



**MOA v JAO (Originating Summons E004 of 2023)
[2024] KEHC 1872 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 1872 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
ORIGINATING SUMMONS E004 OF 2023**

RE ABURILI, J

JANUARY 30, 2024

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT

BETWEEN

MOA APPLICANT

AND

JAO RESPONDENT

RULING

1. Vide a Notice of Motion Application dated the 18th day of May 2023, the plaintiff/ applicant herein seeks from this Court the following orders:
 1. Spent.
 2. That this Honourable Court be pleased to issue a mandatory injunction directing the Respondent, his agents, servants and/or employees to open up and/or avail the keys to the matrimonial home to enable the Applicant access the matrimonial house pending the hearing and determination of this Application and the Originating Summons.
 3. That this Honourable Court be pleased to grant a temporary injunction restraining the Respondent whether by himself, his Agents and/or Servants from threatening to and or actually forcefully evicting and/or removing the Applicant from the matrimonial property/ home and their hotel/restaurant establishment situated at Muhoroni pending the hearing and determination of this Application and Originating Summons.
 4. That this Honourable Court be pleased to grant a temporary injunction restraining the Respondent whether by himself, his Agents and/or Servants from charging, selling, alienating, disposing or in any manner whatsoever dealing with the matrimonial properties being Apartment No. 8 on LR No. MN/1/3087 Nyali Flat No. 102 Block B31 on LR No.



209/10775 in South End - No Estate South C, the shares in Kisumu Plot Number 4/74, Land Reference Number Kisumu/Muhoroni/927, Land Reference Number Kisumu/Muhoroni/1270 and Land Reference Number MN/1/3087 in Nyali Mombasa (Apartment No. 8) pending the hearing and determination of this Application and Originating Summons.

5. That this Honourable Court be pleased to grant a conservatory order stopping the Respondent from accessing, transferring and/or dealing in any way without the express order of this Honourable Court and consent of the Applicant, the remainder of the proceeds of the sale of the matrimonial home situate on Land Reference Number 209/3012/4 at Bankers Court on Green Lane off Ngong Road being held in the Respondent's Bank Account Number 110736xxxx at Kenya Commercial Bank Kenya Limited, Head Office in the name of James Asiko Owiro pending the hearing and determination of this Application and Originating Summons.
 6. That this Honourable Court be pleased to make an order directing the Manager-Kenya Commercial Bank Kenya Limited, Head Office to ensure compliance with Prayer Number 5 hereinabove, to wit, that the funds held in the Respondent's Bank Account Number 110736xxxx at Kenya Commercial Bank Kenya Limited, Head Office being the remainder of the proceeds of the sale of the matrimonial home situate on Land Reference Number 209/3012/4 at Bankers Court be preserved pending the hearing and determination of this Application and Originating Summons.
 7. That in the alternative, this Honourable Court be pleased to grant such orders or directions as would preserve the set of circumstances in such a way that this Application and Originating Summons are not rendered nugatory.
 8. That this Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.
 9. That the costs of this application be provided for.
2. Opposing the applicant's Notice of motion, the Respondent filed a Replying Affidavit sworn on the 24th day of May 2023 denying that the properties subject of the applicant's application are matrimonial properties by virtue of them having been acquired by him without the contribution of the Applicant and further, that in any event, the said properties are registered in his sole name.
 3. The respondent contended that the Applicant misled this Court in obtaining the interim orders against him. It was further contended in deposition by the respondent that all the Muhoroni properties are in the name of his late father and that it forms part of the estate of his deceased father and therefore such properties cannot form part of the matrimonial property.
 4. The applicant filed a further Affidavit sworn on the 29th day of May 2023 adducing further documentary evidence to demonstrate that all the properties listed in her application constitute matrimonial property. She deposed that she had immensely contributed in the acquisition of and development of the said properties. She also deposed that she had actually in conjunction with the Respondent and her brother set up a business on the said matrimonial property hence her contribution. She asserted in her depositions that the Muhoroni properties were transferred to the Respondent sometime in February 2023 and that it was therefore misleading for the Respondent to lie that the said properties are in his late father's name and as such subject to succession.
 5. The applicant further deposed that indeed the Respondent had threatened her and locked her matrimonial house in Muhoroni and left with the house keys.



