



FM v EMM (Matrimonial Cause 1 of 2018) [2024] KEHC 3984 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MATRIMONIAL CAUSE 1 OF 2018
FR OLEL, J
APRIL 23, 2024**

BETWEEN

FM APPLICANT

AND

EMM RESPONDENT

RULING

A. Introduction

1. Before court for determination is the Notice of Motion Application dated 2nd November, 2022 brought pursuant to Section 2, 6 (2), 7, 12 (1) and (2), 14 of the *Matrimonial Property Act* 2013, Order 40 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act* and all other enabling provision of law, and seeks for orders that:
 - a. That this application be certified urgent and be heard ex-parte in the first instance.
 - b. Spent.
 - c. That a temporary injunction be and is hereby issued restraining the respondent by himself, servants, agents and/or representatives or whosoever from entering into, blocking, denying access and/or disposing of or in any other manner interfering with the applicant’s peaceful and quiet enjoyment of residential houses build on land parcels Machakos/Katangi 678, 679 and Kinyatta/Ikombe “B”/17 pending hearing and determination of this suit.
 - d. Spent.
 - e. That the Applicant be given unlimited access to all the properties that are subject of this suit (as listed out in paragraph 4 of applicant’s supporting affidavit) pending hearing and determination of this suit.



- f. That a temporary injunction do issue restraining the Respondent from selling, leasing, letting, charging, alienating, transferring or completing any conveyance in the all properties that are subject of this suit (as listed out in paragraph 4 of the applicant’s supporting affidavit) pending hearing and determination of this suit.
 - g. Spent.
 - h. That the Respondent be held financially responsible for any of the personal items of the applicant found to be lost or damaged and that the Respondent be compelled to compensate the Applicant at a rate to be determined by the court.
 - i. That costs of this application be provided for.
 - j. Any other order this Honourable Court would deem fit and just to grant.
2. The application is supported by the grounds on the face of the said application and the Supporting Affidavit and further Affidavit of the Applicant Francisca Mutinda dated 2nd November, 2022 and 27th January, 2023 respectively while the same is opposed by the Defendant/Respondent who filed his Replying Affidavit dated 26th November, 2022.

B. The Application

3. The Applicant avers that she is the wife of the Defendant/Respondent and had resided together from 1986 to 2017. During this period she contributed monetarily and otherwise in acquisition and development of all the properties the subject of this suit, though registered in the name of the Respondent, but intended to be for her use and benefit of the rest of the family. She further averred that they had built their matrimonial home/residential home on land parcel No. Machakos/Katangi 678 and 679 and also Kinyatta/Ikombe ‘B’/17.
4. On 27th October 2022, when she arrived at their matrimonial home, she found that the normal padlocks which were used had been broken and replaced by new padlocks. She had also found a newly employed caretaker and when the Respondent later arrived home, he chased her away. Further on 28th October, 2022 she had gone to their other matrimonial home at Ikombe and gave her nephew seedlings to plant in the surrounding shamba. Once again the Respondent came and violently chased her away from the home and replaced all padlocks thereat. All these incidents were reported to the police but the Respondent has failed to change his “militant stand”. There was real danger, that unless restrained, the Respondent would go ahead and dispose of the matrimonial property to the detriment of the family. It was therefore necessary to grant the orders sought to enable the parties maintain the status quo.
5. The Respondent did oppose this Application and was particularly vexed by the ex-parte orders issued before this Application was heard on merit as it prejudiced him and was tantamount to the said application being summarily determined. He denied ever marrying the Applicant under Kamba traditional marriage and opposed the averments made by the Applicant at paragraph 4 of her Supporting Affidavit because the said properties listed therein were never jointly acquired as between him and the applicant, while he did not own others listed therein. The Respondent further stated that he was unable to produce the title documents to prove ownership of the properties owned and/or not owned as the applicant had confiscated the same.
6. The Applicant reiterated that most of the suit properties belonged to his father and stressed that the applicant did not make any direct or indirect contribution in acquiring the same. The application as filed was thus frivolous and he prayed that the same be dismissed with costs.



