



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**FAMILY DIVISION**  
**CIVIL SUIT NO. 55 OF 2015**

**M K K.....PLAINTIFF**

**VERSUS**

**W S.....1<sup>ST</sup> DEFENDANT**

**F P LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 24.9.15, M K K the Plaintiff seeks a declaration that there existed a marriage between her and W S, the 1<sup>st</sup> Defendant. She also seeks a declaration that the properties listed in the Plaint and acquired during their cohabitation, though registered in the name of the 1<sup>st</sup> Defendant and of Freedom Properties Limited the 2<sup>nd</sup> Defendant, are matrimonial properties and that she is entitled to a 50% share in the same and in the proceeds of rent or sale in respect thereof.

2. Contemporaneously with the Plaint, the Plaintiff filed an application seeking a temporary injunction to restrain the Defendants, by themselves or their servants and/or agents from selling, charging, transferring dealing or in any manner whatsoever parting with the titles of the said properties pending and pending the hearing and determination of the suit. The Application further seeks a temporary injunction to restrain the 1<sup>st</sup> Defendant his servants or agents from interfering with the Plaintiff's quiet possession of Plot No. Mombasa/Shanzu Squatter/[.....] pending the hearing and determination of the suit.

3. The Plaintiff's case is that she and the 1<sup>st</sup> Defendant have been cohabiting since 2010 as husband and wife pending the formalisation of their union in marriage; that they met in March 2010 at [Particulars Withheld] Beach Hotel where she was working as a waitress and the 1<sup>st</sup> Defendant had come to Kenya as a tourist. At the 1<sup>st</sup> Defendant's request, the hotel management allowed her to manage his special diet as he had certain health challenges. Their relationship grew and towards the end of 2010, the 1<sup>st</sup> Defendant requested her to assist him in running his investments in Kenya whereupon she resigned to partner with him.

4. The Plaintiff avers that the 1<sup>st</sup> Defendant obtained a work permit through the 2<sup>nd</sup> Defendant which was registered with both of them as shareholders, for the purpose of running the family business. She claims that between 2010 and 2012, they acquired several properties which though registered in the name of the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant are matrimonial properties. They completed construction of the matrimonial home on Plot Number Mombasa/Shanzu Squatter/[.....] and moved in at the end of December 2010. The Plaintiff avers that the 1<sup>st</sup> Defendant being the majority shareholder in the 2<sup>nd</sup>

Defendant is selling matrimonial property without her consent or involvement. He has further demanded that she vacates the matrimonial home.

5. The Plaintiff contends that her contribution towards the acquisition of the said properties was non-monetary and included following up on the survey, carrying out due diligence, and keeping off squatters. She also managed the matrimonial home, provided companionship, emotional needs and arranged the medication of the 1<sup>st</sup> Defendant. She further managed the properties during the 1<sup>st</sup> Defendant's absence from the country. She argues that as a spouse, she is entitled to 50% share of the matrimonial properties owing to her aforesaid contribution.

6. The Plaintiff claims that at the beginning of 2015, the 1<sup>st</sup> Defendant left her in the matrimonial home and moved into a house she claims that they had constructed together on Subdivision No. [Particulars Withheld] Section I MN and has not returned since. The 1<sup>st</sup> Defendant has informed her that he intends to sell all the properties and relocate and has in fact sold some plots. She is apprehensive of being evicted from the matrimonial home and being dispossessed of the matrimonial properties. She states that unless the 1<sup>st</sup> Defendant is restrained by the Court, he may sell all the properties, relocate and leave her destitute. The Plaintiff further submits that if the orders are not granted, the suit will be rendered nugatory and that the balance of convenience therefore tilts in her favour

7. The Defendant on his part raises a Preliminary Objection on the grounds that the affidavit in support of the Application contravenes the provisions of Section 5 of the Oaths and Statutory Declarations Act in that it did not have a date and that the annexures contravene Rule 9 of the Oaths and Statutory Declaration Rules in that they were not marked with serial letters for identification. The second ground of the Preliminary Objection is that the documents supporting the Application breach the advocate-client fiduciary duty of confidentiality and contravene Section 134(1) and (2) of the Evidence Act.