6. On the part of the respondent, contemporaneous with the filing of his Replying Affidavit to the applicant's Application dated the 18th day of May 2023, he also filed an Application dated 25th May 2023 seeking to have the interim orders made by this Court on 18/05/2023 under certificate of urgency varied so that he be allowed to operate his bank account number 110736xxxx held at KCB, Head Office. It was his deposition that he was a pensioner whose sole source of survival was his pension banked in the subject bank account at KCB Head Office and as such freezing or stopping him from accessing the funds in the said account would adversely affect his operations.
7. Both parties filed their written submissions which this court has considered as the submissions mirror the grounds and affidavits sworn in support of and against the respective applications which are being considered simultaneously in this ruling.
8. In a nutshell, and as was submitted on by the applicant through her counsel on record, the crux of this matter and specifically the order sought by the applicant to stop the Respondent from accessing and/or wasting the funds in the subject bank account was that the Respondent had sometime in November 2022 illegally sold without the consent of the Applicant, one of the matrimonial properties being the matrimonial home at Kenya Banker's Court and that the proceeds of the sale were transferred to the Respondent's said bank account.
9. The Applicant thus upon learning of the alleged sale of the matrimonial property and coupled with the alleged reckless spending and wastage of the family money by the Respondent, the Applicant moved this Court under Certificate of Urgency to preserve the proceeds of the sale in the subject Bank account pending the hearing and determination of her Application dated the 18th day of May 2023 and the Originating Summons dated the same day.
10. The applicant in her application thus sought to preserve the said funds in the subject bank account from being dissipated by the Respondent at the expense of the children of their marriage which she claims is now irretrievably broken down and that Divorce proceedings have already commenced at the Kisumu Chief Magistrates Court vide Kisumu Chief Magistrate's Court Divorce Cause No. E022 of 2023.
11. The Respondent admitted in his supplementary affidavit sworn on 2nd June, 2023 that he had sold the matrimonial property at Kenya Banker's Court but contended that the said property was his property registered in his sole name and as such, he did not require to explain to the Applicant what he did with the proceeds of the sale.
12. The applicant accused the respondent of mischievously failing to provide the bank statements for the relevant period in this suit being the 16th day of November 2022 when the proceeds of the sale were transferred to the subject bank account to the 18th day of May 2023 when this suit and application were filed and that he instead meanly opted only to attach his bank account statement for the month of May 2023 which also clearly shows that the Respondent had already transferred a substantial part of the proceeds of the sale of the matrimonial property at bankers court and only a sum of Kshs 905,054.95 was remaining in the said Bank Account, and failed to explain where the proceeds of the sale were transferred to by misleading this court in his Application dated the 24th day of May 2023 that he is a pensioner who solely relies on his pension payable to the Bank Account frozen by this Court.
13. The applicant submitted that the Respondent had approached this Honourable Court with unclean hands and is not deserving of the orders he was seeking in his application dated 24th day of May 2023.
14. On whether the Applicant had met the conditions for the grant of interlocutory injunction, the applicant submitted that these conditions were well set out in the leading case of GIELLA VS.



CASSMAN BROWN (1973) E.A 358 and later reiterated in MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD& 2 OTHERS [2003] ECLR where it was held inter alia, that:

“The conditions for the grant of an 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.”

15. On whether the Applicant had established a prima facie case with a probability of success, reliance was placed on the case of *Mawa Family Limited v Amica Savings & Credit Co-operative Society Ltd & another* (Civil Case 2 of 2022) [2022] KEHC 635 (KLR) (16 June 2022) cited with approval the holding in *MRAO LTD -VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS* [2003] KLR 125 that a prima facie case:

“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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues, but 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. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right must be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. See also the holding in *Stanley Anyamba Ageyo & another v Musa Matu Riunga & 5 others* [2022] eCLR.”

