



**EMM v MNM (Civil Appeal E032 of 2022) [2024] KEHC 4849 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4849 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E032 OF 2022  
A. ONG'INJO, J  
APRIL 25, 2024**

**BETWEEN**

**EMM ..... APPELLANT**

**AND**

**MNM ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. A. M. Obura (Mrs)(CM) delivered on 8th July 2022 in Voi Chief Magistrate's Court Case No. E008 of 2022)*

**JUDGMENT**

1. The Respondent MNM vide Complaint dated 20<sup>th</sup> January 2022 sued the Appellant praying for orders of permanent injunction restraining the Defendant in person or his servant, agent or any representative from evicting, removing or chasing the Respondent from the matrimonial house pending the hearing and determination of the issue on the matrimonial property. The Respondent also prayed for costs of the suit at court rates.
2. The brief background of the cause was that a judgment was made dissolving the marriage between the Appellant and the Respondent on 29<sup>th</sup> December 2021 in Voi Divorce Cause No. E020 of 2021. That upon the Appellant obtaining the Decree Nisi while in the company of the area chief, one Mr. Mwakio, and an unknown man purported to be a policeman proceeded to the Respondent's house with the aim of evicting her. That they had a long heated debate and the chief managed to convince the Appellant to take away his padlock and leave the matrimonial home where the Respondent lives with the issues of the marriage. The Respondent complained that the Appellant was convinced to leave but he refused to open the back door and he continued going to the matrimonial house late in the night with threats that the Respondent should leave his house. The Respondent said that the threats had made the last born child to live in fear. That the Respondent had removed the gate to the house and disconnected water frustrating her to leave the matrimonial home. She therefore feared for her life and the life of the children and could therefore not live in peace.



3. The Trial Magistrate found that there was undisputed evidence that the Respondent lived in the suit property with the children of the marriage while the Appellant worked away from home and that pursuant to Section 6 of the *Matrimonial Property Act*, the house in question qualifies as a matrimonial property on a balance of probability.
4. The Trial Magistrate considered that the Respondent was living with the children in the house in question and found that she would be exposed to arbitrary eviction if she is not protected by the court before the issue of distribution of the property is resolved.
5. The prayer by the Respondent for injunctive orders was therefore issued for a period of 6 months while parties attempt to resolve the dispute over division of matrimonial property. The OCS, Mwakitau Police Post was directed to ensure compliance with the order to prevent any breach of the peace. The trial court encouraged parties to pursue an amicable distribution of matrimonial property through mediation.
6. The Appellant was aggrieved by the decision of the Trial Magistrate and filed Memorandum of Appeal dated 8<sup>th</sup> August 2022 and brought the appeal herein on the following grounds: -
  1. That the learned magistrate erred in law and in fact in adjudicating and making a determination in paragraph 26 of the Judgment that the property is matrimonial property in a matter which was not placed before her for determination.
  2. That the learned magistrate erred in law and in fact by issuing an injunction without finding first whether the Respondent was entitled to the permanent injunction sought having also found in paragraph 29 of the Judgment that no proper application or suit was filed for division of matrimonial property.
  3. That the learned magistrate erred in law and in fact by issuing an injunction pending the determination of the issue of matrimonial property yet there is no matrimonial dispute, suit or application filed and/or pending in any court of law.
  4. That the learned magistrate erred in law and in fact in paragraph 23 of the Judgment by failing to adequately evaluate the Respondent's exhibit thus being misled into relying on a false lease agreement which is now a subject of investigations.
  5. That the learned magistrate erred in law and in fact by issuing an injunction sitting on a deceased person's land without representation of the estate of the deceased person.
  6. The Appellant sought for orders that the appeal be allowed with costs, the judgment of Hon. A. M. Obura (Mrs)(CM) delivered on 8<sup>th</sup> July 2022 in Voi Chief Magistrate's Court Case No. E008 of 2022 be set aside in its entirety.
7. The appeal has been canvassed by way of written submissions. The Appellant's submissions are dated 13<sup>th</sup> December 2022 and they are to the effect that there was no prayer in the pleadings for a declaration to be made by the court to determine whether the suit property was a matrimonial property. Therefore, the Trial Magistrate walked away from the pleadings.
8. The Appellant also submitted that the Respondent had not established a prima facie case to warrant the grant of an injunctive relief. He said that the suit property is the only home that he has and he had no intention of disposing the same and that is why the Respondent had not bothered to place any caution on the property.



