



UMA v IID (Matrimonial Cause E014 of 2022) [2023] KEKC 11 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEKC 11 (KLR)

REPUBLIC OF KENYA
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)
MATRIMONIAL CAUSE E014 OF 2022
AH ATHMAN, SPK
MAY 11, 2023

BETWEEN

UMA PETITIONER

AND

IID RESPONDENT

RULING

1. The petitioner through her Notice of Motion application dated January 9, 2022 seeks orders:
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. Spent
 - v. Spent
 - vi. Spent
 - vii. Spent
 - viii. Spent
 - ix. Spent
 - x. Spent
 - xi. That pending hearing and determination of this suit, the parties herein be granted shared legal custody, care and control of the minor children



- xii. That pending the hearing and determination of this suit, the respondent be ordered to release to the petitioner / applicant her original copies of the marriage certificate and children's birth certificates.
- xiii. That pending the hearing and determination of this suit, the respondent be restrained from removing the parties' children from the jurisdiction of this Honourable court.
- xiv. That pending the hearing and determination of this suit, the respondent be ordered to provide maintenance for parties' children as follows:
 - a. Kes 100,000.00 per month food and shopping
 - b. Kes 95,000.00 per month for rent
 - c. Medical expenses and / or provide medical insurance cover
 - d. School fees and related expenses as per the school structure
 - e. Kes 50,000.00 per month clothing and shoes
 - f. Kes 32,000.00 per month for electricity, water and gas bill
 - g. Kes 10,000.00 per month for house help salary
 - h. Kes 70,000.00 per month for fuel and driver's salary and availing motor vehicle KCZ xxx Toyota Ractis, for transportation of the child to and from school
- xv. That pending the hearing and determination of this suit, the Honourable court be pleased to issue an order for injunction restraining the respondent, his servants and / or agents from selling, transferring and / or in any way whatsoever alienating the following matrimonial properties:
 - a. Motor vehicle KDE xxxx Toyota Succeed
 - b. Motor vehicle KDA xxxx Toyota Prado
 - c. Motor vehicle KCZ xxx Toyota Ractis
 - d. [Particulars withheld] Holdings Company limited
 - e. [Particulars withheld] Hotel Resort Limited
 - f. [Particulars withheld] Destinations Limited
 - g. [Particulars withheld] Holdings Limited
 - h. Beyun Construction and General Supplies Limited
 - i. LR No. 36/467/VII
 - j. LR No. 19952/268 / Nairobi
 - k. LR No. 1585 / Mambui / Kilifi
 - l. LR No. 36/122/VII/ Nairobi
 - m. Apartment No. [Particulars withheld] in Kilimani, Nairobi
 - n. Apartment No. [Particulars withheld] in Kilimani, Nairobi



- o. 300 camels in Bangal
 - p. 200 heads in Bangal
- xvi. That pending hearing and determination of this suit, the OCS Parklands and Langata respectively and OCPD, Nairobi be directed to ensure compliance with orders sought herein.
 - xvii. Costs
 - xviii. Any other orders the court deem fit and just.
2. The application is supported by the even dated sworn affidavit of UMA .
 3. The respondent was represented by the Mr. Yusuf of M/S Shehi, Kipkorir & Yusuf advocates LLP. However, the firm, on their own application duly served upon the respondent, ceased to act on his behalf due to lack of instructions and communication.
 4. The petitioner was initially represented by the firm of M/S Hassan Mutembei & Company advocates. She changed her advocates and is now represented by the firm of M/S Fareed, Imaana & Associates advocates.
 5. The respondent filed an affidavit of means dated October 22, 2022. He deposed that he has only one source of income, a co-owner with someone else on Ismarriot hotel which has financial problems due to a loan default and court and court cases over loan recovery. He deposed further that he has other wives two of whom are expectant and eleven (11) other children some of whom are in secondary school. He wondered whether the applicant is seeking over Kes 385,000.00 per month for the children alone or for her comfort and needs after divorce. He contends the amount is exaggerated and urged court not to punish him by subjecting him to punitive responsibilities above his financial abilities.
 6. It is noted that the petitioner had filed divorce case No. 07 of 2019 for dissolution of marriage and upkeep. The parties were directed by the Hon. Dhulkif Waweru, but failed to file consent by April 13, 2020. The matter was dismissed for non-prosecution on July 27, 2022.
 7. The court on January 18, 2023 made the following orders with respect to the custody and education of the minor children:
 - i. Interim actual custody, care and control of the minors is granted to the petitioner / applicant, respondent to get reasonable access.
 - ii. The petitioner/ applicant's application dated September 16, 2022 is marked withdrawn
 8. It is further observed that on January 24, 2023, the parties by consent agreed the children to go to [Particulars withheld] School in South C from their current school and the respondent will cater for all their education needs.
 9. These orders are hereby confirmed in the interim. Parties share equal legal custody of the minors. The parties shall not take the children out the jurisdiction of this court without consultation and consent of both parents and / or express order of the court.
 10. The remaining issues for determination in this application relate to
 - i. Rate and extent of interim children maintenance
 - ii. Injunction on disposal of matrimonial properties.
 - iii. Return of petitioner / applicant's and children documents