16. Further reliance was placed on the case of *Aldofo Guzzini & Another v Emmanuel Charo Tinga* [2006] eCLR where it was held that: In considering whether a prima facie case has been established, the court must ensure it does not go into the merits of the parties respective cases as that is reserved for the trial of the dispute. At this stage the court is only concerned with a prima facie case as defined in the case of *Mrao Ltd v First American Bank of Kenya Ltd* (supra).
17. The applicant submitted that she sought for interlocutory orders specifically to protect/preserve the matrimonial property from wastage or disposal pending the hearing and determination of the Application and the matrimonial cause filed before Court, as there was a real risk and danger of the Respondent continuing to waste, dissipate and or transfer the remaining matrimonial properties and squandering the proceeds thereof hence leaving the Applicant and the children of the marriage homeless and with no means of survival.
18. She submitted that she had demonstrated that the respondent was a reckless spender and was an alcoholic hence there was dire need for this Court to grant the orders sought in the Applicant’s application dated the 18th day of May 2023 pending the hearing and determination of the matrimonial cause to preserve the matrimonial properties.
19. It was submitted that as her marriage to the respondent had irretrievably broken down, she had established a prima facie case with a high chance of success, given that she had commenced the divorce proceedings against the Respondent vide Kisumu Chief Magistrate’s Court Divorce Cause No. E022 of 2023-



20. She emphasized that she had also demonstrated that the properties sought to be protected are matrimonial properties to which she has substantially contributed in their acquisition by taking loans and also contributing directly from her salary to improve the said properties and put them in the developed state they were at now.
21. She maintained that she had discharged her burden of proof by demonstrating to this Court that the Respondent actually illegally and without her consent sold one of the matrimonial properties being the matrimonial home at Banker's Court where the family used to live and the proceeds of the sale transferred to the Respondent's bank account held at KCB Head Office in November 2022, which fact had not been rebutted by the Respondent in his pleadings wherein he admits to selling the matrimonial property as averred by the Applicant.
22. The Applicant further submitted that the Respondent had since learning of the divorce proceedings become extremely hostile towards the Applicant and had threatened the Applicant to leave and/or vacate their matrimonial home in Muhoroni where the Applicant had been residing and established a hotel/restaurant which she runs situated on the matrimonial property. That the threats by the Respondent to forcefully evict/remove the Applicant from her matrimonial home and her business establishment were reported by the Applicant at Muhoroni Police Post vide OB Number 11/16/05/2023, which material allegations the Respondent had not rebutted in his pleadings.
23. In view of the foregoing, it was submitted that this condition has been met by the Applicant hence this court should grant the interlocutory orders sought pending the hearing and determination of the matrimonial cause filed by the Applicant.
24. On whether the Applicant will suffer irreparable injury which would not be adequately compensated by an award of damages, It was submitted on behalf of the applicant that the orders sought by the Applicant are of the nature of, firstly protecting her person from being evicted from her matrimonial home and secondly protecting/preventing the wasting, disposal and/or selling of the matrimonial property pending the hearing and determination of the matrimonial cause filed herein. As such, it was submitted that the threats issued by the Respondent towards the Applicant if not stopped have the effect of forcefully evicting the Applicant from her matrimonial home which she has lived in since she retired from her employment and where she has further spent extensively in establishing a hotel/Restaurant business which she operates and thus the urgency of seeking the orders to stop the Respondent from making the threats real.
25. Secondly, that the applicant had already demonstrated to this Court that the Respondent is a pensioner who has now formed the habit of selling and/or disposing off the matrimonial properties available to fund his reckless lifestyle, which facts have not been rebutted or disputed by the respondent. Further, that the respondent had unilaterally sold one of their matrimonial home at Bankers Court sometime in November 2022 and the proceeds of sale amounting to a sum of Kenya Shillings Thirty-Seven Million, Seven Hundred and Seventy and Fifty-Five Shillings (Kshs 37,770,055/=) were paid to the Respondent vide a bank transfer from his lawyer to the

Respondent's Bank Account Number 110736xxxx held at Kenya Commercial Bank Kenya Limited Head Office, in a period of less than six months yet as per the Respondent's own evidence placed before this Court, it is clear that the balance on the said bank account is only Kshs 905,054/= and that the Respondent had not offered to this court any explanation regarding the whereabouts of the proceeds of the sale choosing to state that he does not owe any explanation as to the said proceeds of sale as the property was registered in his sole name.



