



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

Originating Summons No. 5 Of 2016

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT, 2013

BETWEEN

P K.....PLAINTIFF/APPLICANT

- VERSUS -

S N M.....DEFENDANT/RESPONDENT

R U L I N G

1. By an originating Summons dated 11th July, 2016, the Plaintiff sought the resolution of various questions, including whether he and the Defendant were husband and wife and the shares of entitlement, if any, of matrimonial properties. Contemporaneous with the said Summons, the Plaintiff took out a Motion on Notice under Order 40 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules and sections 1A, 1B and 62 (c) and (e) of the Civil Procedure Act and section 68 of the Land Registration Act, 2012. In the said Motion, the Plaintiff sought various orders including inhibition over title Nos. [Particulars withheld], an injunction to restrain any dealing with the said titles until the suit is determined and that the Plaintiff be permitted to collect and receive Kshs. 36,000/- as rental income from the premises erected on [Particulars withheld].

2. The grounds upon which the application was predicated upon were set out on the body of the Motion and in the Supporting Affidavit of P K E sworn on 11th July, 2016. These were that the Plaintiff and Defendant were husband and wife but the marriage had irretrievably broken leading to dissolution proceedings being instituted in Chuka Law Courts; that during the marriage the parties had acquired [Particulars withheld] (hereinafter "*the properties*") which the Defendant was about to alienate. That there was rental income of Kshs.72,000/- per month from one of the properties. That the Plaintiff wants half (1/2) share in the properties as he had contributed in their acquisition.

3. The application was opposed through the Replying Affidavit of S N M sworn on 13th September, 2015. The Defendant swore that the application was fatally defective; that the Plaintiff had lied to court; that there was no evidence of marriage; that there were no developments on [Particulars withheld]; that her relationship with the Plaintiff's relationship was of mere acquaintances resulting in two (2) children being born and that the application infringed on her constitutional right to own property. that the Plaintiff was but a lazy tailor who did not contribute in the acquisition of the properties; that the business of the bookshop was started before the relationship between the parties started and that the properties were acquired after the relationship between the two had broken. The Defendant swore that if the orders sought were granted, the same will highly prejudice her.

4. On 14th September, 2016, at the request of Counsels for the parties, the Court directed that the

application be determined by way of written submissions which were to be filed by 6th October, 2016. By the 6th October, 2016, none of the parties had filed any submissions and in order not to delay the determination of the matter as decreed under Article 159 (2) (c) of the Constitution, the Court proceeded to fix the date for the ruling. However, when the court retired to write the ruling, it discovered that the Plaintiff's Counsel did on 7th October, 2016 file his submissions. Since those submissions were on record as at the time of writing this ruling, the court did carefully consider them. However, for the avoidance of any doubt, the court did not consider the so called further Supporting Affidavit which was filed without leave.

5. This is an injunction application. The principles applicable are well known as set out in the case of **Giella .v. Cassman Brown & Co. Ltd [1973] EA 358**; that an applicant must establish a prima facie case with a probability of success, that if the injunction is not granted, the applicant may suffer damage that cannot be compensated by an award of damages and that in the event of doubt the court should determine the application on a balance of convenience.

6. On the first principle, a prima facie case was defined in the case of **Mrao Ltd .v. First American Bank of Kenya Ltd and 2 others [2003] eKLR** as a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party and which calls for an explanation for rebuttal. What is the Plaintiff's case? The Plaintiff contends that he and the Defendant were married under Meru customs in 1999; that they established their matrimonial home at [Particulars withheld] Market; that as such, their marriage was blessed with two children but the relationship had irretrievably broken and there were divorce proceedings pending before court. He contended that during the currency of the said marriage, the couple acquired two properties the subject of the dispute and that he was entitled to a half share thereof. The Plaintiff was apprehensive that the Defendant may alienate the properties as the same is in her name. His occupation was said to be that of a farmer and businessman. Mr. Mwanzia learned Counsel for the Plaintiff submitted that under the Matrimonial Properties Act, 2013 any party is entitled to a declaration of a right over a property acquired jointly. Counsel relied on the cases of **C.C.J .v. E.M M [2016] eKLR** and **Rahab Ngina Kimari & Others .v. Samuel Mugwe Kimari & Anor [2012] eKLR** in support of his submissions.

7. The Defendant's rebuttal was that there was no marriage between the two; their relationship was that of mere acquaintances; that the Plaintiff is a mere tailor who earns a few shillings which he squanders in buying miraa and drugs, a lazy and unproductive person. To her, the Plaintiff never contributed anything in the acquisition of the subject properties. She gave details on how the properties were solely acquired by her.

8. I warn myself that this is only an interlocutory application and that the main suit remains to be prosecuted. What is clear from the record is that the parties to these proceedings were in a relationship. That relationship began sometimes in 1999 but it is not clear when it landed on rocks. One party contends that the relationship was marriage while the other calls it mere acquaintances. Whatever that relationship was, it resulted in two children being born, that is not disputed. It is difficult in the circumstances to discern from mere averments in Affidavits whether or not a relationship of marriage existed. That is an issue that can only be tested on cross-examination on testimonies of witnesses.

9. Be that as it may, the Defendant swore that she established the [Particulars withheld] Bookshop in January, 1999. According to exhibit "PE1" which is the Certificate of Registration for the said business and which is dated 10th September, 2003, the business of [Particulars withheld] BOOKSHOP b to S N M w/o P K E. That piece of evidence was not challenged. At least it can be safely argued that as at that time, 10th September, 2003, the Defendant presented herself to the Registrar of Business names as the wife of the Plaintiff. To my mind, that is prima facie evidence of the likelihood of the existence of a marriage relationship between the two.

10. Section 14 of the Matrimonial Properties Act, 2013 provides:-

"14. Where matrimonial property is acquired during marriage:-

a) in the names of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and

b)"

The section 17 of that Act provides as follows:-

"17 (1). A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person."

11. Although the existence of the marriage is disputed, I have found that as at 10th September, 2003, the Defendant held herself out as the wife of the Plaintiff. It is also not in dispute that whatever relationship that existed between the two, children resulted therefrom. To my mind therefore, on a prima facie basis, it is important to preserve the properties pending the hearing of the suit by way of an inhibition on the titles.

12. As regards the injunction, the prayer is sought in the following terms:-

"THAT the Honourable court be pleased to issue an order of temporary injunction restraining the Defendant/Respondent whether by herself, her agents, servants, assigns and/or any other person acting at her behest from alienating and/or interfering with the Plaintiff/Applicant's title, user, occupation and/or enjoyment of parcels of land Nos. [Particulars withheld] and eviction thereof pending the hearing and determination of this suit."

On alienation, the order of inhibition already granted is sufficient. As regards interference with the Plaintiff's title, user, occupation or enjoyment of the property there was no evidence that any of the titles is in the Plaintiff's name or that the Plaintiff was either in occupation or use of any part of the properties. There was also no evidence that the properties or any of them was producing an income of Kshs.72,000/- per month as alleged. In the Circumstances, prayer Nos. 4 and 5 are without merit and are declined.

13. In the premises, the application is partially successful. I grant prayer No. 3 as prayed. Prayer Nos. 4 and 5 are declined. Since the Application failed to a greater extent, I will make no order as to costs.

It is so ordered.

DATED and delivered at Chuka this 3rd day of November 2016.

A.MABEYA

JUDGE

Ruling read and delivered in open court in the presence of the plaintiff in the absence of the Defendant who had notice of the ruling.

A.MABEYA

JUDGE

3/11/2016