7. That Plaintiff/Applicant did file a further Affidavit where she reiterated the fact that she was married to the Applicant under Kamba traditional marriage, which ceremony was held in 1986. She attached several documents/agreements and title deed to prove that indeed the applicant owned the suit parcels of land and she reiterated that she had contributed directly and indirectly to their acquisition. She and her children therefore had the legitimate expectation to use and benefit from the same. She therefore urged the court to issue the orders sought to prevent the Respondent from transferring the said properties during pendency of this suit.

B. Submissions

Appellants submissions

8. The Applicant did file their submissions dated 31st January 2024, wherein they stated that the main issue for determination was whether the Applicant had established a case to warrant the orders sought. Order 40 rule 1(a) &(b) of the Civil Procedure Rules provided that where the applicant had proved that the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit or it was in danger of being removed and/or disposed off affording reasonable probability that the a party may obstruct or delay the execution of any decree, the court could issue a temporary injunction to restrain such Act or make necessary orders to prevent the wasting, damaging alienation, sale, removal or disposition of the said property. Reliance was placed on *Giella Vrs Cassman Brown* (1973) EA 358 & *Mrao Vs First American Bank Ltd & 2 others* (2003) Klr 125.
9. Based on the evidence presented it had been proved that the parties herein were married and had been blessed with five (5) children. During the period of the marriage, they had acquired several properties, which could all be classified as matrimonial property as defined under Section 6(1) of the Matrimonial property Act. Further section 7 of the Matrimonial property Act did provide that ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. It was therefore prudent to preserve the said properties and prevent their disposal as this suit was being heard and determined.
10. The applicant further averred that they had established their matrimonial home on parcel of land known as Machakos/Katangi 687 and 679 and also at Kinyaatta/Ikombe“B”/17. The respondent had illegally denied the Applicant access thereto since 27.10.2022, by changing all the padlocks to the said homes and giving the workers instructions not to allow the applicant into the said matrimonial properties. This act was illegal and contrary to section 12(3) of the Matrimonial property Act, which expressly out lawed a party to a marriage from evicting the spouse from matrimonial home except through a court order.
11. The applicant thus averred that she had established a prima facie case with high chances of success, further she stood to suffer irreparable, loss and damage should the respondents act remain unchecked as she had contributed to acquisition of the said suit properties and resided thereon for a long period of time. The balance of convenience also tilted in her favour as she was the one who stood to suffer the most should orders sought not be granted. Reliance was placed in the case of *Paul Gitonga Wanjau Vs Gathuthis Tea Factory Company Ltd & 2 others* (2016) eKLR & *Kenleb Cons Ltd Vrs New Gatitu service station Ltd & Another* (1990) eKlr.
12. It was in the interest of substantive justice, for the court to issue the orders sought to ensure that the suit properties are not alienated to the detriment of the Applicant until this suit is heard and determined.



The Respondents Submissions.