26. It was therefore submitted that if the injunctive orders sought are not granted then by the time matrimonial cause is heard and determined, all the matrimonial properties will have been disposed leaving the Applicant and the children of the marriage homeless and with no funds for survival at all and at that time the Respondent will not be in a position to raise any damages if ordered to.
27. The applicant's counsel submitted that this is a perfect case where the Applicant will suffer irreparable injury which cannot be adequately compensated by an award of damages.
28. On whether the court is in doubt and therefore in whose favour the balance of convenience tilted, it was submitted that it was clear from the above submissions that the same tilts in favour of the Applicant, who has demonstrated that she direly needs to protect the matrimonial property from wastage since the children of the marriage who still depend on the Applicant and who are jobless and in school will depend on the said matrimonial property for their future survival.
29. Further, that allowing the Respondent to forcefully kick out the applicant from her matrimonial home would actually render the Applicant homeless yet she is the legally married wife of the Respondent and who deserves in the eyes of the law and customary laws and usage of the Luo people to occupy the matrimonial home in Muhoroni.
30. Additionally, that the applicant has heavily expended on establishing the hotel/restaurant business which she operates on the said matrimonial home and it would be unfair to forcefully evict or even evict her from the said property.
31. The applicant therefore urged this court to grant her an interlocutory injunction and that the same ought to be extended until hearing and determination of the Originating Summons.
32. In opposition to the respondent's application dated 24th May 2024, it was submitted that the prayer for varying this prayer sought by the Applicant is not tenable as this Court is being asked to vary an order that does not exist at all. That this Court did not issue any order on the 18th day of May 2023 for it to be called upon to vary it. To this extent, it was submitted that the Respondent/Applicant's Application dated 24th day of May 2023 should be dismissed in limine.
33. It was submitted in the alternative that in any event, the respondent had not established the principles for setting aside and/or varying of the interlocutory injunction granted by this Court on the 19th day of May 2023. Reliance was placed on the case of *Kiimeu Kieti & 184 Others v Kenya Meat Commission* [2015] e KLR where the Court set out the principles upon which a court can use as a basis of varying injunctions as follows:
 - a. The applicant must show inter alia that the conditions prevailing at the time of making the order have changed or are different from those prevailing now.
 - b. There is justification and necessity to set aside an interlocutory injunction.
 - c. The applicant shows that prejudice has been caused to the applicant.
 - d. The interlocutory injunction is obtained by misrepresentation or concealment of material facts.
34. It was submitted that the Court in the above cited case pronounced itself as follows:-

“ A court has discretion, on an application by any party dissatisfied by that order, to discharge or vary an injunction order pursuant to Order 40 Rule 7 of the Civil Procedure Rules. The essence of the provisions for discharging an injunction order was stated in the case of



1 wherein the Court held as follows:-

- “1. An interlocutory injunction is given on the Court’s understanding that the defendant is trampling in the rights of the Plaintiff.
2. 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.
3. The orders of injunction cannot be used to intimidate and oppress another party. 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....
- ... The law permits that before the court can exercise its discretion, it has to differentiate what is shadow and what is substance in order to exercise the discretion judicially. However, a Court can only revert to the discretion when there are valid reasons, excuses, mistakes and errors...but when there is no proper explanation, then the court’s power are limited....”
- 7.

It is also settled law that an interlocutory injunction will be set aside or discharged if it has been obtained by means of misrepresentation or concealment of the material facts. See in this regard *Ragui v Barclays Bank of Kenya Ltd* [2002] 1KLR 647 and *Star Publication Limited & Another vs Ahmednasir Abdullahi & 5 Others* [2015] EKLR.

