



**JWN v JWN (Matrimonial Cause E001 of 2024)  
[2024] KEHC 15433 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15433 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
MATRIMONIAL CAUSE E001 OF 2024  
AK NDUNG’U, J  
DECEMBER 5, 2024**

**BETWEEN**

**JWN ..... APPLICANT**

**AND**

**JWN ..... RESPONDENT**

**RULING**

1. The Applicant instituted this suit by way of notice of motion and originating summon both dated 23/02/2024 under certificate of urgency. A temporary injunction was issued by this court on 26/02/2024 in terms of prayer 2 of the motion pending interparties hearing.
2. In the notice of motion, the Applicant is seeking for the following orders;
  - i. Spent
  - ii. Spent
  - iii. An order of temporary injunction do issue restraining the defendant whether by itself or through its trustees, agents, assigns, servants, employees or anyone else acting at its behest from proceeding with any works or other related activities or disposing off the portions Parcel No. 5180/12 and 5180/13 housing matrimonial home in Equator-Kiamberiria pending the hearing and determination of this application, the suit and Divorce Cause E002/2024.
  - iv. An order of injunction do issue reinstate the Applicant to their matrimonial home aforesated pending the hearing and determination of this application and the suit.
  - v. An order of temporary injunction do issue restraining the defendant whether by itself or through its trustees, agents, assigns, servants, employees or anyone else acting at its behest from proceeding with any further applications, stopping the pending conversion of North ways



Motors to a private limited company or disposing off the 15 motor vehicles in yard of North Ways Motors pending the hearing and determination of this application and the suit.

- vi. An order of temporary injunction due issue compelling the defendant to pay the Applicant maintenance for the desertion period all through the matrimonial proceeding pending the hearing and determination of this application and the suit.
  - vii. An order do issue allowing the Applicant access to account records related to North Ways Motors and rental properties (Central Apartments and Taifa Building) both in the name of the Respondent pending the hearing and determination of this application and the suit.
  - viii. An order do issue for production of bank records of Nyahururu Central Hardware a joint account for both the Applicant and the Respondent pending the hearing and determination of this application and the suit.
  - ix. That costs of this application be borne by the Defendant.
3. The application is grounded on the grounds on the face thereof and is supported by an affidavit of Juliah Wanjiku Ndungu, the Applicant herein. She averred that she has indefeasible proprietary interest in the land known as Nyahururu Municipality Block 6/xxx, Nyahururu Municipality Block 8/xxx Plot No. 6585/xxx (Taifa Building), Nakuru plot in Naka area housing Central Apartments, Equator-Kiambereria in Gakwa housing-Matrimonial home parcel No. 5180/xx and Parcel No. 5180/xx, Naivasha Municipality Block 9/xxx and two plots in Rumuruti in Location Area being the legal spouse and business partner of the Respondent having contributed directly and indirectly towards the acquisition of the said properties. That on 24/01/2024, the Respondent broke into their matrimonial home and instructed his agents to take her clothes and other items to her parent home and on 04/02/2024, he instructed his son and another person to lock her completely out of the matrimonial home leaving her at the mercy of well-wishers. That she sought assistance from police but the access was unsuccessful as the Respondent asked the police that she should prove that she was his wife.
  4. She averred that she holds indefeasible ownership in North Ways Motors as one of the sole proprietors and the Respondent has been undertaking major changes in the said business without her consent to the extent that her signature was forged and she lodged a complaint at the DCIO. That the Respondent has already disposed of one of the motor vehicles without her consent. Further, she received information that the Respondent is in the verge of disposing the listed properties without her consent and unless he is restrained from disposing the parcels of land acquired during the marriage and motor vehicles belonging to North ways Motors, the said properties will be alienated to her prejudice.
  5. The Respondent filed grounds of opposition dated 29/02/2024. He stated that the application is incompetent and hence an abuse of the court on account that this court lacks jurisdiction over any issue surrounding Northways Motors, the court lacks jurisdiction over any issue surrounding Nyahururu Central Hardware and that the application offends the rules of evidence.
  6. The application was canvassed by way of written submissions. The Applicant's counsel proceeded in the submissions as if the Respondent had raised a preliminary objection. The Respondent had filed grounds of opposition and not a preliminary objection. She submitted that Northways Motors and Nyahururu Central Hardware are family businesses which cannot be isolated in the matrimonial cause before this court. That this court has jurisdiction on all criminal and civil matters and the matter before this court is civil in nature and therefore this court has jurisdiction. That the said businesses are family businesses and as such, the Applicant has pecuniary as well as proprietary rights over the said business as they form part of matrimonial properties. Further, this court is vested with jurisdiction by virtue of section 17 of Matrimonial Properties Act.



