

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO.75 OF 2013 (OS)

IN THE MATTER OF THE DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT

BETWEEN

G G WAPPLICANT

VERSUS

D W M.....RESPONDENT

R U L I N G

The Applicant and the Respondent were husband and wife. They were divorced on 8th January 2013 when the Nairobi Chief Magistrate's Court issued a certificate making the decree nisi absolute. This was in **Divorce Cause No.162 of 2011**. On 27th November 2013, the Applicant filed an originating summons pursuant to **Section 17** of the **Married Women's Property Act, 1882** (now repealed) seeking division of matrimonial property. In particular, the Applicant sought the determination of the respective ownership rights between the Applicant and the Respondent in respect to two parcels of land *i.e.* LR. Nos. **[Particulars withheld]** and **[particulars withheld]** (the suit properties). The two parcels of land are situate in Marurui in Kasarani and are registered in the joint names of the Applicant and the Respondent. Contemporaneous with filing suit, the Applicant filed an application pursuant to the provisions of **Order 40 Rules 1(b), 3(1), 3(3) and 4(1)** of the **Civil Procedure Rules** seeking orders of this court to restrain the Respondent, by himself or through his servants or agents from alienating, wasting, damaging or otherwise interfering with the current status of the suit properties pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the Applicant. The application is opposed. The Respondent swore a replying affidavit in opposition to the application.

At the hearing of the application, this court heard oral rival submission made by Mr. Mbuthia for the Applicant and by Mrs. Wambugu for the Respondent. Mr. Mbuthia submitted that, from the replying affidavit filed by the Respondent, it was apparent that the only issue for determination was whether the suit properties were being held by the Applicant and the Respondent in trust for the children of the marriage. Mr. Mbuthia explained that there was no evidence to support the contention by the Respondent that the suit properties were intended to be held in trust for the children of the marriage. He stated that the Respondent had refused to have the suit properties, which are matrimonial properties, divided between the Applicant and the Respondent. He urged the court to divide the properties in the manner that the Applicant has proposed. It is on this basis that the Applicant prayed for interlocutory orders of injunction to preserve the suit property pending the hearing and determination of the case.

Mrs. Wambugu for the Respondent submitted that the suit properties were registered in the joint names of the Applicant and the Respondent. She explained that the Respondent feared that if the suit property is transferred to the Applicant, she will dispose of it to the detriment of their children. She submitted that the

present suit was an offshoot of the divorce dispute. After dissolution of the marriage, the Respondent was left with the children of the marriage. Learned counsel submitted that the reliefs sought by the Applicant cannot in the circumstance be granted because the suit properties were meant to be held in trust for the children of the marriage. She prayed for the application to be dismissed with costs.

This court has carefully considered the rival submission made by Mr. Mbutia for the Applicant and Mrs. Wambugu for the Respondent. The issue for determination by this court is whether the Applicant laid sufficient grounds for this court to grant her application for interlocutory injunction. The principles guiding this court in determining whether or not to issue such an order of interlocutory injunction are well settled. The Applicant must establish that she has a prima facie case with likelihood of success. The Applicant must also establish that she would suffer irreparable loss that cannot otherwise be compensated by an award of damages if the injunction is not issued. Finally, in the unlikely event that the court shall be in doubt, it shall determine the application on the basis of convenience (see **Giella –vs- Cassman Brown [1973] EA 358**).

In the present application, certain facts are not in dispute. It is not disputed that the suit properties are registered in the joint names of the Applicant and the Respondent. It is further not disputed that the suit properties were gifted to the Applicant and the Respondent by the father of the Respondent. The Applicant and the Respondent are divorced. The Applicant has prayed for the suit properties to be preserved pending the hearing and determination of the division of the matrimonial property suit. The Respondent is opposed to the application on essentially two grounds: firstly, that the suit properties were not registered in their joint names in their personal capacities but in trust for their children. Secondly, that he had no intention of disposing of the suit properties. It was the Respondent's case that what is motivating the Applicant to file the present suit is her desire to dispose of this property. It was his submission that if the suit property is sold, it would be to the detriment of their children. In the premises therefore, he urged the court to dismiss the application with costs.

The Applicant craves for an order of injunction to restrain the Respondent from interfering with the current status of the suit properties. The Respondent indicated that he would not interfere with the current status of the suit properties. In essence, the Respondent was saying that he would not dispose of the suit properties pending the hearing and determination of the suit. From the character and nature of the dispute between the Applicant and the Respondent, it is imperative that the suit properties be preserved pending the hearing and determination of the main suit. In the premises therefore, this court holds that the Applicant established a prima facie case when she argued that she was a joint registered owner of the suit properties. Interlocutory injunction will be issued in terms of prayer 2 of the application dated 26th November 2013 pending the hearing and determination of the main suit. Costs shall be in the cause. It is so ordered.

DATED AT NAIROBI THIS 2nd DAY OF OCTOBER 2014

L. KIMARU

JUDGE