



REPUBLIC OF KENYA



**SWM v PMK (Matrimonial Cause 3 of 2023) [2024] KEHC 6299 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6299 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
MATRIMONIAL CAUSE 3 OF 2023  
FN MUCHEMI, J  
MAY 30, 2024**

**BETWEEN**

**SWM ..... APPLICANT**

**AND**

**PMK ..... RESPONDENT**

**RULING**

**Brief facts**

1. The application for determination dated 23<sup>rd</sup> October 2023 seeks for orders of an injunction restraining the respondent from selling or dealing in any manner, land parcels Ruiru/ Ruiru East Block 7/xxx, Ruiru/ Ruiru East Block 7/xxx, Ruiru/ Ruiru East Block 7/xxx, Ruiru/ruiru East Block 7/xxx, Ruiru/ Ruiru East Block 7/xxx And Ruiru/ Ruiru East Block 7/xxx pending the hearing and determination of the originating summons dated 3<sup>rd</sup> October 2023.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 20<sup>th</sup> March 2024.

**The Applicant's case**

3. The applicant states that she was married to the respondent and contributed to acquiring of the six (6) properties L.R. Ruiru/ Ruiru East Block 7/xxx-xxx during the subsistence of their marriage. The applicant is apprehensive that since all the suit properties are registered in the names of the respondent, he may deal with the properties as he wishes to her detriment. Thus, the applicant prays that the court grants a temporary injunction to preserve the properties.

**The Respondent's Case**

4. The respondent states that he acquired the suit properties by himself and the applicant did not contribute in any way to their purchase. The respondent further states that he applied for a loan facility from his employer, Equity Building Society which facility was granted to purchase and develop a one



- acre plot being Ruiru/ Ruiru East Block 7/xxx. The respondent states that he bought the said parcel of land from one Francis Thuiya Mwangi and subsequently the title was charged to his employer as he continued paying the loan accordingly.
5. The respondent thereafter left Equity Building Society and joined Family Bank who took over his loan upon his request. The respondent states that he continued paying the said loan through check off until he was retrenched by Family Bank on 30<sup>th</sup> April 2010. During that time, the respondent states that he put up a house and other buildings and started living with his family on the said premises.
  6. Upon retrenchment, the respondent states that it was difficult for him to pay the loan balance and the bank threatened to auction the property. The respondent states that he entered into an agreement with the bank to let him sell part of the land and clear the outstanding debt and he sub divided the said land parcel into 8 plots and sold two of the plots clearing the outstanding loan and paid school and college fees.
  7. The respondent states that it took him about 15 years to clear the loan plus the heavy interest and penalties and at no time did the applicant assist him in any of the repayments. Further, the respondent states that he has provided for his family all along but upon been retrenched the applicant became hostile towards him forcing him to move out of the house. Consequently, the respondent depones that he was denied access to his house and further the applicant placed cautions on the suit properties.
  8. The respondent contends that the applicant is a primary school teacher and has other properties she has not disclosed including a ¼ plot in Embakasi being Embakasi Ranching Block 105/616 which he bought together with the applicant from one John Theuri Kimunya. The respondent states that from the said property, the applicant received rental income. Further, the applicant rents some other buildings in the respondent's home and keeps the proceeds yet she has not disclosed the same to the court.
  9. The respondent argues that his two children are adults aged 33 years and 32 years who still reside in his house despite being employed. The respondent further argues that they have no right nor should they interfere at all with the properties that he bought.
  10. The respondent states that he is currently living as a destitute in a semi-permanent house without any income yet he has properties that can assist him financially.
  11. The respondent depones that the suit premises are not matrimonial plots and that the applicant has brought the current application in bad faith. The respondent argues that the application and the originating summons are frivolous, vexatious and an abuse of the court process and the same should be dismissed and the land registrar Ruiru be ordered to remove the caution.
  12. The applicant filed a Further Affidavit dated 5<sup>th</sup> February 2024 and states that the respondent left their matrimonial home in 2018 and he is currently living with Cecilia Wambui Mahinge at Ithanga in Muranga County. The applicant further avers that the respondent left with the land titles of the suit properties and the family car motor vehicle registration number KBL 311B.
  13. The applicant states that when the respondent was retrenched in 2010. She paid school fees for her children who were in college and high school and she supported the respondent financially as he set up a property management office in Pangani.
  14. The applicant avers that the respondent is not destitute as he has worked in several organizations and has been self-employed since his retrenchment from Family Bank. Further, the respondent is currently selling timber with Cecilia in Ithanga.



