



**LMM v PKK (Matrimonial Case E006 of 2024)
[2024] KEHC 8140 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MATRIMONIAL CASE E006 OF 2024
FN MUCHEMI, J
JUNE 27, 2024**

BETWEEN

LMM APPLICANT

AND

PKK RESPONDENT

RULING

1. The application for determination dated 8th February 2024 seeks for the orders of an injunction restraining the respondent from destroying, disposing of, removing, wasting, developing, alienating and/or transferring of land parcel number RUIRU/KIU/BLOCK 6/992 pending the hearing and determination of the originating summons.
2. In opposition to the application, the respondent filed a Replying Affidavit sworn on 2nd April 2024 together with a Notice of Preliminary Objection dated 3rd April 2024.

The Applicant’s case

3. The applicant deposes that she was married to the respondent but the respondent deserted their matrimonial home which is on LR No. RUIRU/KIU/BLOCK 6/992. The applicant states that the suit property was sold to her and the respondent. Further, the applicant states that the respondent took a loan using the suit property as security and he failed to repay the loan forcing her and her children to clear the same. The applicant further states that their first born son now deceased wrote to the Agriculture Finance Corporation informing them not to lend any more money to the respondent as he would not repay the loans which made the respondent violent towards her and the children to the extent of evicting the children from the suit property. As such, the applicant states that she registered a caution on the said suit property.
4. The applicant argues that the respondent has began damaging the developments on the subject property, evicting tenants, installing goons and carting away building materials and moveable property



from the suit premises to dispose of causing her untold financial loss. Further, the applicant states that the respondent eventually began assaulting her which incidents she reported at Githurai Kimbo Police Station vide OB Nos. 18/21/10/2019, 22/10/5/2022 and 19/18/6/2023. The respondent was thereafter charged in Ruiru Criminal Court Case No. E297 of 2024 and released on a cash bail of Kshs. 20,000/-.

5. The applicant avers that the respondent has and continues to become a threat to her every time he accesses the subject property. The applicant is apprehensive that the respondent will cause destruction, disposal, removal, wastage, alienation and/or transfer of the property to escape the jurisdiction of the court and to obstruct justice. Further, the applicant argues that she continues to suffer irreparable and unmitigated loss without any lawful justification. The applicant states that the respondent's unlawful and illegal actions are causing and subjecting her a lot of suffering and prejudice as she cannot enjoy quiet possession and use of the subject property.

The Respondent's Case

6. The respondent states that he and the applicant had a come we stay relationship in the year 1980 and 1981. The respondent further states that he acquired the suit property in 1988 for a consideration of Kshs. 60,000/- by himself and the applicant did not contribute in any way to its purchase as she was a housewife. The respondent argues that if the applicant had made any contribution to the suit property, she would have been included in the registration.
7. The respondent denies that the applicant has been the sole bread winner and further states that their children are all adults as he raised and educated them.
8. The respondent states that he and his friend Patrick Ndung'u purchased Githurai Ting'ang'a Plot No. 457/8867 and sold it with the proceeds being used by the applicant to develop LR No. RUIRU/KIU/BLOCK 6/68, which the applicant got as a gift from her mother. The respondent further states that LR No. RUIRU/KIU/BLOCK 6/68 was gifted to him and the applicant by the applicant's mother, but it is jointly registered in the names of the applicant and her sister. Furthermore, the respondent argues that he has carried out all the developments on the said land parcel and the suit property.
9. The respondent states that the applicant has acquired other properties from the rental income diverted and solely registered in her name. The respondent further states that the applicant has never been employed and that they have not divorced as such, she is still his legally wedded wife.
10. The respondent argues that there is no property known as LR. No. RUIRU/KIU/BLOCK 6/992 in his name.
11. The respondent further filed a preliminary objection on the grounds that the court lacked jurisdiction to entertain the suit and that the suit property does not exist.
12. The applicant filed a Supplementary Affidavit dated 3rd May 2024 and states that after the respondent deserted their matrimonial home, she developed the suit property and built some rentals in order to collect rent and be financially stable. The applicant further states that the respondent ran out of financial options in his new union and forcefully started collecting rent from her rental houses and thereafter gave authority to a tenant to be managing the houses when he is away. As such, the applicant states that she became economically disenfranchised as that was her only source of income as she had closed down her previous groceries business.
13. The applicant argues that LR No. RUIRU/KIU BLOCK 6/992 exists and it is where their matrimonial home exists. The applicant further states that despite an express order of the court



directing the respondent to maintain peace, the respondent resorted to visiting the suit premises in the company of goons to destroy the houses she built and to assault her.