7. The Respondent on the other hand submitted that the Applicant has not led any evidence of marriage between the parties herein as what is pending is a divorce cause that is yet to be concluded and therefore, the burden of proof that the Applicant is a wife to the Respondent has not been discharged. On immovable properties listed, he submitted that the Applicant has not proved ownership to the said properties as well as contribution to the acquisition of the said properties in order to raise a presumption of matrimonial proprietary rights in her favour. That the dispute surrounding Northways Motors is commercial in nature and not matrimonial hence this court lacks jurisdiction to entertain the said dispute and the Applicant ought to pursue the rights of a partner in a different forum. That the said business was a partnership registered by both parties under The Registration of Names Act and the said registration depicts a partnership.
8. He submitted that the Applicant has not proved the existence of a joint account for Nyahururu Central Hardware and existence of the said hardware as it is not clear what kind of institution it is. That the remedies sought by the Applicant should be sought under the regime which provides for partnership and not under matrimonial law. He urged the court to find that it lacks requisite jurisdiction in regards to Northways Motors and Nyahururu Central Hardware and that the Applicant has not made out a case for the grant of the orders sought.
9. I have considered the application, the affidavit evidence on record and learned submissions by counsel. Of determination is whether the applicant has achieved the threshold for the grant of the orders sought.
10. From the pleadings, and this is not contested, there is a divorce cause that is pending hearing and determination. It is during the pendency of this divorce cause that the Applicant filed the Originating Summons herein and contemporaneously moved this court vide the Notice of Motion dated 2/2/24, the subject of this determination.
11. As seen earlier, the orders sought by the Applicant in the notice of motion are for injunctions, an order for reinstatement to the matrimonial home and an order for maintenance be made to the Applicant by the Respondent. The originating summons on the other hand has myriad of prayers including the prayer that the court do declare that the subject properties form part of matrimonial property, a declaration that the Applicant made contribution to the acquisition of the said properties, that the Respondent was holding the said properties in trust on behalf of the Applicant and that she be granted a half share of the said properties and an order that she be granted half stake of Northways Motors.
12. Section 17 of the [Matrimonial Property Act](#) provides as follows –
  - “ 17. Action for declaration of rights to property
    1. A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
    2. An application under subsection (1) –
      - a. shall be made in accordance with such procedure as may be prescribed;
      - b. may be made as part of a petition in a matrimonial cause; and



- c. may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

13. Section 7 of the Act on the other hand provides that;

“Subject to section 6(3), 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.”

14. Under both sections 17 and 7 of the Act, there thus must be a marriage which either is still in existence (in the case of section 17) or already dissolved (in the case of section 7).

15. In the present case the issue whether or not there is a valid marriage between the Applicant and the Respondent is a live and pending issue in Divorce Cause No E002 of 2024 and in these proceedings.

16. The Court of Appeal decision in *AKK V PKW (2020) eKLR* the court discussed the jurisdiction of the High Court with regards to declaration of rights of spouses’ in matrimonial property as follows:

“Whilst the respondent argued that the suit offended Section 7 of the *Matrimonial Property Act*, 2013 on the basis that the remedy sought for division of property was not available until divorce or dissolution of marriage, the appellant, relying on Section 17 of the same Act argued that the court is not limited in respect to the declaration of rights of a spouse’s interest in matrimonial property. Section 7 states:

“... 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.”

Section 17 states that:

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

(2) An application under subsection (1) –

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

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. It can be discerned from the appellant’s pleadings in the High Court that she sought not only division but also orders from the court that the listed property was matrimonial property and a further finding that she had proprietary and pecuniary interests in the same. The trial court found that it had no jurisdiction under Section 7 to make orders as to the division of property. It is also correct that the orders concerning division of matrimonial property pursuant to Section 7 of the *Matrimonial Property Act* was unavailable to the appellant until the determination of Divorce case 867 of 2017 between the parties hereto. However, in view of the order sought by the appellant extensively detailed above, it cannot categorically be said that the appellant’s prayers fell solely within the ambit of Section 7 of the Act. It is our opinion that the learned



Judge erred in limiting the court’s jurisdiction to the provisions in Section 7 of the Act. In failing to address itself to the nature of reliefs sought by the appellant and the enabling provisions under Section 17 of the Act, the trial court did not proceed to determine whether the appellant satisfied the provisions under Section 17 of the Act in order for the court to make the declaratory orders sought.....

