



**MK v ND (Matrimonial Cause E013 of 2023)
[2024] KEHC 4136 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4136 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MATRIMONIAL CAUSE E013 OF 2023**

G MUTAI, J

MARCH 15, 2024

BETWEEN

MK APPLICANT

AND

ND RESPONDENT

RULING

Introduction

1. The Applicant and the Respondent were previously married under the *Marriage Act*. Their marriage was solemnized at the Registrar's Office in Mombasa on 12th November 2002. The marriage irretrievably broke down and was dissolved by the order of the Court. The Certificate of Decree Absolute was issued at Msambweni Law Courts on 1st December 2023.
2. Vide a Notice of Motion dated 14th December 2023, the Applicant sought the following 9 orders:-
 1. Spent;
 2. That an order of temporary injunction do issue restraining the Respondent from evicting and or denying the Applicant free access, use and quiet occupation of the parties' matrimonial home constructed on Land Reference No Kwale/ Shimoni Village Squatter Scheme/699 pending the hearing and determination of the suit herein;
 3. Spent;
 4. That this Honourable Court be pleased to make an order of temporary injunction restraining the Respondent from threatening, intimidating or aiming near the party matrimonial home constructed on land parcel Kwale/Shimoni Village Squatter Scheme/699 or in any manner whatsoever, within a distance of 100 metres on all directions pending the hearing and determination of this suit;



5. Spent;
 6. That this Honourable Court be pleased to issue an order of temporary injunction restraining the Respondent by himself, his employees, servants and/or agents from selling, disposing off, charging, mortgaging, pledging, alienating, wasting, damaging and/or otherwise howsoever interfering with all that piece of parcel of land known as Kwale/Shimoni Village Squatter Scheme/699, Kwale Shimoni Village Squatter Scheme/55, Kwale/Shimoni Village Squatter Scheme/248, pending the interpartes hearing of this suit;
 7. That due to this quick nature of depreciation, this Honourable Court be pleased to make an order that motor vehicle registration KCY 494T Toyota Probox and motorcycle registration No. KMGE 819S, bought with joint finances between the parties herein and registered in the name of the Respondent, be forthwith valued, then sold out, and proceeds thereof be shared among the parties herein on a 50:50 basis;
 8. That this Honourable Court do make any further orders as it may deem fit and just to grant; and
 9. That the costs of the application be borne by the Respondent.
3. The application is based on grounds listed in the said motion, the Supporting Affidavit of the Applicant as well as the documents annexed to the said affidavit. The Applicant asserted that from the year 2002, she was in stable employment and carried out a business and, as a result, had a regular income with which she greatly and immensely contributed to the acquisition of the family properties. She averred that the Respondent was in the process of disposing and or parting away with the said properties with a view to defeating the Applicant's claim.
 4. Ms Kinama stated that if the orders sought in the said Motion were not granted, she would suffer irreparable loss and damage.
 5. The application was opposed by the Respondent. Mr Njole Diyo filed an Affidavit in Reply sworn on 11th January 2024. In the affidavit, he accused the Applicant of being economical with the truth by excluding certain properties from the list of matrimonial properties. He averred that the excluded properties were matrimonial properties and ought, therefore, to be shared equally. Mr Diyo stated that Title Nos. Kwale/Shimoni Village Squatter Scheme/55, 248 and 699 were "neither jointly owned nor do the same form part of the matrimonial property the same having been acquired in 2000 prior to marriage." He accused the Applicant of having fraudulently caused her name to be included as a co-owner during the registration process. Lastly, Respondent accused the Applicant of disobeying Court orders on the grounds that she changed locks of the house, removed a motor vehicle and broke into house rooms.
 6. The Applicant filed a further Affidavit in which she denied the averments of the Respondent.

Hearing of the Application

7. On 15th January 2024, I directed that the application be canvassed by way of Written Submissions and gave timelines within which the same would be done. Both parties filed Written Submissions, which I shall briefly restate below:-



Submissions of the Applicant

8. The Applicant's Submissions are dated 14th February 2024. In the said submissions, it was urged that Title No Kwale/Shimoni Village Squatter Scheme/699 was her matrimonial home. She submitted that the Respondent became abusive to her after instituting the divorce cause.
9. Her counsel referred the Court to a plethora of decisions on principles that guide that Court while considering an application for an injunction. The cases cited were *East Africa Industries Ltd v Trufoods* [1972]EA420, *Giella v Cassman Brown & Co Ltd* [1973]EA358, *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* [2014]eKLR, *Airland Tours & Travel Ltd v National Industrial Credit Bank*; Nairobi HCC No 124 of 2002, *Esso (Kenya) Ltd v Mark Makwata Okiya* [1992]eKLR, *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003]eKLR and *Plus Kipchirchir Kogo vs Frank Kimeli Tenai* [2018]eKLR.