14. Parties disposed of the application and preliminary objection by way of written submissions.

The Applicant's Submissions

15. The applicant relies on Section 17 and 18 of the *Matrimonial Property Act*, Rule 7 of the Matrimonial Property Rules and the cases of P.R.N. vs F.N.M. [2019] eKLR; C.K. vs A.G.M. HCCC No. 14 of 2013 cited with approval in Winnie Juliet Wairimu Macharia vs Peter George Heinrich Koeneke [2018] eKLR and N.C.K. vs G.V.K. [2015] eKLR and submits that the court can make declarations to property rights interventions and determinations even without the process of divorce having been commenced or concluded. The applicant argues that for the declaration to property rights prayers to be granted, the parties can still be married. Further, the applicant argues that her intention from the pleadings is to be recognised as a contributor to the matrimonial property, her contribution be maintained as such and that the respondent be restrained from causing her any interruption use and or enjoyment of the subject property.
16. The applicant submits that the respondent does not live on the suit property and it is only registered in his name in trust for her and the children. As such, the applicant argues that it would be prejudicial to turn her away on the basis of a procedural technicality such as the one the respondent relies on in his preliminary objection.
17. The applicant further relies on the case of Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696 and argues that the preliminary objection is not sustainable as it requires the court to exercise its judicial discretion.
18. The applicant submits that the suit property exists and availed a copy of the title to the court. Therefore, the applicant argues that the preliminary objection fails on that ground as when the respondent raised the preliminary objection, it is automatically inferred that the facts pleaded by the applicant are true.
19. Relying on the case of Giella vs Cassman Brown (1973) EA 358, the applicant argues that she has demonstrated that her case is prima facie based on the documents supporting her application. Further, she argues that the respondent only filed a replying affidavit which consisted of mere denials and he did not attach any evidence to support his response.
20. The applicant submits that the balance of convenience tilts in her favour as the applicant instituted a criminal suit against the respondent being Ruiru Criminal Case No. E297 of 2024 which arose after the respondent assaulted her. The applicant further submits that the respondent proceeded and destroyed the property and recently assaulted her on the said property to which she reported to the police station vide OB No. 20/25/04/2024. As such, the applicant prays for the intervention of the court as failure to which will cause her irredeemable harm that cannot be compensated by way of damages.

The Respondent's Submissions

21. The respondent relies on Section 7 of the Matrimonial Properties Act and the case of N.C.K vs G.V.K [2015] eKLR and submits that the applicant is still married to him and their marriage has not been dissolved and neither has there been any divorce between the parties. As such, the respondent argues that the instant application has been brought in bad faith and the court has no jurisdiction to determine the suit. Furthermore, the respondent submits that it is not clear whether the applicant wants the property to be declared matrimonial property or whether she wants the property to be declared as her own.



22. The respondent further submits that the suit property does not exist as evidenced by the green card which indicates that the suit property does not belong to him.

Issues for determination.

23. The main issues for determination are:-
- a. Whether the preliminary objection is sustainable.
 - b. Whether the applicant has met the requisite conditions to warrant the granting of a temporary injunction.

The Law

Whether the preliminary objection is sustainable.

24. The case of Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-
-a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.
25. Sir Charles Newbold P. stated:-
- A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.
26. Similarly, the Supreme Court in the case of Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR held that:-
- A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.
27. Further in the case of Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others, [2014] eKLR the court held that:-
- Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.
28. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.
29. The respondent argues that the court lacks jurisdiction to entertain the matter as he and the applicant are not divorced and neither have they filed any divorce proceedings therefore precluding her from bringing her application for division of matrimonial property thus offending Section 7 of the Matrimonial Properties Act. The applicant argues that she has brought the current application under Section 17 and 18 of the *Matrimonial Property Act* for the court to make a declaration to her property rights.

PARA 30.



Section 17 of the Matrimonial property Act provides:-

SUBPARA 1.

A person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.

SUBPARA 2.

An application under sub section (1)-

SUBPARA a.

Shall be made in accordance with such procedure as may be prescribed;

SUBPARA b.

May be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.

31. Section 7 of the *Matrimonial Property Act* provides:-

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.

32. Evidently, Section 7 refers to division of matrimonial property whilst Section 17 refers to a declaration of rights in any property contested between a person and a spouse. A plain reading of Section 17 enables a spouse to make an application for declaratory orders, notwithstanding the subsistence of a marriage. The Court of Appeal in the case of *A.K.K. vs P.K.W* [2020] eKLR in finding that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage relied on the case of *P.N.N. vs Z.W.N* [2017] eKLR and stated:-

An inquiry may thus be made under Section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy -Guest in *Pettit vs Pettit* [1970] AC 777:-

One of the main purposes of the act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property the question for the court was whose is this? And not to whom shall it be given?.

