



**MAM v COR alias A (Divorce Cause E303 of 2023)
[2024] KEKC 18 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEKC 18 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
DIVORCE CAUSE E303 OF 2023**

AH ATHMAN, CK

MAY 23, 2024

BETWEEN

MAM PETITIONER

AND

COR ALIAS A RESPONDENT

RULING

1. The petitioner’s Notice of Motion dated 20th November, 2023 under rule 116 of the *Kadhi’s Court (Procedure and Practice) rules*, 2020 seeks temporary injunction orders against the respondent by himself, agents, servants, employees, relatives and / or whomsoever else acting on their behalf from entering, constructing, trespassing, moving into, seeking to occupy, digging, alienating and / or in any other manner whatsoever from interfering with their matrimonial home and matrimonial property; and the applicant’s rights of ownership, possession, occupation or use of the applicant’s share of the matrimonial property pending interparty hearing and determination of this matter.
2. It is based on the ground that the respondent is threatening to evict tenants from rental houses and to collect all the household items from the matrimonial home.
3. The respondent opposed the application through replying affidavit dated 15th January, 2024.
4. The parties were married under Islamic marriage in 2014. They had initially cohabited and lived at the applicant’s mother’s rental houses in Utange. Around 2010 they jointly acquired a plot on the applicant’s mother’s plot and constructed three bedroomed houses, the matrimonial home. The respondent worked for gain in Germany and often visited his wife in Kenya. In 2011 another plot No. 4X1 adjacent to their matrimonial home, was bought from applicant’s relatives and rental houses constructed on it. Upon completion of this project, its ownership and management has been the cause of disagreement between the couple.



5. The application was disposed by way of written submissions. Counsels of both parties duly complied in this regard.
6. Rule 116(i) of the *Kadbi's Court (Practice and Procedure) rules* 2020 allows a party to file an application for injunctive orders before or after hearing of the matter.
7. For an order of injunction to issue the applicant must sequentially demonstrate a *prima facie* case with probability of success, show damage he or she will suffer if order is not granted and that same cannot be compensated by way of damages as enunciated in the case of *Giella vCassman Brown & Co Ltd.* [1973] E.A.358.
8. In this matter, it is not disputed the parties are still legally married under Islamic law. It is not disputed the matrimonial home was jointly acquired. It is not disputed also that the rental houses are constructed during pendency of the parties' marriage on land initially belonging to relatives of the applicant. Division of matrimonial property commences upon dissolution of marriage. The court has however, right and power to declare parties' rights to contested matrimonial property. The Court of Appeal in *AKK v PKW* [2020] eKLR where the court stated:

'It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved.'
9. *Prima facie*, the applicant will suffer irreparable damage if she is evicted from the matrimonial home and the household items taken. She has nowhere else to go and her right to dignity, housing and accommodation will be prejudiced under articles 28 and 43 (1) (b) of the *constitution* of Kenya (2010). On the other hand, *prima facie*, the respondent has made considerable contribution towards the construction and development of the rental houses. He will thus suffer more damages than the applicant if the orders sought are granted as prayed. In the circumstances, the rental houses be ordered to be managed by an estate agent through parties' counsels and approved by court pending hearing and determination of this matter. The proceeds of the rent shall, pending determination of this matter, be distributed in the ratio of Applicant 35%, Respondent 65%.
10. The application is successful in part; it is allowed with respect to the matrimonial home only and direction given with respect to the rental houses.

DATED, SIGNED AT MOMBASA ON 23RD MAY, 2024.

HON. ABDULHALIM H. ATHMAN

CHIEF KADHI