8. In his Replying Affidavit sworn on 3.11.15, the defendant denies all the allegations by the Plaintiff and in particular denies proposing marriage or ever marrying her. He claims that she is married to one J and they have a son P and that their matrimonial home is at [Particulars Withheld]. The Defendant denies ever asking the Plaintiff to run his investments as she has no expertise. Upon completing construction of his house on Plot Number Mombasa/Shanzu Squatter /[...] he did ask the Plaintiff to be caretaker thereof so as he was not permanently resident in Kenya and also on humanitarian grounds as she had no job. He states that he paid her for her services and even set up a shop for her which he stocked with goods to enable her carry on business. The Defendant avers that he constructed the said house singlehandedly and the same is not a matrimonial home as there is no marriage between him and the Plaintiff.

9. The 1<sup>st</sup> Defendant states that he gave the Plaintiff 5% shares in the 2<sup>nd</sup> Defendant as it was a legal requirement to have a Kenyan director to be allowed to run a business in Kenya and he trusted her, having been friends since 2010. He states that he has the right to sell the properties as they belong to him. He has asked her to vacate the house as she has abused her position as caretaker by allowing other people to enter therein including her husband J without his consent. The 1<sup>st</sup> Defendant contends that the Plaintiff seeks to reap where she has not sown by claiming that she is a spouse. She is doing this with the help of her advocates on record who previously acted for the 1<sup>st</sup> Defendant in all his legal work, including purchase of his properties. The said advocates are privy to all his legal undertakings and are therefore in breach of advocate-client confidentiality.

10. It was submitted for the Defendant that no proof of a customary marriage or presumption of marriage was produced by the Plaintiff. It was further contended that no proof of contribution the acquisition of property was provided and that the Plaintiff was a casual worker from February to June 2010, long before she met the Defendant. It cannot therefore be said that she stopped working to support the 1<sup>st</sup> Defendant. On the 2<sup>nd</sup> Defendant, it was argued that it was a separate legal entity. On damages, it was argued that damages would be adequate if the Plaintiff were to succeed. The properties can be valued and she would be paid the quantifiable equivalent of 50%. It was submitted that the Defendant would be greatly prejudiced if the orders sought were granted. The Court was urged to dismiss the Application with costs.

11. I have considered the Application the Preliminary Objection and the submissions by counsel for the parties. On the first ground of the Preliminary Objection, I have carefully looked at the Plaintiff's Affidavit in support of the Application. Section 5 of the Oaths and Statutory Declarations Act provides:

***“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”***

The *jurat* clearly shows that the Affidavit was sworn on 23.9.15 at Mombasa as required by the above provision.

12. Rule 9 of the Oaths and Statutory Declarations Rules stipulates that:

***“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification”.***

The annexures to the said Affidavit are duly sealed by the commissioner for oaths and serially marked as required by law. It is my finding therefore that the Affidavit and annexures thereto comply with the Oaths and Statutory Declarations Act and the Rules thereunder, in all respects.

13. I now turn to the ground of breach of advocate-client confidentiality. It was submitted for the 1<sup>st</sup> Defendant that the documents annexed to the Plaintiff's Affidavit were prepared by his erstwhile advocates who are presently on record for the Plaintiff. The said advocates have now gone behind the back of the 1<sup>st</sup> Defendant. They have used the documents and information obtained from the 1<sup>st</sup> Defendant to file suit against him contrary to the provisions of Section 134 of the Evidence Act. For this reason, the Application should be struck out *in limine*. Section 134 of the Evidence Act provides:

***“(1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:...”***

***“(2) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.”***

14. The Plaintiff argues that the issue raised by the 1<sup>st</sup> Defendant requires explanation and does not meet the requirements of a preliminary objection. In the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696, Sir Charles Newbold rendered himself thus:

***“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

While the issue of breach of advocate-client confidentiality may be a ground for disqualification of the said advocates from acting for the Plaintiff herein, the same cannot be a ground for a preliminary objection. This ground has not raised a pure point of law but factual issues that require to be ascertained through interrogation and enquiry. It is my finding therefore that the Preliminary Objection fails the test set out in the Mukisa Biscuit case (*supra*). Consequently, the same is dismissed.

