



**DAS v FP (Family Appeal E018 of 2025)
[2025] KEHC 12325 (KLR) (Family) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY APPEAL E018 OF 2025
CJ KENDAGOR, J
JULY 31, 2025**

BETWEEN

DAS APPLICANT

AND

FP RESPONDENT

(Being an appeal from the Ruling delivered by Hon. Festus Terer on 7th February, 2025 in Chief Magistrate Court Milimani Divorce Cause No. E1511 of 2024)

RULING

1. The parties herein got married on 16th December, 2022 at the Office of Registrar of Marriages, Nairobi. They did not get a child together, but the Applicant had a child from her previous relationship. However, their marriage faced challenges as a result of which the Respondent filed for a divorce at the lower Court in November, 2024. Before the divorce petition could be determined, the Applicant brought an application before the lower Court dated 3rd December, 2024 seeking several orders relating to alleged matrimonial properties. She also wanted the Court to compel the Respondent to pay maintenance for her and the child pending the divorce proceedings.
2. The Respondent raised a Preliminary Objection to the said application, wherein he argued that the Court did not have pecuniary jurisdiction to entertain the application. The Court heard the application and delivered a Ruling on 7th January, 2025 in which it held that it did not have pecuniary jurisdiction to grant the orders touching on the alleged matrimonial properties. The Court also dismissed the Applicant’s prayer for spousal maintenance, holding that it did not have enough material to determine on that issue. The Court opined that the issue needed to be addressed on merits and parties be examined on it.



3. The Applicant was dissatisfied with the Ruling and appealed to this Court vide a Memorandum of Appeal dated 10th February, 2025. She listed the following Grounds of Appeal;
 1. That the Learned Magistrate erred in law and in fact by dismissing the Appellant's Notice of Motion Application dated 3rd December, 2024 due to failure to fully appreciate the full circumstances of the Appellant herein.
 2. That the Learned Magistrate erred in law by holding that the Court lacked pecuniary jurisdiction to issue Declaratory and Conservatory orders under Section 17 of the Matrimonial Properties Act.
 3. That the Learned Magistrate erred in law by misinterpreting the jurisdictional scope under Section 17 of the *Matrimonial Property Act*, which expressly empowers the Court to make declaratory orders regarding matrimonial property and interim conservatory orders without looking at the value of the properties involved, thereby incorrectly limiting its jurisdiction.
 4. That the Learned Magistrate erred in law and in fact by arriving at the conclusion that the properties in question were of a value beyond the jurisdiction of this Honourable Court without a Valuation report or any basis at all.
 5. That the Learned Magistrate erred in law and in fact by treating the properties collectively thereby arriving at a presumptive wrong value.
 6. That the Learned Magistrate erred in law and in fact by failing to consider adequately the spousal and child maintenance issues raised in the Appellant's application dated 3rd December, 2024 require urgent interim redress pending the substantive hearing of the Divorce Petition herein, leading to potential prejudice against the Appellant and the minor and goes against the best interests of the child.
 7. That the Learned Magistrate erred in law and in fact by failing to consider the welfare of the Appellant and the minor pending the hearing and determination of the Divorce Petition.
 8. That the Learned Magistrate erred in law and in fact by arriving at the erroneous finding that the orders sought in the Appellant's Application could only be granted after hearing the Petition on merit.
 9. That the Learned Magistrate erred in law and in fact by failing to uphold the Appellant's interests and right to continue staying in their matrimonial home, being Apartment No. xxxxx BLOCK A, Alba Garden, thereby exposing the Appellant to the risk of eviction.
 10. That the Learned Magistrate erred in law and in fact by failing to uphold the Appellant's rights and interests in the matrimonial properties of the Appellant and the Respondent herein, being Apartment No. A235 in Misty Springs, Apartment No. A93 in Siaya Park Apartments and Apartment No. A42 BLOCK in Siaya Park Apartments, pending the hearing and determination of the divorce petition, thereby increasing the likelihood of the Respondent selling, transferring or disposing off the matrimonial properties.
 11. That the Learned Magistrate erred in law and in fact by failing to appreciate that the Appellant and the Respondent agreed that matrimonial properties are used for commercial activities for Airbnb businesses and the proceeds of the business were the main sources of income that the Appellant largely depended on for her survival and that of the minor thereby undermining the welfare of the Appellant and the minor.