Submissions of the Respondent

10. The Respondent, on his part, filed Written Submissions dated 5th February 2024. The Respondent's submissions are in respect of the main suit. The said submissions urge in the penultimate paragraphs that:-

“your honour, the Respondent avers that the Applicant never contributed to the acquisition of any of the assets to the extent she wants to enjoy the same at all

In light of the foregoing we urge the honourable Court to disregard the Applicant's prayer for 50:50 distribution and base the distribution on the parties' contribution.”

11. I have considered both sets of submissions and will now turn to my analysis and determination.

Analysis and Determination

12. The principles applicable in respect of injunction applications are well settled. An applicant must satisfy the following three requirements: -
 - i. She must establish that there is a prima facie case;
 - ii. Demonstrate that she will suffer irreparable injury if a temporary injunction is not granted; and
 - iii. Ally any doubts as to (b) by showing that the balance of convenience is in her favour (see *Nguruman Ltd versus Jan Bonde Nielsen & 2 Others* (supra).
13. As was stated in the *Nguruman Ltd case* (supra), the 3 requirements must be satisfied sequentially. In the words of the Court: -

“the three conditions and stages are to be applied as separate, distinct and logical which the applicant is expected to surmount sequentially...”

1. I am not at this point required to determine the parties' respective rights. I am, however, called upon to determine whether a prima facie case exists. The Court of Appeal in *Mrao Ltd versus First American Bank of Kenya Ltd & others* (supra) defined a prima facie case as being one “on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by defence... In a civil case, 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 as to call for an explanation or rebuttal from the latter...”

14. Does a prima facie case in this matter? In my view, it does. The Applicant has produced photographs of what she says is her matrimonial home. She was married to the Respondent as evidenced by the divorce documents that she produced. There is evidence of complaints made by her against the Respondent. It does appear to me that the suit property could be matrimonial property. In the circumstances, I find that the first requirement has been fulfilled.
15. Having found that there is a prima facie the Applicant must surmount the next test. Is she at risk of suffering irreparable injury if an injunction is not granted? From the reports that appear to have been made, there is a likelihood that the Applicant may be evicted from what she says has been her home for 23 years. The Applicant is 60 years old and has no children. Her eviction would inflict on her an injury, which, in my opinion, is irreparable. I am therefore persuaded that the second requirement has been met.
16. I am in no doubt that an injunction ought to be issued. Even if I was I not, the Applicant appears to be in possession of the suit property presently. In my view, it would be fair and just to let her remain in occupation thereof until this suit is heard and determined.
17. In the interest of justice the Court will fast-track the matrimonial cause so that the matter is determined as soon as possible.

Disposition

18. Flowing from the foregoing, the Court is satisfied that interim relief should be issued. In the circumstances, I order as follows:-
 1. That an order of temporary injunction is issued restraining the Respondent from evicting and or denying the Applicant free access, use and quiet occupation of the parties' matrimonial home constructed on LR No Kwale/ Shimoni Village Squatter Scheme/699 pending the hearing and determination of the suit herein;
 2. That an order of temporary injunction is hereby issued restraining the Respondent from threatening, intimidating or coming near the parties' matrimonial home constructed on land parcel Kwale/Shimoni Village Squatter Scheme/699 or in any manner whatsoever, within a distance of 100 metres in all directions pending the hearing and determination of this suit; and
 3. That this Honourable Court be pleased to issue an order of temporary injunction restraining the Respondent by his employees, servants and/or agents from selling, disposing of, charging, mortgaging, pledging, alienating, wasting, damaging and/or otherwise howsoever interfering with all that piece or parcel of land known as Kwale/Shimoni Village Squatter Scheme/699, Kwale Shimoni Village Squatter Scheme/55, Kwale/Shimoni Village Squatter Scheme/248, pending the interpartes hearing of this suit.
19. As this is a matrimonial matter, each party shall bear their own costs.
20. Orders accordingly.

DATED AND SIGNED THIS 15TH DAY OF MARCH 2024 AT MOMBASA.

GREGORY MUTAI

JUDGE



In the presence of: -

Mr. Oloo, for the Applicant;

Mr. Odundo, for the Respondent; and

Arthur - Court Assistant.

