



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 41 OF 2013 (OS)**

**P N K.....APPLICANT**

**VERSUS**

**J K M.....RESPONDENT**

**RULING**

The Applicant filed suit by originating summons under **Section 17** of the **Married Women Property Act 1882** seeking a declaration that the properties that were acquired during the subsistence of her marriage to the Respondent was acquired through the joint efforts of the Applicant and the Respondent. In the circumstances therefore, the Applicant prayed that the properties registered in the name of the Respondent, which were acquired during the subsistence of the marriage be equally divided between herself and the Respondent. The Applicant gave a list of the properties that she sought to be declared matrimonial property. Contemporaneous with filing suit, the Applicant filed an application seeking interim relief from the court in the nature of injunction to restrain the Respondent from removing the Applicant from the matrimonial home (i.e. LR. No. *[particulars withheld]* (original *[particulars withheld]*)) in Karen Nairobi (House No.*[particulars withheld]*) pending the hearing and determination of the suit. The Applicant further prayed that the Respondent be restrained by means of an interlocutory injunction from alienating, transferring, encumbering or in any other way adversely dealing with the properties listed in the application pending the hearing and determination of the suit.

The application is supported by the annexed affidavit of the Applicant. In the affidavit, the Applicant deponed that she was married to the Respondent under Kamba Customary Law in September 1979 before the marriage was converted into a statutory one on 20<sup>th</sup> November 1999 under the **African Christian Marriage and Divorce Act**. The marriage was blessed with three (3) children. The children are all adults. There are pending divorce proceedings before the court i.e. **Divorce Case No.437 of 2012**. It is the Applicant's contention that during the subsistence of the marriage, several properties were acquired directly or indirectly through their joint efforts. In particular, the Applicant stated that although the properties were registered in the name of the Respondent, she contributed to their acquisition either directly or indirectly by either contributing towards their improvement or by managing the household and paying for the education of the children. In the premises therefore, the Applicant urged the court to preserve the suit properties pending the hearing and determination of the suit. The Applicant swore an affidavit in further support of the application.

The application is opposed. The Respondent swore a replying affidavit. He conceded that he was indeed married to the Applicant as stated by the Applicant in the affidavit in support of the application. He also admitted that there are pending divorce proceedings in court. In paragraph 5, the Respondent stated thus:

***“THAT It is true we married under Kamba customary law in 1979 and only solemnized the marriage on 20<sup>th</sup> November 1999 under the African Christian Marriage and Divorce Act. In***

***this regard, it is clear that our marriage was founded on customary laws and the distribution of property should be guided by the customary law when the marriage was regulated by customary law and statutory law when the marriage was regulated by the statute. The Kamba Customary law provides that when parties divorce the parties moves out with what they personally acquired during the marriage not what belongs to the other party. Under the statute the party claiming a share of the property must prove that she contributed to the acquisition of the property.”***

The Respondent went further to swear that the properties listed in the application were his properties. The Applicant contributed nothing towards their purchase. He put the Applicant to strict proof thereof requiring her to produce evidence to support her claim that she contributed directly towards the purchase of the suit properties. He explained that he purchased the suit properties through his own industry, either from mortgages that he obtained from financial institutions or from loans that were given to him by his employer. He further stated that he had purchased virtually all the motor vehicles through bank loans that he obtained from NIC Bank. It was the Respondent's case that there were properties which the Applicant had purchased and were registered in her own name which he was not claiming. As regard whether the Applicant directly contributed towards the university education of the children, he swore that he was against the idea of children acquiring their university education out of the country. However, the Applicant made the decision to take the children out of the country for their university education. He did not believe that the Respondent applied the sum of Kshs.21 million towards the education of the children as she claimed in her application. In essence, it is the Respondent's case that the Applicant did not either directly or indirectly contribute towards the acquisition of the suit properties. He asked the court to dismiss the application with costs.