13. The Respondent filed their submissions dated 6th February, 2024 and urged the court to make a determination on two issues:
 - a. Whether an order of temporary injunctions should issue.
 - b. Whether the applicant should be given unlimited access to properties listed at paragraph 4 of her Supporting Affidavit.
14. The principles which applied to the grant of injunction had been well settled in the case of *Giella v Cassman Brown & Co. Ltd.* It was the Respondent's contention that the Applicant had not established a prima facie case as most of the properties she alleged were owned by him, did not in fact belong to him and he had demonstrated the same by the Replying Affidavit filed. The court could therefore not issue orders that cover properties owned by third parties/who were also not parties in the suit. Reliance was placed on the case of *Virginia Wanjiku Mwangi v David Mwangi Jonathan Kamau* [2013] eKLR where the court held that an injunction could not issue against a party not registered as the owner of a parcel of land.
15. The Respondent also relied on the case of *RE Estate of the late Moses Cypran Kimanjui Ngure* [OCO] eKLR and *Lucy Jebet Kiptoo v Kiptoo Kirui* [2019] eKLR where the court also similarly held that "the applicant had not proved that the plots belonged to the deceased. She had therefore not established a prima facie case with any chance of success".
16. With regard to the question of the Applicant suffering irreparable harm, it was the Respondent's contention that the value of the properties could be easily ascertained and in the unlikely event that the Applicant was successful, the injury or loss suffered could be easily compensated by way of damages. Reliance was placed in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR and *Vivo Energy Kenya Ltd. v Maloba Petrol Station and 3 others* [2015] eKLR.
17. Finally, on the question of balance of convenience, it was the respondent's contention that, the plaintiff had not shown how she would be inconvenienced and/or that the inconvenience she would suffer, would be greater than that caused to the respondent. Reliance was placed on *Solomon Too and Another v Zipporah Jebichi Senoney and Ano.* [2018] eKLR to emphasis on this point.
18. Finally, on the question of unlimited access to properties listed at paragraph 4 of the Appellants Supporting Affidavit, the Respondent submitted that granting the same was tantamount to granting an order of mandatory injunction. The applicant had to demonstrate existence of special circumstances, a different standard higher than that required in the normal prohibitory injunction and such could only be issued in the clearest of cases. The fact as pleaded did not bring out and/or demonstrate the exceptional circumstance, which existed in this suit and it was therefore not in order to grant the said orders. Reliance was placed on *Shapheroh Homes Limited v Sandahm* [1971] ICH 34 and *Nation Media Group and 2 Others v John Harun Mwau* [2014] eKLR.
19. The Respondent urged the court to find that the Applicant had failed to meet the legal threshold of granting an injunction and prayed that the Application under consideration be dismissed with costs.

Analysis & Determination

20. I have considered the application, the affidavits both in support of the application and in opposition thereto, the submissions and the authorities relied upon by the parties and this is the view I form of the matter.



21. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. 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.”

22. The Court of Appeal in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [2014] eKLR further opined that:

“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

23. While reiterating the said principles, Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank* Nairobi (Milimani) HCCC No. 1234 of 2002 stated that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. However, the Court is not excluded from expressing a prima facie view of the matter and the



Court is entitled to consider what else the deponent to the supporting affidavit/replying affidavit has stated on oath which is not true and/or is inconsistent.

24. According to the Court of Appeal in *Esso Kenya Limited. vs. Mark Makwata Okiya* Civil Appeal No. 69 of 1991:

“The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff’s alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.”

25. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity.
26. The Court is also, by virtue of section 1A (1) & (2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided for thereunder, while exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing, while expeditiously disposing off of this suit.
27. What is a prima facie case? The Court of Appeal in *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR stated that:

“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 has to be material and substantive and there must be an



urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

28. Rule 20(2) of the *Matrimonial Properties Act* provides that:

A party to the proceedings may, before or after commencement of the proceedings under these Rules, but before the final determination of the respective claims, apply for temporary injunctions or other interlocutory orders in accordance with Order 40 of the Civil Procedure Rules, 2010, and the court may grant the orders sought on such terms or conditions as may be just in the circumstances.

29. In this case, the Plaintiff and the Defendant are husband and wife, though the defendant denies this fact. The Plaintiff alleged that during their marriage the couple established their matrimonial homes on Land Parcel Number Machakos/Katangi/678/679 and Kinyatta/Ikombe “B”/17, which properties were acquired and developed through their joint effort, though registered in the defendant's name in trust and for the benefit of the family. The said defendant had turned hostile and violently chased the plaintiff away from the said properties. The plaintiff also provided a list of properties directly owned by the defendant and or where he is alleged to have beneficial interest. The defendant in his reply stated that the plaintiff carries out farming on parcel No Kinyatta/Ikombe “B”/17, while the parcels Machakos/Katangi /678/679 belonged to Pius Muendo Mwanthi and Munyao Muindi Ngao. He further listed properties which he averred did not belong to him and stated there was therefore no basis upon which injunctive orders could be granted

30. Section 6(1) of the *Matrimonial property Act*, provides that matrimonial property means;

- a. The matrimonial home or homes;
- b. Household goods and effects in the matrimonial homes; or
- c. Any other immovable or movable property jointly owned and acquired during subsistence of the marriage.