15. The issue for determination in the Application is whether the Plaintiff established a case for the grant of interlocutory injunction pending the hearing and determination of the suit. The principles governing the grant of interlocutory injunction as set out in the case of Giella –vs- Cassman Brown [1973] EA 358) are well settled:

***“The conditions for a grant of an interlocutory injunction are now I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant must otherwise suffer irreparable injury, which would not adequately be compensated by an award for damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience.”***

16. First, the Plaintiff must establish that she has a prima facie case with a probability of success. Second, the Plaintiff must establish that if the order of injunction is not granted, she is likely to suffer irreparable harm that would not adequately be compensated by an award of damages. Third, in the event that the Court shall be in doubt, it shall determine the case on a balance of convenience.

17. It is the Plaintiff’s case that the properties herein though registered in the name of the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant are matrimonial property and were acquired through their joint effort during coverture. The 1<sup>st</sup> Defendant’s case however is that the said properties cannot be matrimonial property as there is no marriage between them and further that the properties were acquired by him singlehandedly with no contribution from the Plaintiff. That the Plaintiff is seeking to reap where she did not sow.

18. Has the Plaintiff has established a prima facie case with a probability of success? She claims that she and the Defendant cohabited in circumstances that would lead to a presumption of marriage. I find that it would be difficult at this stage to make a determination on whether or not there was a marriage unless *viva voce* evidence is taken. On whether the Plaintiff would suffer irreparable loss, this can only be determined upon settling the question as to whether there exists a marriage between the Plaintiff and the 1<sup>st</sup> Defendant. Being in doubt, I am required to decide the application on the balance of convenience.

19. Regarding which way the balance of convenience tilts, I am guided by the finding in Ojwang, J (as he then was) in Amir Suleiman v Amboseli Resort Limited [2004] eKLR who cited Justice Hoffmann who stated in the English case of Films Rover International, ([1986] 3 All ER 772, at pp 780 – 781)

***“A fundamental principle is....that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’.....”***

Ojwang J, (as he then was) did himself himself opine in the said case:

***“Lastly there would be a much larger risk of injustice if I found in favour of the defendant, than if I determined this application in favour of the applicant”.***

20. The purpose of any interlocutory orders is to preserve the status quo pending the hearing and determination of the suit. Order 40 Rule 1 of the Civil Procedure Rules provides for cases in which temporary injunction may be granted:

***“1. Cases in which temporary injunction may be granted***

***Where in any suit it is proved by affidavit or otherwise—***

***(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or***

***(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”.***

21. It would appear to me that the properties herein are in danger of being sold by the 1<sup>st</sup> Defendant. He has stated as much in his Affidavit. If the said properties are sold, the Plaintiff may be obstructed or delayed in the execution of any decree that may be passed against the 1<sup>st</sup> Defendant in the suit. There would thus be a much larger risk of injustice if I found in favour of the defendant, than if I determined this application in favour of the applicant. The balance of convenience tilts in favour of the Applicant. In the premises therefore, this Court holds that it is imperative that the subject properties be preserved pending the hearing and determination of the suit.

22. In the circumstances, I do find for the Plaintiff. Interlocutory injunction is granted in terms of Prayer 1 and 2 of the application dated 24.9.15 pending the hearing and determination of the suit. The order shall however not apply to the properties registered in the name of the 2<sup>nd</sup> Defendant. Costs shall be in the cause.

**DATED, SIGNED and DELIVERED in MOMBASA this 3<sup>rd</sup> day of March 2017**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Plaintiff**

..... **for the Defendants**

..... **Court Assistant**