15. According to the applicant, they acquired the following properties during the subsistence of their marriage; 2 acres in Kabare- Nyangiti in 1990 at Kshs. 80,000/- which the respondent sold; 4 acres in Kiine-Rukanga on 13<sup>th</sup> June 1994 at the cost of Kshs. 160,000/- of which the applicant contributed Kshs. 40,000/- of the total cost. The applicant states that the respondent sold the parcel of land for 4.8 million and kept all the proceeds for himself. In 1998, the applicant states that they purchased 1 acre plot in Ruiru East which cost Kshs. 800,000/- from one Francis Thuiya Mwangi.
16. The applicant states that the respondent worked in different bank branches away from home forcing them to rent two houses. Due to the nature of the respondent's work, the applicant states that she would single handedly take care of the family and children both financially and emotionally. Further, the applicant avers that she had to take loans from Sacco and the bank to enable her meet the family obligations of school fees, house rent and providing food. The applicant attached the respondent's payslips to prove that he could not meet all those financial obligations by himself.
17. The applicant argues that the family home they are currently living in was built when the respondent worked at equity Bank Othaya Branch and she contributed financially by buying building materials. In 2013, the applicant states that the respondent called a family meeting and informed them of his intention to sell a quarter acre of the Ruiru plot to clear the loan balance of Kshs. 600,000/-. The respondent sold the property for Kshs. 5.4 million, paid out the loan balance, bought a family car and misused the rest failing to pay school fees for their son at the university and boosting their income by rearing chicken as they had agreed. The applicant contends that the respondent has squandered their money and left the family suffering and thus she is apprehensive that if he sold the suit properties he will squander their hard earned money and leave them homeless.
18. The applicant avers that she purchased LR Embakasi Ranching Block 105/616 solely and it is not part of their matrimonial property. The applicant further states that the respondent has properties in Kangema being Loc.10/Kahuti/688 and Mavoloni which do not form part of their matrimonial property.
19. On 6<sup>th</sup> February 2023, the applicant states that the respondent sent two agents to show potential buyers their property and two men to cut down the fence in their home. The applicant argues that she reported the matter to the police and he was summoned by the area chief to appear at his office on the same day. The applicant is apprehensive that the respondent shall sell their family property and use the proceeds for his own personal gain leaving her and the children destitute.
20. The respondent filed a Supplementary Affidavit dated 1<sup>st</sup> march 2024 and states that it is untrue that the applicant has been paying school fees for their children as they agreed as a couple that he would handle all the family bills and the applicant would take care of food and pay the house help's salary.
21. The respondent further states that it is untrue that his net pay was very little because his employer allowed them to draw from their salary in the middle of the month and hence therefore the final balance in the pay slip should not be considered as his net pay. Further, the respondent argues that the applicant's claims that she took Sacco loans are unsubstantiated as she has not adduced any evidence to prove the same. Neither did she pay school fees or contribute towards building the matrimonial home.
22. The respondent avers that upon retrenchment, he founded a property management agency at Pangani with his retrenchment dues but business failed and he closed it. He thereafter worked with Mathara holding and later Imara Savings and credit Ltd but left in 2015 to start a partnership with some friends in Jamii Investment Limited but the business failed and thus he lost his investment of 3.5 million. As an investor and director of the company, apart from losing his life line and the capital invested, they needed to pay their employees their dues and thus the financial position he is in currently. The respondent



states that he does not have any regular income to sustain himself or even to put up a decent house or lift up himself economically.

