



**MWM v JMM (Matrimonial Cause 46 of 2019)
[2023] KEHC 20611 (KLR) (Family) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20611 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

MATRIMONIAL CAUSE 46 OF 2019

MA ODERO, J

JULY 3, 2023

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY ACT 2013

BETWEEN

MWM APPLICANT

AND

JMM RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion application dated October 27, 2022 by which the Applicant MWM seeks the following orders:-
 1. Spent.
 2. Spent.
 3. Pending the hearing and determination of the suit herein, this honourable court be pleased to issue orders to restrain JMM the Applicant herein whether by himself, his agents or employees or servants or any other person acting on his authority from selling or transferring or disposing of or alienating or charging or mortgaging or interfering with the ownership of all those properties known as Plot xxxx Kahawa West, Mugugua/Muguga/xxxx, Segera/Segera Block2/xxxx, Laikipia Daiga Umande Block 6/xxxx (Nyariginu) and Laikipia Daiga Umande Block 6/xxxx (Nyariginu).
 4. That the costs of this application be provided for.”
2. The application was premised upon Section 4, 6, 7 and 17 of the *Matrimonial Property Act*, 2013, Rules 20 and 21 of the *Matrimonial Property Rules 2022* and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the Applicant.



3. The Respondent JMM opposed the application through the Replying Affidavit dated December 19, 2022. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated February 27, 2023 whilst the Respondent filed the written submissions dated March 20, 2023.

Background

4. The Applicant and the Respondent got married to each other on May 2, 1992. Their union was blessed with two (2) children who are now adults. The marriage later ran into problems and the couple divorced in the year 2022.
5. The Applicant avers that during the course of their marriage in the year 2001 the Respondent moved to the USA leaving her in Kenya to take care of the children.
6. The Applicant states that during the subsistence of the marriage the couple acquired the following assets:-
 - (a) Plot xxxx Kahawa West
 - (b) Mugugua/Muguga/xxxx
 - (c) Segera/Segera Block2/xxxx
 - (d) Laikipia Daiga Umande Block 6/xxxx (Nyariginu)
 - (e) Laikipia Daiga Umande Block 6/xxxx (Nyariginu)
7. The Applicant avers that she acquired xxxx Kahawa West while the Respondent was away in the USA. The Respondent eventually returned to Kenya in the year 2013. The couple resumed cohabitation but their marriage did not survive. The couple eventually divorced in May 2022. The Applicant remained in the Kahawa West Plot whilst the respondent moved to live in Mugugua/Muguga/xxxx . The Respondent then filed this suit seeking division of matrimonial property.
8. In order to secure her rights over the Mugugua Property the Applicant placed a caveat against the same. However she states that she has been receiving summons from a person alleging to be the Assistant County Commissioner of Kabete trying to compel her to lift the caveat.
9. The Applicant is apprehensive that the Respondent may move to sell, transfer or otherwise dispose of the matrimonial properties before the suit is heard and determined. She therefore seeks interim injunctive orders pending the hearing and determination of the suit.
10. The Respondent opposed the application. The Respondent asserts that the properties listed by the Applicant were all acquired in the year 1991 before the couple got married but that the Title Deeds were issued after the marriage.
11. The Respondent confirms that both the Kahawa West plot and the Mugugua Property were purchased whilst he was away in the USA. However, he maintains that he single handedly acquired and developed the two properties.
12. The Respondent denies that he has any intention of disposing the listed properties and submits that the conditions of grant of injunctive orders have not been met. He asks that the court dismiss this application in its entirety.



Analysis and Determination

13. I have carefully considered the application before this court the reply filed thereto as well as the written submissions filed by both parties.
14. The law regarding the issuance of interlocutory injunction is found in Order 40 Rule 1 of the [Civil Procedure Rules](#) which provides as follows:-
 - a. That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree;
 - b. That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further order”.
15. The Applicant herein is seeking temporary orders to prevent the sale and/or disposal of the suit properties pending the hearing and determination of the main suit.
16. The grounds upon which an injunction may be granted were set out in the case of *Giella Vs Casman Brown* (1973) EA as follows:-

“The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, an Applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the 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”.
17. The definition of a *prima facies* case was given in [Mrao Ltd Vs First American Bank Of Kenya Ltd & 2 Others](#) (2003) eKLR as follows:-

“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 been 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. This is clearly a standard, which is higher than an arguable case”.
18. At this stage the court is not required to make conclusive findings on the matters in issue. All that the court is required to do is to determine whether there exists a *‘prima facie’* case warranting issuance of the interlocutory orders.
19. The question of whether the properties are matrimonial properties and the question of what share each party is entitled to cannot be determined at this interlocutory stage. Those are issues which can



only be determined after a full hearing of the main suit. The only issue for determination at this point is whether the injunctive orders sought ought to be granted.

20. In the case of *Silvester Momany Mrube -vs- glizar Ahmed Motar & Another* [2012] eKLR, Hon. Justice George Odunga (as he then was) stated as follows:

“In determining this application, I am well aware that at this stage 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 and that in an application for injunction although the court cannot find conclusively who is to be believed or not, 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 has stated on oath which is not true.”

21. I note that the Kahawa West property is registered in the joint names of the Applicant and the Respondent. A copy of the certificate of ownership is annexed to the supporting Affidavit dated October 27, 2022 (Annexure 'MW2')

22. Though the other properties are registered in the sole name of the Respondent the Applicant pleads that she made substantial contribution towards the acquisition of the said properties and that the sale/ disposal of said properties will occasion her irreparable harm.

23. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR the court stated as follows:-

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

24. There can be no doubt that the sale and/or disposal of the listed properties will occasion irreparable harm to the Applicant. Moreover the Respondent has indicated in his Reply that he has no intention to dispose these properties therefore he stands to suffer no prejudice if the injunctive orders sought are granted.

25. On the question of balance of convenience am guided by the case of Pius Kipchirchir Kogo – Vs- Frank Kimeli Tenai [*supra*] where the court defined “balance of convenience” as follows:-

“The meaning of balance of convenience tilts favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience cause 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 plaintiff's to show that the inconvenience cause to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.

26. I find that in this case the balance of convenience tilts in favour of the Applicant.

27. Finally, I find merit in the present application. Accordingly the same is hereby allowed and I make the following orders:-



- 1) Pending the hearing and determination of the suit, a temporary orders of injunction is hereby issued restraining the Respondent, himself, his agents or employees or servants or any other person acting on his authority from selling or transferring or disposing of or alienating or charging or mortgaging or interfering with the ownership of all those properties known as Plot xxxx Kahawa West, Mugugua/Muguga/xxxx, Segera/Segera Block2/xxxx , Laikipia Daiga Umande Block 6/xxxx (Nyariginu) and Laikipia Daiga Umande Block 6/xxxx (Nyariginu).
- 2) This being a family matter each side will bear their own costs.

DATED IN NAIROBI THIS 3RD DAY OF JULY, 2023.

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MAUREEN A. ODERO

JUDGE