12. That the Learned Magistrate erred in law and in fact by failing to appreciate the Appellant's interest in the matrimonial properties pending the hearing and determination of the divorce petition, contrary to Article 40 and 60 (1) of *the Constitution* of Kenya, 2010.
 13. That the Learned Magistrate erred in law and in fact by failing to appreciate the purpose and the rationale behind the provisions of Section 17 of the Matrimonial Properties Act which is to protect matrimonial property pending a determination of the rights and interests of the parties to a divorce petition.
 14. That the Learned Magistrate erred in law and in fact by failing to appreciate and take into consideration the fact that the Respondent has since excluded and blocked the Appellant from the management of the matrimonial properties.
4. In the Appeal, the Applicant is asking this Court to allow the appeal and set aside the Ruling delivered by Honourable Festus Terer on 7th February, 2015. She is also asking this Court to issue a declaration that the lower Court has the requisite jurisdiction to issue interim declaratory and conservatory orders under Section 17 of the Matrimonial Properties Act. She is also seeking an order restraining the Respondent from evicting her from Apartment No. xxxxx BLOCK A, Alba Garden pending the determination of the divorce. She similarly seeks an order restraining the Respondent from dealing with the alleged matrimonial properties pending the determination of the divorce petition.
5. Before this Court could hear and determine the Appeal, the Applicant brought an application dated 12th February, 2025 in which she sought the following orders;
1. Spent.
 2. Spent.
 3. That pending the hearing and determination of the Appeal herein and the divorce petition, this Honourable Court be pleased to issue a temporary injunction barring the Respondent, his agents, servants and/or employees or whosoever acting on his behalf or instructions from interfering with the Appellant's stay, occupation, and accommodation and peaceful and quiet enjoyment by the Applicant of the property known as Apartment No. xxxxx BLOCK A situate on the 18th Floor of a Building erected in the Development known as 'Alba Garden,' Kasuku Road off Lenana Road, Kilimani Nairobi where the Appellant currently resides with the child.
 4. That pending the hearing and determination of the Appeal herein, this Honourable Court be pleased to issue an order directing the Respondent to pay maintenance for the Appellant and the child.
 5. That in the alternative to prayer 4 above, this Honourable Court be pleased to give an order directing the Respondent to allow the Appellant collect rental income from one of the following properties for her daily survival with her child pending the hearing and determination of this Appeal and the divorce petition:
 - i. Apartment No. A235 situate on the 23rd floor of a building erected at the Development known as 'Misty Springs' on Nairobi/Block xx/450 24 Westlands Road (Land Reference Number 209/75/4/2 Westlands Road Nairobi County);
 - ii. Apartment No. A93 situate on 14th Floor of a building erected on the Development known as 'Siaya Park Apartments' on Block A erected on Land Reference Number 209/22207 (Original Number 209/3289 Nairobi);



- iii. Apartment No. A42 Block A situate on the 6th Floor of a building erected on the Development known as 'Siaya Park Apartments,' Oloitoktok Road, Kileleshwa Nairobi.
 6. That pending the final determination of the Appeal herein and the divorce petition, this Honourable Court be pleased to issue an order restraining the Respondent from selling, transferring, or in any way transferring with or disposing off the following matrimonial properties of the Respondent and the Appellant herein
 - i. Apartment No. A235 situate on the 23rd floor of a building erected at the Development known as 'Misty Springs' on Nairobi/Block xx/450 24 Westlands Road (Land Reference Number 209/75/4/2 Westlands Road Nairobi County);
 - ii. Apartment No. A93 situate on 14th Floor of a building erected on the Development known as 'Siaya Park Apartments' on Block A erected on Land Reference Number 209/22207 (Original Number 209/3289 Nairobi);
 - iii. Apartment No. xxxxx BLOCK A situate on the 18th Floor of a Building erected in the Development known as 'Alba Garden,' Kasuku Road off Lenana Road, Kilimani Nairobi
 - iv. Apartment No. A42 Block A situate on the 6th Floor of a building erected on the Development known as 'Siaya Park Apartments,' Oloitoktok Road, Kileleshwa Nairobi.
 7. The costs of this application be provided for.
 8. That this Honourable Court be pleased to issue any other order it might find just and fair to issue.
6. The grounds of the application are enumerated on its face and supported by an affidavit sworn by the Applicant and dated 12th February, 2025. She stated that the Ruling left her without any protection and at the mercy of the Respondent who is likely to evict her from the house where she currently resides with her child. She averred that the Respondent has issued verbal threats to her to that effect. She also stated that she is concerned that the Respondent may dispose of the matrimonial properties without her knowledge or involvement.
7. She averred that she has no place to live as well as any sufficient means of sustaining her needs and that of the child. She claimed that she is likely to be left without any recourse particularly without an assured shelter during the pendency of the divorce petition. She averred that it is in the interest of justice and fairness that this Court issues the orders sought herein to protect her welfare and that of the child as well as her interests in the matrimonial properties pending the hearing and determination of the divorce petition.
8. The Respondent filed a replying affidavit sworn by him and dated 13th March, 2025 in which he opposed the application. He stated that he has never assumed parental responsibility for the minor in question. He also stated that his name was fraudulently inserted in the child's birth certificate because he did not consent to the same. He stated that he has never acknowledged, supported, or accepted the minor as is own in any capacity. He also stated that the properties in question do not qualify as matrimonial properties because he solely acquired them by himself prior to his marriage to the Applicant.