23. Parties disposed of the application by way of written submissions.

### **The Applicant's Submissions**

24. The applicant submits that the suit properties are matrimonial property pursuant to section 6 of the *Matrimonial Property Act*. The applicant further submits that the said properties were acquired during the subsistence of their marriage to which she contributed by providing financial support and through companionship. The applicant further argues that pursuant to Section 14 of the *Matrimonial Properties Act*, although the suit properties are under the name of the respondent, he holds them in trust for herself as they are matrimonial property.
25. Pursuant to Section 2 of the *Matrimonial Property Act* and the cases of *MGNK v AMG* [2016] eKLR; *NWM v KNM* (2014)eKLR and *White v White* (200) UKHL 54, the applicant submits that she contributed to the acquisition of the suit properties monetarily and non-monetarily and has evidenced the same by providing some receipts. Furthermore, she took care of her family by buying food, taking the children to school, employing house helps, paying school fees for her children in private schools, public high schools and college/universities and attending all school meetings due to the nature of her work and the respondent working away from home most of his working life. The applicant further submits that she spent most of her time with her children and attending to the family property. Furthermore, she borrowed loans to cater for her needs and those of her children when the respondent left their matrimonial home in 2018.
26. The applicant submits that she has a valid claim of interest in their matrimonial property and therefore requests the court to grant her an injunction restraining the respondent from misusing their property without due regard to her interests.

### **The Respondent's Submissions**

27. The respondent relies on the case of *Giella v Cassman Brown & Co. Limited* [1973] EA 358 and submits that the applicant has not satisfied the conditions to warrant her the orders sought. On the issue of a prima facie case, the respondent submits that the applicant has not demonstrated that she has a prima facie case with a probability of success. The respondent submits that there is no dispute that he is the registered proprietor of the suit parcels as he purchased them through a loan taken from his employer. Further, the respondent states that he has produced documentary evidence to that effect. Evidently, the respondent argues that the applicant did not contribute at all to the acquisition of the said suit properties or building of their home.
28. The respondent argues that the applicant will not suffer irreparable damage as he has not shown any intention of selling the family home which he could have done as all the properties are registered in his name. Furthermore, the respondent submits that the applicant has other properties under her name which she did not disclose to the court. As such, the respondent submits that the application has not been brought in good faith.
29. The respondent submits that the balance of convenience tilts in his favour as he is a hardworking, responsible man who became a bank manager when he was young and contributed to the banking industry for a long time. The respondent further relies on Section 7 of the *Matrimonial Causes Act* and submits the applicant has not shown any monetary contribution. The respondent urges the court to take into consideration that the applicant has not disclosed properties she holds in her name when considering non-monetary contribution.



30. The respondent urges the court to allow him deal with one of the suit properties so that he can dispose it to enable him uplift himself financially pending the hearing and determination of the suit.

## The Law

### Whether the applicant has met the requisite conditions to warrant the granting of a temporary injunction.

31. The principles of interlocutory injunction are now well settled. Those principles were set out in *East African Industries v Trufoods* [1972]EA 420 and *Giella v Cassman Brown & Co. Ltd* [1973]EA 358. Restating the said principles, Ringera J, (as he then was) in *Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi* (Milimani) HCCC No. 1234 of 2002 set them out as follows:-
- a. A prima facie case with a probability of success at trial;
  - b. The applicant is likely to suffer an injury, which cannot be adequately compensated in damages;
  - c. If the court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;
  - d. The conduct of the applicant meets the approval of the court of equity.
32. Similarly in *Dr. Simon Waiharo Chege v Paramount Bank of Kenya Ltd* Nairobi (Milimani) HCCC No. 360 of 2001, Ringera J, (as he then was) held:-

“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation, which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show that he has a prima facie case with a probability of success at the trial. If the court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as pertains to the subject matter of the suit does not meet the approval of the eye of equity.”