33. The foregoing cases testify to the effect that under Section 17 of the *Matrimonial Property Act*, this court is possessed of the jurisdiction to make a declaration with regard to property acquired during the subsistence of the marriage even before divorce or prior to division of such property. The applicant only needed to show that the property was acquired during the marriage and that there exists a dispute on the management of such property. As such, this court has the requisite jurisdiction to entertain and determine the matter.

34. The respondent has also raised a preliminary objection on the fact that the suit property does not exist. A preliminary objection as stated before hand raises a pure point of law and cannot be raised if any facts has to be ascertained. The fact that the respondent claims that the suit property does not belong to him yet the applicant argues that it does requires the court to ascertain and interrogate these facts. Therefore, the ownership of the description of the property is not a pure point of law but would require



interrogation of the parties by the court. Through evidence. The applicant describes the property as the one where their matrimonial home sits. This leaves no doubt as to the property in issue herein.

35. It is my finding that the preliminary objection does not meet the requirements of the law and it is hereby dismissed.

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

36. The principles 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. Restating 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* 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.

37. Similarly, in *Dr. Simon Waiharo Chege vs 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.”

prima facie case with a probability of success at trial

38. What then constitutes a prima facie case? In the case of *Mrao Ltd vs 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.”

39. It is not in dispute that the applicant and the respondent were married. According to the applicant, they were married under Kikuyu Customary Law on 6th March 1980 and they lived together until when the respondent deserted the matrimonial home. During this period, they acquired the suit property to which she contributed directly and indirectly. The fact of marriage is not disputed by the respondent. He stated that he purchased the suit property in 1988 but denied that the applicant contributed to its acquisition. The respondent states that he acquired the suit property by himself at a consideration of Kshs. 60,000/-.
40. 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.
41. At this juncture it is evident that as the parties were married and lived as a couple they must have contributed to the acquisition of property acquired during the subsistence of the marriage in their own ways. During the pendency of the marriage both parties acquired certain rights which this court must protect pending the hearing and determination of their divorce and subsequently during the division of the property. The proof of individual contribution towards its acquisition is not relevant herein and will have to be dealt with at a later stage. The applicant has sought for injunctive orders based on the fact that she contributed to the acquisition of the suit property and it is registered in the name of the respondent. Her argument is that she developed the suit premises on her own and built rentals which provide her income since the respondent deserted her.
42. From the record, it is evident that the issue of contribution cannot be determined at this interlocutory stage and would need to be ventilated during the hearing. Both parties contend that they are the ones who developed the suit property on their own and argue that the other spouse did not contribute. Therefore, the court would need to interrogate the issue of contribution which can only be ventilated during the hearing. It is therefore my considered opinion that the applicant has established a prima facie case.



Irreparable Injury

43. In *Paul Gitonga Wanjau vs 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.”

44. The applicant has a duty to demonstrate 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 the suit property is in the name of the respondent and he can dispose of the same without due regard to her interests. The applicant further stated that she placed a caution on the suit property after the respondent used the suit property as collateral for a loan without her consent and failed to repay. The applicant stated that the respondent has assaulted her numerously to the extent that she filed a criminal case against him being Ruiru Criminal Case No. E297 of 2024 Republic vs Peter Kihui Kinungi.

45. The respondent has not denied the allegations of intimidating the applicant at their matrimonial home and further the applicant has annexed proof of her statements at the police station. It is thus my considered view that the fact that the property is listed in the respondent's name solely poses a threat that he may dispose of the properties without the knowledge or consent of the applicant. The applicant has demonstrated that a real threat exists that she may be left homeless or a destitute if the injunction is not granted. I am therefore satisfied that the applicant is likely to suffer irreparable injury which would not be adequately compensated by way of damages.

Balance of Convenience Test

46. In the case of *Pius Kipchirchir Kogo vs 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.

47. In light of the above, it is my considered opinion 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

48. I thus opine that the applicant herein has met the threshold set out in the case of *Giella vs Cassman Brown* and is therefore entitled to the orders sought.



49. I find application dated 8th February 2024 merited and hereby allow it in the following terms: -

That an injunction do hereby issue against the respondent either by himself, his agents, servants not to dispose, charge, develop, alienate transfer or interfere with L.R. No. Ruiru/Kiu/Block 6/992 pending the hearing and determination of this case.

50. Each party to meet their own costs of this application.

51. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF 2024.

F. MUCHEMI

JUDGE