9. The Appellant also contended that the trial magistrate was wrong in issuing an injunctive order on a property belonging to the deceased person in the absence of the representative of the deceased owner of the land in question.
10. The Respondent's submissions dated 20<sup>th</sup> December 2022 relate to a Notice of Motion application date 8<sup>th</sup> August 2022 filed by the Appellant seeking stay of execution of the judgment in Voi CMCC No. E008 of 2022 pending hearing and determination of the appeal herein.
11. When this matter came up on 11<sup>th</sup> November 2022, directions were taken that the appeal should be heard by way of written submissions and parties were given 30 days each to file and serve their written submissions. It is true that parties were referred for mediation pending judgment on the appeal but the Mediator's Report dated 4<sup>th</sup> January 2022 indicates that a settlement was not reached as the Appellant maintained that the Respondent did not contribute to the costs of all the 8 assets that were fronted.
12. The Respondent's submissions are therefore related to an application and not the appeal herein and will not be helpful in determination of the appeal.

### **Analysis and Determination**

13. The mandate of this court was settled in *Francis Lokadongoy Lokogy v Reuben Kiplagat Kiptarus* [2020] eKLR where it was held as follows: -

As this is a first appeal, this court is under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching its own conclusions in the matter. In carrying out this duty this court has to remember that it has no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. The court has also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanor of witnesses. In a nutshell a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement.
14. Having reevaluated the evidence and judgment in the trial court and having considered the grounds of appeal and submissions by the parties, the issues for determination are: -
  - a. Whether the decision of the trial magistrate was based on evidence pleaded by the parties.
  - b. Whether prima facie evidence was established for the issuance of injunctive orders.
  - c. Whether orders granted amounted to intermeddling with the estate of the deceased person.
15. The reason why the trial magistrate issued the injunctive orders was because of evidence of bitterness and animosity between the parties as well as evidence of damage to the matrimonial house and other properties belonging to the parties and the fact that the Respondent was occupying the house in question with the children of the dissolved marriage. It was considered view of the court that the hostility between the parties would expose the Respondent to arbitrary eviction if she is not protected by the court before the dispute over distribution is resolved.
16. The orders granted by the court were capped to last for 6 months to allow the parties to commence matrimonial property proceedings. The said 6 months were to lapse on 8<sup>th</sup> January 2023.



17. Whether the trial magistrate was right in granting injunctive orders, it is observed and rightly so that there was obvious bitterness, animosity and hostility between the parties that required protection of the Respondent and the children of the dissolved marriage from the adverse actions of the Appellant. The court had the duty to hold those adverse actions and protect the Respondent. This court therefore finds that a prima facie case was established to warrant a grant of injunctive orders by the trial magistrate.
18. It is true that the issue of whether or not the house in which the Appellant, the Respondent and the children were living was a matrimonial house was not before the trial magistrate for adjudication but that is the only place that the Respondent was staying and she needed to be protected by the court pending determination of whether or not it was a matrimonial house or whether she made any contribution towards construction of the said house. The trial magistrate therefore rightly safeguarded the interest of the Respondent and the children of the marriage pending litigation on the issue of matrimonial property.
19. This court finds that the appeal lacks merit as orders of the trial court lapsed on 8<sup>th</sup> January 2023 and there were subsequently no orders to set aside. Each party to bear their own costs of the appeal. 14 days right of appeal explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 25<sup>TH</sup> DAY OF APRIL 2024**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

In the presence of: -

Otolo- Court Assistant

Appellant present in person

Respondent present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