During the hearing of the application, the court heard oral rival submission made by Mrs. Mbugua for the Applicant and by Mr. Wanyanga for the Respondent. Learned counsel essentially reiterated the contents of the application and the affidavits filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the Applicant established a case for this court to grant the interim relief of interlocutory injunction pending the hearing and determination of the suit. The principles to be considered by this court in determining such applications are well settled. The Applicant must establish that she has a prima facie case with a likelihood of success. She must also establish that if the order of injunction is not granted, she is likely to suffer irreparable harm that cannot be otherwise compensated by an award of damages. Finally, in the unlikely event that the court shall be in doubt, it shall determine the case on a balance of convenience (See **Giella –vs- Cassman Brown [1973] EA 358**).

In the present application, it is the Applicant's case that the properties registered in the name of the Respondent were matrimonial property and were acquired by their joint efforts during coverture. The properties that the Applicant has listed in her application fall in three (3) broad categories: the residential properties in Nairobi, agricultural land in Machakos County, and motor vehicles and tractors. There are properties situate at Narok County, Masai Mara and Amboseli Wildlife Parks which the Respondent stated that were a partnership with other persons. The Respondent denies that the said properties were matrimonial property. It is his case that he solely purchased the said properties and therefore the Respondent had no claim over them.

Having evaluated the facts of this application, it was clear to this court that it would be difficult for a determination to be made firstly, on what constitutes matrimonial property and secondly, the respective shares of the Applicant and the Respondent unless *viva voce* evidence is taken. Before such evidence is taken, it is imperative that the suit properties be preserved from being adversely dealt with pending the hearing and determination of the suit. The Respondent argued, *inter alia*, that since he married the Applicant under Kamba Customary Law, the law that shall be applied during the division of matrimonial property is Kamba Customary Law, at least at the time they were so married before the marriage was converted into a statutory one. This court was not persuaded by that argument. Where there is a statutory provision specifically addressing an issue, customary law is not applicable. In the present application, it is clear that the Applicant's claim is made on the basis of **Article 45(3)** of the **Constitution** which provides that:

***“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”***

The Court of Appeal in **Mombasa CA Civil Appeal No.127 of 2011 Agnes Nanjala William –vs- Jacob Petrus Nicolas Vander Goes** (unreported) in interpreting the above Article of the Constitution held at page 21 thus:

***“The new constitution is expected to re-shape the legal landscape. A positive feature of this new constitution is that it has the principles of equality and social justice woven through it. It places an obligation on all persons to live up to the national values set out in Article 10(2) which include sharing, equity, social justice and protection of the marginalized. Having said that, there are specific articles that deal with women’s property rights. Article 45(3) of the Constitution provides that the parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However, pursuant to Article 68 parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home.”***

Pursuant to **Article 68** of the **Constitution**, Parliament enacted the **Matrimonial Property Act (Act No.49 of 2013)**. **Section 6(1)** of the **Act** defines matrimonial property as follows:

***“(1) 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.”***

In the present application, the Applicant stated that she had directly or indirectly contributed in the acquisition of the properties that she has listed in the suit. The Respondent disputes this fact. From the definition of what constitutes matrimonial property given by **Section 6(1)** of the **Matrimonial Property Act**, there is no doubt that some of the properties that the Respondent insists are his properties will fall within the category of properties defined as matrimonial properties. As stated earlier in this Ruling, this will be conclusively determined during the full hearing of the case.

The purpose of any interlocutory orders is to preserve the status quo pending the hearing and determination of the suit. In the premises therefore, this court holds that the Applicant has established a prima facie case that entitles this court to issue the interlocutory orders of injunction pending the hearing and determination of the suit. The Applicant also established that she will suffer irreparable loss that cannot be compensated by an award of damages if the suit properties are disposed of before the determination of the suit. Interlocutory injunction is granted in terms of Prayer 1 and 2 of the application dated 11<sup>th</sup> July 2013 pending the hearing and determination of the suit. The order shall not apply to the properties that the Respondent averred are joint venture in Masai Mara and Amboseli Wildlife Parks. Costs shall be in the cause.

**DATED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2014**

**L. KIMARU**

**JUDGE**