



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC CASE NO. 56 OF 2019**

**MJB.....PLAINTIFF**

**VERSUS**

**GWM.....DEFENDANT**

**RULING**

1. The application dated 13/8/2019 is brought by the plaintiff under *Sections 3 & 3A of the Civil Procedure Act and Section 58 and 69 of the Land Registration Act and Order 40 Rules 1, 2, 3, 4 of the Civil Procedure Rules*, seeking the following orders:-

**(1) That this application be certified urgent to be heard ex-parte in the first instance.**

**(2) That an inhibition order be issued restraining any dealings over Land Parcel No. KAPLAMAI/SIRENDE BLOCK [..]/NGONYEK/[..] and SOUTH KABRAS/CHEMUSE/[..], pending hearing and determination of this suit.**

**(3) That a temporary injunction be issued restraining the defendant/respondent from selling and/or in any other way interfering with Land Parcel No. KAPLAMAI/SIRENDE BLOCK [..]/NGONYEK/[..] and SOUTH KABRAS/CHEMUSE/[..], pending hearing and determination of this suit.**

**(4) ...spent**

**(5) That costs be provided for.**

2. The application is supported by the plaintiff's supporting affidavit sworn on the even date.

3. The grounds relied upon are that the plaintiff and the defendant are husband and wife; that the relationship between the parties has deteriorated; that the defendant has threatened to dispose of the suit properties and it is necessary and in the interests of justice that the orders sought be granted.

4. In response to that application, the defendant filed a replying affidavit sworn on 16/9/2019. He deponed that land parcel No. **South Kabras/Chemuse/[..]** is not matrimonial property having been bought before the marriage; that land parcel No. **Kaplamai/Sirende Block [..]/Ngonyek/[..]** was bought without any contribution from the plaintiff and that he had made no threats to the plaintiff as alleged and he has not acted against the interests of marriage in any way; that the applicant is the one who acts against the interests of the marriage, having inter alia deserted the respondent on 16/8/2019 to undisclosed destination up to the present day; that the title deeds to the suit properties are lost and that the applicant is welcome to return to the matrimonial home. In the respondent's view the applicant has not established a case for grant of temporary injunction in this matter.

5. The plaintiff filed his submissions on 2/10/2019. The defendant filed his submissions on 15/10/2019. I have considered the contents of the application and the response including the submissions.

6. The issue that arises from the application is whether a temporary injunction should be granted on the basis of the material on record.

7. The plaintiff identifies land parcel No. **Kaplamai/Sirende Block [..]/Ngonyek/[..]** and the defence admits the same as the land on which the couple's matrimonial home is built.

8. In my view matrimonial home is recognised and protected by provisions of **Article 68 (c) (iii)** of the Constitution and **Section 12** of the Matrimonial Property Act.

9. **Article 68 (c) (iii)** provides as follows:

“Parliament shall -

(a) ...

(b) ...

(c) enact legislation-

(i)...

(ii)...

(iii) to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage.”

10. Section 12 provides as follows:

“12. Special provisions relating to matrimonial property-

(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.

(2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man’s wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

(3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.

(4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except-

(a) on the sale of any estate or interest in the matrimonial home in execution of a decree;

(b) by a trustee in bankruptcy; or

(c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.

(5) **The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.”**  
(emphasis mine)

11. For the moment, It matters not whether the defendant’s claim that the plaintiff never contributed to the purchase of **KAPLAMAI/SIRENDE BLOCK [..]/NGONYEK/[..]** is true or not. It is clear from the provisions of the law as cited above any disposal of **KAPLAMAI/SIRENDE BLOCK [..]/NGONYEK/[..]** before the finalization of this suit by the defendant may render the proceedings herein nugatory and hence violate some of the right of the plaintiff.

12. With regard to parcel **South Kabras/Chemuse/[..]** it is the defendant’s case that he purchased the same before meeting the plaintiff. There is no claim of any encumbrance on that parcel by reason of existence of any matrimonial home as is the case of **KAPLAMAI/SIRENDE BLOCK [..]/NGONYEK/[..]**.

13. The defendant has exhibited to his replying affidavit an agreement for sale of a plot of 50 by 100 feet dated 23/10/1997 and another one dated 17/1/1997 and alleged that these are the agreements vide which he bought the property. I have examined those agreements, they do not mention the plaintiff as a party or as a witness. However no marriage certificate is attached to either the application or the replying affidavit.

14. There are exhibited in the application certificates of birth for various children said to be of the marriage showing the dates of birth as ranging from 22/2/2000 to 1/8/2018 and the defendant as the father though the defendant denied siring one of them born on 10/1/2004.

15. Going by the reply filed by the defendant the parties were not married as at 1997. As I have said before there is no evidence that confirms the date of marriage of the parties. This court has no evidence to rely on to reach a concrete finding that the parties were not married as at the year 1997.

16. The plaintiff cites **Section 14 of the Matrimonial Property Act** for the proposition that if a property is acquired during marriage in the name of one spouse there shall be a rebuttable presumption that the beneficial interests in the matrimonial property are equal. She also cites **Nakuru HCCC No. 161 of 2016 Leah Wangui Ngata -vs- Francis Ngata Kingori & Another**. In that case the plaintiff sought a permanent injunction and a declaration a certain land parcel was matrimonial property held by the defendant in trust in equal shares. The court observed that the matrimonial home was built on that parcel and that there was joint effort culminating in its acquisition. The decision also cited **Section 12 (5) of the Matrimonial Property Act 2013** which states that the matrimonial home or property shall not be mortgaged or leased without written and informed consent of the spouses and **Section 12 (4) of the Act** which provides that the spouse shall not be evicted

from the matrimonial home by any person except on certain conditions inter alia sale in execution of a decree, trust or bankruptcy or exercise of chargee's power of sale and found that the plaintiff's claim is merited and that she has proved her case on a balance of probabilities. That decision is persuasive.

17. Having observed as above I find that in the instant case it is clear that the applicant has established a *prima facie* case. She has also established that she may suffer irreparable loss if both or any of the parcels were disposed of before the finalization of this litigation.

18. I therefore grant the application dated 13/8/2019 in terms of prayer No. (2) and (3) thereof. The costs of the application shall be in the cause.

**Dated, signed and delivered at Kitale on this 28<sup>th</sup> day of October , 2019.**

**MWANGI NJOROGE**

**JUDGE**

**28/10/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the plaintiff

Defendant present (in person)

**COURT**

Ruling delivered in open court at 2.45 p.m.

**MWANGI NJOROGE**

**JUDGE**

**28/10/2019.**