9. The Applicant filed a further affidavit sworn by her and dated 25th March, 2025, whose content I have carefully considered at length. She stated that the Respondent assumed parental responsibility of the child and even consented to the addition of his name on the child's birth certificate. She averred that the Respondent used to send upkeep for the child to her mother. She also stated she made significant contribution to the purchase and improvement of the alleged matrimonial properties in question. She stated that she depended on the rental income from the properties for her survival and that of the child.
10. I note that the Applicant brought another application dated 21st February, 2025 in which she sought several orders. I have looked at the said application and I have established that it has been overtaken by events. All the prayers sought in the said application are all spent. For these reasons, the said application is not available for this Court's determination. Thus, the only application for determination by this Court is the one dated 12th February, 2025.
11. The application was canvassed by way of written submissions.

Applicant's Written Submission

12. The Applicant submitted that the Court should allow the Application and grant her the orders sought. She argued that the preservation orders are essential in maintaining the status quo of the properties listed in the Application. She argued that unless the injunctive orders are granted, the Respondent will persist in his threatened actions which may interfere with the safety, security, and welfare of the child as well as her rights to the properties in question. She argued that the Respondent should be ordered to cater for the child's maintenance because he has voluntarily accepted parental responsibility.
13. She submitted that she has also met all the conditions necessary for the grant of an interlocutory injunction. She argued that she has established a prima facie by proving her direct non-financial contribution to the acquisition, management, and maintenance of the properties in question. She also submitted that she has proved that she will otherwise suffer irreparable loss for which damages are not an adequate remedy. She argued that the disposal of the suit property will mean that the substratum of her case herein and in the matrimonial proceedings would no longer exist, rendering her suit untenable.

The Respondent's Written Submissions

14. The Respondent submitted that the Application should be dismissed, arguing that it is an abuse of Court process. He submitted that the Application is framed such that, if granted, it will have the effect of prejudicing and determining the very issues under consideration in the Appeal itself. He argued that the Court would effectively be issuing final orders at an interlocutory stage, thereby rendering the Appeal nugatory and undermining the appellate process and his right to be heard on merit. He also submitted that the Applicant does not have a right to the properties, arguing that she did not constitute to their acquisition.
15. He also submitted that he should not be ordered to pay maintenance for the child, arguing that there was no evidence that he had assumed parental responsibility. He also argued that the Applicant has not proven a case warranting orders for spousal maintenance. He argued that the Applicant seems to be living in the former age of our legal regime where a husband was automatically deemed the sole provider regardless of whether or not the wife possessed the ability to fend for herself. He argued that she has consistently refused to engage in any income-generating activities to sustain her lifestyle.



Issues for determination

16. I have carefully considered the grounds of the Application, the various affidavits filed by the parties, and their respective written submissions. I find that the singular issue that arises for disposal is whether the Applicant has met the threshold for grant of injunctive relief and the orders sought.
17. Courts have established the conditions that a party must satisfy for the Court to grant an interlocutory injunction. The leading authority on this area is *Giella vs Cassman Brown & Company Limited* [1973] E A 358, where the court expressed itself in the following terms;
- “First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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. The Court in *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR commented on the rule established in *Giella vs Cassman Brown* and expressed itself as follows;
- The above principles were authoritatively captured in the famous Canadian case of *R. J. R. Macdonald Vs. Canada (Attorney General)* [3] where the three part test of granting an injunction were established as follows:-
- a. Is there a serious issue to be tried?;
 - b. Will the applicant suffer irreparable harm if the injunction is not granted?;
 - c. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").
19. The Court is being invited to look at the facts of this case and make a determination on whether the Applicant has met the three conditions established by case law and discussed above.

Whether the Applicant has established a Prima Facie case with probability of success

20. The first issue to evaluate is whether the Applicant has disclosed a prima facie case with a reasonable probability of success. Courts have determined what constitutes a prima facie case in terms of the principle established in *Giella vs Cassman Brown*. In *Mrao Ltd Vs First American Bank of Kenya and 2 others* {2003} KLR125, the Court of Appeal described a Prima Facie case in the following terms;

So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

Mr Wasuna, appeared to me to imply that the test as to whether or not a prima facie case had been made out is satisfied if the applicant is able to show the existence of an arguable case.

But as I earlier endeavoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show



an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.

21. Similarly, the court in *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR, made the following observations concerning the establishment of a prima facie case;

Steven Mason & McCathy Tetraut in their well-researched article entitled "Interlocutory Injunctions: Practical Considerations" have authoritatively stated as follows:-

"With some exceptions, the first branch of the injunction test is a low threshold....." Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a limited review of the case on the merits." It is usually a brief examination of the facts and law.

22. The parties herein agree that they got married to each other on 16th December, 2022. The Applicant claims that she has beneficial interest in the properties acquired during the subsistence of their marriage. One of the properties is Apartment No. A235 erected on Nairobi/Block xx/450 24 Westlands Road, which was acquired on 6th December, 2023 and is registered in the name of the Respondent. Another property is Apartment No. A42 erected on the Development known as 'Siaya Park Apartments,' Oloitoktok Road, Kileleshwa Nairobi, which was acquired on 27th November, 2023, and the same is also registered in the name of the Respondent.

23. On the face of it, it is clear to this Court that the two properties stated above were acquired during the subsistence of the marriage, given that the union of the parties herein is yet to be dissolved. Section 9 of the Matrimonial Properties Act provides as follows;

9. Acquisition of interest in property by contribution

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.

24. The Applicant claimed that she made contributions through the running, management, and operation the Airbnb business on the properties. She also claimed that she took care of the general care and maintenance of the properties. The Respondent has denied the said contribution by the Applicant, claiming that the Applicant has not provided any documentation, financial records, or specific explanations of the nature, extent, or value of the alleged contributions.

25. The Court has just summarized/rephrased the parties' respective positions on this issue. However, it does not wish to comment on the adequacy of the evidence adduced by the parties to support their respective positions. The Court reserves its view on this issue in the interest of justice, and in view of the substantive appeal pending determination. This notwithstanding, the Court is of the view that the Application is neither vexatious nor frivolous.

Whether the Applicant Will Suffer Irreparable Loss Which Would Not Be Adequately Compensated by an Award of Damages

26. I now turn to the second test for determination which is whether the Applicant will suffer irreparable loss if the injunction is not granted. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen*



& 2 others [2014] eKLR gave guidance on how to determine whether an applicant is likely to suffer irreparable loss. The court held as follows;

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

27. This Court also associates itself with the reasoning of the Court in *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR, where the court interrogated the same issue and held as follows;

The second test for determination is whether the applicant will suffer irreparable loss. The following paragraph in Halsbury’s Laws of England [14] is instructive. It reads:-

“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 an 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 his 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”

28. The Applicant claimed that the Respondent may dispose of the alleged matrimonial properties without her knowledge or involvement. She also averred that she has no place to live as well as any sufficient means of sustaining her needs and that of the child. She claimed that she is likely to be left without an assured shelter during the pendency of the divorce petition. I have carefully analyzed Applicant’s averments on this issue vis a vis as the counter-responses by the Respondent. It is basically the words of the Applicant against the words of the Respondent.
29. Based on this analysis, this court is in doubt as to whether the Applicant is likely to suffer irreparable loss or harm if the injunction is not granted.

In Whose Favour Does The Balance Of Convenience Tilt In?

30. I now turn to the third test for determination. The question under this limb is to determine which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits. It is also known as balance of convenience. This question is usually answered by determining whether the balance of convenience lies in favour of granting or refusing the application.



31. Courts have established that this third limb comes into play where the Court is in doubt on whether the Applicant is likely to suffer irreparable loss. This rule was recently applied in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the Court of Appeal held as follows;

“... It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

32. This Court is being invited to determine which party will suffer the greater harm from granting or refusing the injunctive reliefs sought. I have carefully analyzed the unique circumstances of this matter. In my view, the most appropriate thing to do in the circumstances is to deny the injunctive reliefs sought, but ensure that the substantive Appeal is heard and determined on a priority basis.

Disposition

33. These are the final orders of the Court;

- a. The Applicant’s Application dated 21st February, 2025 is hereby dismissed with no order as to costs.
- b. The Appeal shall be heard on a priority basis.
- c. The Applicant shall file the Record of Appeal within 45 days of this Ruling.

34. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 31ST DAY OF JULY, 2025.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Mumbi, Advocate holding brief for Omiti Advocate for the Appellant

Mr. Mutua, Advocate for the Respondent