Children maintenance.

11. I have read the petition dated August 19, 2022 amended on December 16, 2022 by the petitioner, it seeks, save for dowry, essentially the same prayers as in the current application. At the interlocutory stage, courts are concerned with issues that really cannot wait for evidence to be tested through the normal but crucial viva voce and cross-examination process. Petitions cannot be sufficiently prosecuted through affidavit evidence. In *Muslims for Human Rights (Muburi) & 2 Others V Attorney General & 2 others* (2011) e KLR Ibrahim J (as he then was) stated as follows with regard to the need for caution in the issuance of interlocutory orders:-

“The Court must be careful for it not to reach final conclusions and to make final findings. By the time the application is decided, all the parties must still have the ability and flexibility to prosecute their cases or present their defenses without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either parties. This principle is similar to that in temporary or interlocutory injunctions in civil matters.

12. The quantum of children maintenance is predicated on a balance between the twin factors of needs of children and the financial ability of the husband as espoused under Q.65.35 read together with Q.2.233 which provide:

“Let him who hath abundance spend of his abundance and he whose resources are restricted, let him spend according what Allah has given him. Allah puts no burden on any person beyond what He has given him. Allah will grant after hardship, ease”. Qur’an.65.7

“...No person shall have a burden laid on him greater than he can bear. No mother shall be treated unfairly on account of her child; nor father on account of his child.” Q.2.233

13. . Ibn Kathir (d.774H) in his commentary of the verse Q.2.233 stated:

The father of the child is obligated to provide food and clothing (of the child) according to custom of her peers in her community without extravagance or stinginess, according to his means in times of abundance, moderation or want.’

14. The petitioner / applicant has four (4) children with the respondent who has eleven (11) other children from other marriages and at least two other wives. The amount applied for as interim children maintenance is more than 357,000.00 per month plus motor vehicle and school fees. It is highly exaggerated, unreasonable and prima facie beyond the financial ability of the respondent. We thus order the respondent to pay interim children maintenance as follows:

- i. Accommodation
- ii. School fees and related expenses including transport to and from school
- iii. Kes 45,000.00 per month for food, utility bills
- iv. Medication as necessary or medical insurance cover.

Injunction orders



15. An injunction in the words of Bosire J, in *Njenga v Njenga*, ‘being a discretionary remedy is granted on the basis of evidence and sound legal principles. In *Kenleb Cons Ltd v New Gatitu Service Station Ltd & Another*, Bosire J, held that:

to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.’

16. In Halsbury’s Laws of England, the test for grant of injunction is elucidated: it stated:

It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if these rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question.’

17. The *Giella v. Cassman Brown & Co Ltd*. [1973] E.A.358 case set out the conditions for granting of interlocutory injunction orders. The court stated:

The conditions for the grant of 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 be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

18. Regarding the sequence of granting interlocutory injunction, the court in *John Ngumo Murere v Muriuki Karue & 7 Others* [2006] eKLR cited the court of appeal case in *Kenya Commercial Bank v Afraba Education Society* [2001] 1 EA 86 (CAK) as follows:

The sequence of granting interlocutory injunction is firstly, that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour; secondly, that such an injunction will not be normally be granted unless the applicant might suffer irreparable injury; and thirdly, when the court is in doubt it will decide the application on the balance of convenience. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt the third condition can be addressed.

19. In the case of *Paul Gitonga Wanjau v Gathuthis Tea Factory Ltd & 2 others* [2016] eKLR the court dealing with the issue of balance of convenience expressed itself thus:

Where any doubt exists as to the applicants’ or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the respondent on the other hand would suffer if the injunction was granted



and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain, if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer greater harm with the outcome of the motion. If the applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.

20. The court in granting interlocutory injunction order must be convinced the alleged irreparable damage on the applicant cannot be adequately compensated by way of damages. In the case of *Pius Kipchirchir Kogo versus Frank Kimeli Tenai* [2018] eKLR the court held:

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

21. This was further expounded in the case of *Mobile Kitale service station v Mobil Oil Kenya Limited & Another* Civil Case 205 Of 1999 Kisumu, [2004] eKLR, the Court, Warsame J, held:

in my view the object of granting an interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable. While an interlocutory injunction, being an equitable remedy, would be taken away [discharged] where it is shown that the person's conduct with respect to matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter. The orders of injunction cannot be used to intimidate and oppress another party. It is meant to protect the fence of the person who obtained the said orders. It is a weapon only meant for a specific purpose - to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it.

22. Section 7 of the *Matrimonial Property Act, 2013* (The MPA) provides, division of matrimonial property is subject to divorce or dissolution of the marriage. It states:

subject to section 6(3) ownership of matrimonial property vests in spouses according to their contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or the marriage is otherwise dissolved.

23. The High court has interpreted the provision of the *MPA* to mean hearing and determination of a division of matrimonial dispute can only start upon divorce (or dissolution of marriage) of spouses. In the case of *ENN v SNK* [2021] eKLR, the High Court, Kemei J, while ruling on a preliminary objection in a division of matrimonial property dispute stated:

‘23. These are factual issues that cannot be litigated at this point. This court has the requisite jurisdiction to hear and determine matters regarding division of matrimonial property and hence has power to hear and determine the instant matter and more specifically on the division of matrimonial property which shall commence upon proof of dissolution of marriage.’

24. This was further held by 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.

25. Rule 157 of the *Kadhi's court rules of procedure and practice (2020)* suggests the court can be moved at any time by way of Notice of motion to determine disputes on division of matrimonial property. Rules of procedure being a subsidiary legislation cannot override statute. There is, in my view, no contradiction between the rules and the statute. The issue of division of matrimonial, may but does not have to be pleaded in a divorce petition. It may be filed separately at any time after divorce or dissolution of marriage even if it had not been specifically pleaded in a divorce case. It may also be filed before but can only be canvassed during, upon or after divorce or dissolution of marriage proceedings. This is because rule 157 of the KCPPR is not couched in mandatory terms. Further it is trite law that the claimant must prove his or her claims. In a division of matrimonial property dispute, unless admitted, any such proof will include proof and extent of contribution, payments, registrations which must be tested for the court to make a considered decision. Affidavit evidence is insufficient to make conclusive finding on ownership of matrimonial property.
26. In the instant case, it is not disputed the parties are still legally married. The ownership of the listed properties and whether or not they comprise part of the matrimonial property is contested. Affidavit evidence in my view is not sufficient to grant the injunctive orders sought. The balance of convenience tilts in favour of the respondent. Accordingly, the prayers for injunctive orders are dismissed.

Costs be in the course.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON 11TH MAY, 2023.

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of

Mr. Suleiman A. Mohamed, Court Assistant

Mr. Fareed for Petitioner / Applicant

Respondent