35. It was therefore submitted that the above threshold set up by this Court has not been discharged at all by the Respondent. Firstly, that the Respondent has not demonstrated by any evidence that this Court was misled by the Applicant in obtaining the orders sought to be varied.
36. That it is the Respondent in his application, who has totally misled this Court with falsehoods and further concealed material/relevant facts in his knowledge and possession which would have assisted this Court to arrive at a decision on merit. That he misleads this Court that he solely relies on the bank account for his survival yet he fails to explain where he transferred the Kenya Shillings Thirty-Seven Million, Seven Hundred and Seventy and Fifty-Five Shillings (Kshs 37,770,055/=) paid to the Bank Account Number 110736xxxx held at Kenya Commercial Bank Kenya Limited Head Office only in November 2022. That it is less than six months since the said amounts were transferred to the Respondent’s Account and yet as per the Respondent’s own evidence placed before this Court, it is clear that the balance on the said bank account is only Kshs 905,054/=. That it was not true that the Applicant’s only source of survival is the funds in the subject bank account. That no misrepresentation has thus been proved and/or demonstrated by the Respondent to warrant this Court to vary its orders of the 19th day of May 2023.
37. That this Court has clearly held that the only time it can revert to the discretion to vary, set aside or discharge an injunction order is when there are valid reasons, excuses, mistakes and errors proved and/or demonstrated by the party seeking the orders to be varied and/or set aside such that where there is no proper explanation offered by the Applicant, then the court’s power are limited.
38. The applicant urged this court to grant her the orders sought in her application and to dismiss the respondent’s application dated 24th May, 2023 with costs.



39. On the part of the respondent, it was submitted, opposing the application by the applicant dated 18th May 2023 that the applicant had not demonstrated that the respondent intended to sell the properties named, that the properties listed were bought by him using his earnings as an employee of Kenya Commercial Bank, that the said properties were registered in his sole names while some were registered in his father's names, that the applicant had not contributed to the purchase of the said properties that she claims are matrimonial properties, that the divorce proceedings were still pending determination hence division of matrimonial properties cannot be done, which division would be dependent on evidence of contribution to the acquisition of the said properties, that the Bank Account with KCB as frozen was a pensions account which should not be interfered with.
40. On the application dated 24th may 2023, it was submitted that the account with KCB was his personal account by which he receives his pension hence he was unable to meet his daily needs if the Bank account is frozen then his livelihood and that of his children who depend on the account would be affected.

Determination

41. I have considered the two applications and as stated earlier, I shall determine them simultaneously. The main issues for determination are whether the application for injunction is merited and secondly, whether the court should vary the orders made on the application dated 18th May, 2023.
42. Some preliminary issue has to be resolved first being, whether there are orders made on 18th May 2023. The applicant submitted that there is no such order. I agree. However, there is an application dated 18th May 2023 upon which interim ex parte orders were made on 19th May 2023. That being the case, the issue of orders made on 18th May 2023 does not arise and this court is bound by its record which is apparent. For that reason, the court will consider the application dated 18th May 2023 on its merits regarding the interim ex parte orders made on 19th May 2023.
43. Onto the issue of whether the applicant has made out a case for the grant of the orders of interlocutory injunctions sought in her application dated 18th May, 2023, the principles for grant of temporary injunction are now well settled. In the case of *Giella vs Cassman Brown* [1973] EA 358, the court stated the conditions for grant of interlocutory injunctions as follows:

“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 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.”
44. A prima facie case was defined in the case of *Mrao Limited vs. First American Bank of Kenya & 2 Others* [2003] e KLR as follows:

“A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”
45. In the instant case, the applicant has pleaded, deposed and submitted that she has a prima facie case in that she has demonstrated that she is married to the respondent, that she has filed for divorce due