### A prima facie case with a probability of success at trial

33. What then constitutes a prima facie case? In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125,

“The principles which guide the court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless an 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....A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly



be made when the case for the defence has been heard. It may not be easy to define what is meant by “prima facie case” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a suitable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of prima facie case, the former being the lesser standard of the two...In civil cases 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 being 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.”

34. It is not in dispute that the applicant and the respondent were married. According to the applicant, they were married under Kikuyu Customary Law in 1991 and they lived together until 2018 when the respondent deserted the matrimonial home. During this period they acquired the suit properties and further she contributed to their acquisition both directly and indirectly. The fact of marriage is not disputed by the respondent. He only denied that the applicant contributed to the acquisition of the suit properties. The respondent states that he acquired the suit properties by himself when he took out a loan facility with his employer, Equity Bank Limited.
35. Section 6 of the Matrimonial Property Act 2013, defines matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage.
36. At this juncture, it is not in dispute that the parties were married and lived as a couple for many years. There is a possibility that both contributed to their acquisition of property in different ways which is subject to proof. During the pendency of the marriage both parties acquired certain rights which this court must protect pending the hearing and determination of this case of distribution of property. The applicant seeks for injunctive orders based on the fact that she contributed to the acquisition of the suit properties and that all are registered in the name of the respondent. However, from the past conduct of the respondent, the applicant stands to lose out on the said properties in the event that the respondent sells them without her knowledge or consent. The respondent has admitted in his supplementary affidavit that the applicant made payments for food and for the house help. Which are indirect contributions in the household. It is thus clear that the issue of contribution cannot be determined at this interlocutory stage and would need to be ventilated during the hearing. It is therefore my considered opinion that the applicant has established a prima facie case.

### **Irreparable Injury**

37. In *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others* [2016]eKLR the court considered *Halsbury’s Laws of England* on what irreparable loss is and stated that:-

“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.”

38. In her evidence, the applicant has demonstrated that she will suffer irreparable loss unless the injunction is granted, which loss would not adequately be compensated by an award of damages. The applicant submits that she is apprehensive that since the suit properties are in the name of the respondent, he can sell them at any time without due regard to her interests. The applicant further stated that she placed cautions on the suit properties after the respondent sent agents to their matrimonial home in a bid to sell the house and thereafter sent two men who cut the fence at their matrimonial home to which she reported the incidents at the police station.
39. The respondent maintains that he does not desire to sell the suit properties but at the same breadth he states that financially he is struggling and is urging the court to allow him sell one of the properties to enable him survive financially.
40. The respondent has not denied the allegations of intimidating the applicant at their matrimonial home due to their differences. The applicant has annexed proof of her statement recorded at the police station following a report of assault. It follows that the fact that the properties are registered solely in the name of the respondent poses a threat that he may dispose of the properties without informing the applicant. There exists a real threat that the applicant and her children may be left homeless if the injunction is not granted. I am therefore satisfied that the applicant may suffer irreparable injury which would not be adequately compensated by way of damages.

### **Balance of Convenience Test**

41. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, the court in dealing with the issue on balance of convenience held as follows:-

The meaning of balance of convenience in favour of the plaintiff is that if the injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience 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.

42. I have weighed the material placed before me and find that the balance of convenience tilts in favour of the applicant because the inconvenience caused to her will be much greater than that caused to the respondent if the injunction is not granted.

### **Conclusion**

43. It is my considered opinion that the applicant has met the threshold as set out in the case of *Giella v Cassman Brown* and as such, an injunction should issue in her favour. Consequently, the application dated 23<sup>rd</sup> October 2023 has merit and ought to be allowed.
44. It is hereby so ordered.

**RULING DELIVERED, DATED AND SIGNED AT THIKA THIS 6<sup>TH</sup> DAY OF JUNE 2024.**



**F. MUCHEMI**  
**JUDGE**