31. Section 7 of the *Matrimonial properties Act* also provide that;

Subject to section 6(3) ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards the acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

32. Section 9 of the *Matrimonial Property Act* provides that;

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.

33. It follows that for all intents and purposes all properties directly acquired by the defendant, which are registered in his name and or those that were acquired during subsistence of the marriage but not in his name, but under his possession form part of the matrimonial property. Some of the said property may indeed, be ancestral land bequeathed to him, but at this point, the plaintiff's claim regarding her contribution towards their development cannot be termed as a frivolous one. It is therefore my view that the Plaintiff has established a prima facie case as regards the said properties.

34. As regards the second condition, whether the Plaintiff stands to suffer irreparable loss, it was held in *Nguruman Limited case* (supra) expressed itself as hereunder:

“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 facie, 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.”

35. It is the plaintiff's case that she has nowhere else to go if evicted. Secondly, if the suit properties are not secured, the same maybe alienated and/or disposed off before the suit is heard. This will in effect wipe off the substratum of the suit and render the subsequent decree issued nugatory. The respondent on the other hand avers that the value of the suit properties can be determined and the plaintiff be compensated, if successful. Accordingly, I agree that the Plaintiff has surmounted the second condition for the reason that she is elderly and if evicted from her home that will greatly inconvenience her. It has also not been shown that the defendant will be able to compensate the plaintiff as to the value of properties she may deserve (if successful) and even if he were in a position, that would still be at great cost both in terms of enforcement of decree and/or further litigation.

36. As regards the issue of balance of convenience, I associate myself with the decision in *Pius Kipchirchir Kogo vs. Frank Kimeli Tenai* [2018] eKLR where it was held as follows:

“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

37. It was further averred by the Plaintiff that during the subsistence of the marriage, the couple jointly acquired several properties registered in the defendant's name but held in trust for the family. Particulars of the said properties were set out by the Plaintiff. However, the Defendant averred that



the said properties belong to him and/or that the plaintiff did not make any contribution towards the acquisition and development of the same. I do find that; the defendant is likely to suffer less prejudice even if the injunction sought is granted since an order restraining him from disposing of a property which he does not own and cannot dispose of cannot be prejudicial to him. Further even for the properties which he owns, he all still be able to utilize the same and only will be restrained from disposing them off.

38. Having considered the issues raised by the Plaintiff, I find that she has established a prima facie case for the purposes of the grant of an injunction pending the hearing and determination of the suit. That does not necessarily mean that she will succeed. What it means is that there is a basis upon which this Court can restrain the Defendant from disposing of the said properties.
39. In light of my findings above, I am satisfied that the Plaintiff has satisfied the conditions necessary for the grant of the injunctory orders sought. In the premises I find merit in the application dated a Motion dated 2nd November 2022 and grant the following order:
 - a. That an order of temporary injunction be and is hereby issued restraining the respondent by himself, servants, agents and/or representatives or whosoever from entering into, blocking, denying access and/or disposing of or in any other manner interfering with the applicant's peaceful and quiet enjoyment of residential houses build on land parcels Machakos/Katangi 678, 679 and Kinyatta/Ikombe "B"/17 pending hearing and determination of this suit.
 - b. That an order of temporary injunction do issue restraining the Respondent from selling, leasing, letting, charging, alienating, transferring or completing any conveyance in the all properties that are subject of this suit (as listed out in paragraph 4 of the applicant's supporting affidavit) pending hearing and determination of this suit.
40. The costs of this application will be in the cause.
41. Orders accordingly.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 23RD DAY OF APRIL, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 23RD DAY OF APRIL, 2024.

In the presence of;

No appearance for Applicant

Mr Wambua for Respondent

Sam Court Assistant