- to their irreconcilable differences, that she contributed to the acquisition of the properties listed in the application and the suit, although the said properties are registered solely in the names of the respondent, that she resides on the Muhoroni property, that one of the properties in Muhoroni is where she resides and carries on restaurant business for her upkeep and that of her children of the marriage and that the respondent has not only sold one of the Nairobi properties which she lays claim to as matrimonial property, being at Bankers Court without her consent, but that he also did lock her out of the matrimonial house in Muhoroni as per her own affidavit and that sworn by her brother.
46. The applicant argues that the status quo should be maintained to protect her interest before the dispute herein and the divorce case are fully determined.
 47. She has annexed documents showing in whose favour the properties in question are registered. She also accuses the respondent of failing to file a bank statement showing that the proceeds of sale of the Bankers Court House were deposited in the said account with KCB, Headquarters.
 48. The respondent on the other hand denies the claims made by the applicant saying that all the properties in question were acquired by him including the sold out property in 2022 and that the bank account which was frozen by this court on account that it held the proceeds of sale of the Bankers Court property is his pension account, the only source of his livelihood hence it should be reopened. He urges this court to set aside the orders freezing the said Bank account.
 49. From the above summary, I find that the issues raised on whether or not the properties listed in the OS and the application by the applicant are matrimonial properties and or whether the applicant resides on matrimonial property on which she also carries out hotel business which is the source of her livelihood and the livelihood of her children, are arguable issues and raise a prima facie case, which case need not necessarily succeed. This court will therefore not delve deep into the arguability of the said case as that will prejudice the parties' positions before evidence is tendered on oath and witnesses are cross examined on the same.
 50. As to whether the Plaintiff/ Applicant shall suffer irreparable injury should the temporary injunction not be granted, the applicant has argued that the Respondent in 2022 sold off one of the matrimonial properties situate in Bankers Court, Nairobi without her consent and that he had also chased her out and locked her out of and continues to threaten to chase her from the matrimonial house in Muhoroni to her detriment and that of her children as that is where she runs and a hotel business thereby eking a living for herself and her children since the respondent does not provide for them as a family.
 51. *The Constitution* at Article 43 guarantees every person the right— (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; (b) to accessible and adequate housing, and to reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quality.
 52. At this stage, there is no material to suggest that the applicant is a stranger to the respondent or that she has imposed herself to him as his wife. *The Constitution* also guarantees married couples equal rights under Article 45(3). Under the said Article, 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. From the material placed before this court and without delving into the merits thereof, I am satisfied that unless the properties listed in the OS and the application are preserved pending the hearing and determination of these proceedings, the said properties which are registered in the names of the respondent are likely to be disposed of which disposal will render the applicant herein a pious explorer in the judicial process as there will be nothing left to be declared to be matrimonial property. That in itself will prejudice the applicant and the damage or injury and loss cannot be quantified and compensated by way of damages adequately.



53. However, regarding the Bankers Court property, I note that it was sold in 2022 and that the applicant does not have to wait until May 2023 after the proceeds thereof had been utilized for other purposes not disclosed and even dissipated before approaching this court. The KCB account held by the respondent does not show that any such proceeds of sale of the said property were deposited therein and the burden of proof lay with the applicant to avail evidence of the depositing of the said proceeds in the account or seek orders for accounts to be rendered and not for the respondent to prove otherwise. Furthermore, the respondent did annex copy of the Bank statement showing that the said account is a pensions account in which no proceeds of sale of the disputed property was deposited. This court resists the temptation to attach a pensioner's account which is a source of his livelihood as he is not engaged in any other gainful employment and therefore his alleged reckless social life cannot be a bar for him to access his final dues post active employment period. In addition, these being matrimonial property proceedings and not alimony pending litigation for divorce proceedings, this court finds that if the applicant is interested in being financially maintained by the respondent then she can apply before the Divorce court for such orders and not to subject the respondent to hardship and pecuniary embarrassment
54. It is for that reason that I find and hold that the respondent's application dated 24th May 2023 is merited. It is hereby allowed to the extent that the orders made on 19th May 2023 freezing the respondent's Bank Account No..... held at KCB Headquarters which is a pension account are hereby lifted and set aside to allow the respondent to operate the said account.
55. On whether the balance of convenience tilts in favour of the applicant, I find that as far as preservation of the listed properties, other than the KCB Bank Account is concerned, the balance of convenience tilts in favour of the applicant who is not the registered proprietor of the listed properties, which she claims are matrimonial properties.
56. In the end, and for the above reasons, I find and hold that the applicant has demonstrated that she has a prima facie case with probability of success against the respondent to the extent that if she is evicted from her residence at Muhoroni where she also carries out restaurant business for her livelihood, the place she calls her matrimonial home, and or the properties listed in the suit and application herein are disposed off, she will suffer irreparable damage which cannot be adequately compensated by an award of damages.
57. Accordingly, I grant her prayers Nos. 2,3 and 4 of the Notice of Motion dated 18th May 2023 pending the hearing and determination of this suit in order to preserve the subject matter of the OS.
58. Each party to bear their own costs of the two applications.
59. Mention on 29th February, 2024 for pretrial conference and directions. Both parties to comply with Order 11 of the Civil Procedure Rules.
60. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE

