonial property Land Parcel [particulars withheld] and distribute proceeds of the sale equally between the parties would not be granted as it is contrary to section 7 of the Act.

**Section 12(1) and (3) Matrimonial Property Act** provides that:

*“(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise....*

*(3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.”*

The Applicant and Respondent are still married and it is on record that they are currently separated as the Applicant left the matrimonial home with the 4 issues of the marriage. The suit property is admittedly by both parties registered in both their names. It is also deposed that during their marriage and living together, the suit property was and is their matrimonial home. By virtue of **Section 12 (3) of the Act**, the Applicant ought not to have been forced out or evicted from the matrimonial home and suit property.

Further, pursuant to **Section 14 of the Act** allows the Court to presume that spouses' beneficial interest in matrimonial property are equal where the property is acquired during the subsistence of the marriage and is in the names of both spouses. **Section 26 of Land Registration Act** provides for certificate of title to be held as conclusive evidence of proprietorship. The title document of the suit property lists both names of the Applicant and Respondent. Therefore, the Applicant has proprietary rights over the suit property just as the Respondent has.

The respondent deposed in pleadings filed in the main suit that the Respondent did not contribute financially to acquisition of the property. **Section 27 of the same Act** provides for transfer of land without valuable consideration and one obtains similar interest over the land as long as it is not out of fraud or misrepresentation.

**Section 28 of the same Act** recognizes spousal rights over matrimonial property as overriding interests. **Section 93 of the same Act** provides for co ownership and other relationships between spouses. The presumption is that the spouses shall hold land as joint tenants unless the contrary is depicted on the title of land.

From the above provisions; this Court finds that the parties have an equal beneficial interest in the property and thus none of the spouses can purport to have a bigger claim and thus entitled to evict or use the property to the disadvantage of the other spouse.

### **Have the principles for granting injunctions been attained?**

A party may seek injunctive relief under **Order 40 of the Civil Procedure Rules, 2010** if the party satisfies the principles of granting injunctive reliefs established in the *locus classicus* case of **Giella v Cassman Brown & Co Ltd, 1973** which is applicable to date.

In **Giella V Cassman Brown & Co Ltd, 1973** and **E.A. Industries v Trufoods, 1972**, it was held that,

***“..first, the Applicant must show a prima facie case with a probability of success, secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages and thirdly, if the Court is in doubt, it will decide on a balance of probability.”***

In the instant case, the Applicant has demonstrated a prima facie case with probability of success by stating that she was married to the Respondent and that the suit property was acquired during the subsistence of the marriage which naturally means that she then contributed towards its acquisition in one way or the other. Moreover, she has demonstrated that she is apprehensive that she might suffer irreparable harm if the property is sold by the Respondent since the said property is currently in his possession and he holds the title document.

The Respondent on the other hand did not enter an appearance despite being duly served through the Court. This leaves the Court to determine this Application *ex-parte* solely relying on the Applicant's case. The Applicant's evidence is not controverted and therefore serves to prove her claim on a balance of probability. Taking all these circumstances into account, the Applicant has indeed established she is married to the Respondent and they have children of the marriage. She was evicted from the matrimonial home and suit property and another woman resides in the said property. She is apprehensive that the Respondent wants to sell the property without her knowledge and consent. Therefore she is likely to suffer irreparable harm if the sought injunctive reliefs are not granted.

### **DISPOSITION**

**This Courts orders as follows:**

**I. The Respondent and/or his agents and servants is hereby restrained by way of temporary injunction pending the *interpartes* hearing and determination of the main suit from evicting**

or interfering with the Applicant's quiet enjoyment and occupation of the suit property known as Land Parcel [particulars withheld] which is registered jointly under the names of both parties.

II. None of the parties are to sell, alienate, subdivide, dispose, lease, transfer, charge, or in any other way interfere with the suit property [particulars withheld] pending the hearing and determination of the main Suit.

III. The Respondent evicted the Applicant from their matrimonial home on the suit property Land Parcel [particulars withheld] contrary to Section 12 of the Matrimonial Property Act . The Applicant and children of the marriage shall be reinstated in the matrimonial home forth and the third party evicted from the matrimonial home.

IV. The order shall be enforced by OCS Kirwara Police Station

V. Costs of this Application shall be in the main Cause.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY 2017.

MARGARET W. MUIGAI

JUDGE

IN THE PRESENCE OF;

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