We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant’s prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of the Act.

In our opinion, the trial court had jurisdiction to make declarations in so far as the interest in the property during the pendency of a marriage is concerned. The issues of distribution of the property would then only be determined upon dissolution of a marriage.....”

17. The applicant lays a claim to Northways Motors, a business enterprise. The Respondent submitted that the issue around the venture is commercial in nature and not matrimonial and therefore this court lacks jurisdiction to entertain the said dispute and the Applicant ought to pursue the rights of a partner in a different forum. That the said business was a partnership registered by both parties under The Registration of Names Act and the said registration depicts a partnership.

18. On this issue, the decision of the court of Appeal in *PWK v JKG* [2015] KECA 535 (KLR) illuminates the law. The court stated;

“That practical approach to matrimonial property that is so closely linked to or mixed inextricably with property in the name of a company under the sole shareholding of a couple without outsiders in it, appears to us to be more conducive to the doing of real and substantive justice untrammelled and unfrustrated by the technicalities and esoteric niceties of company law that would defeat what ordinary citizens would see as rather straight-forward issues of division of matrimonial property. *MUTHEMBWA –VS- MUTHEMBWA* has been followed in other cases including *RFS –VS- JDCS* [2010] eKLR where the Court appreciated that when the matrimonial home is built on land belonging to a company where the husband is the major shareholder with his consent, the property becomes altered and he cannot be heard to raise the distinctions of company law in the hope of defeating the spouse’s interest in it as matrimonial property. The need to look beyond company law per se is the more compelling in the instant case where it is quite clear that the matrimonial home was matrimonial property before the respondent, somehow, transferred it, at no consideration, into the name of the company...”

19. I have applied my mind to the facts of this case and the applicable law. The applicant seeks injunctory reliefs pending the determination of her originating summons on declaration of rights over what she deems to be matrimonial property by virtue of her being a wife to the respondent.

20. It is urged that a divorce cause between the parties is pending before court and the respondent contends that the issue of the existence of a marriage between the 2 is a contested issue.

21. Has the Applicant met the threshold of grant of injunctory or other orders? 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.

22. To succeed in an application for injunction, an Applicant must meet the 3 conditions. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. The establishment of a prima facie case alone is not a ground enough to access injunctory relief. An applicant must go ahead and demonstrate to the court 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. Where in doubt, the court will result to the balance of convenience based on the circumstances of both parties.

23. What then constitutes 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.”

24. In this case the Applicant has deponed on oath that she is the legal spouse of the Respondent. That she has contributed to the acquisition of the properties the subject of this suit. She adds that on 24<sup>th</sup> of January 2024, the Respondent threw out her clothes and essentials from the matrimonial home and instructed his agents and one of his sons to take the same to the Applicant’s parents’ home. He changed locks to the premises.

25. She reported the matter to the police but made no success to return home as the Respondent told the police that she was to prove that she was a wife and not just a girlfriend.

26. The evidence on record and more specifically the fact that there is no denial that the parties were living together and that the Applicant’s items were thrown out and which fact is not denied by the Respondent, demonstrates there exists a prima facie case that requires ventilation at a full hearing.



27. Further, am satisfied that should the alleged matrimonial property be disposed of, the Applicant would suffer irreparable harm as some of the properties, and especially the matrimonial home, could have sentimental value which may not be compensated by damages.
28. I have looked at the framing of the prayers in the Notice of Motion. The same cannot be granted in the blanket manner sought which includes stoppage of development. Such an order would be prejudicial to the respondent should the Applicant fail in her originating Summons. The order that commends itself to me is to have a general order restraining disposal of any of the properties pending determination of the Originating summons.
29. On the properties related to businesses, adequate laws exist to protect the applicant's interest and she should be at liberty to pursue them.
30. The application partially succeeds to the extent that an order be and is hereby issued that the applicant shall not dispose of any of the properties as more particularly described at prayers 2, 3 and 4 of the Notice of motion pending the determination of the Originating Summons herein.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF DECEMBER 2024**

**A.K. NDUNG'U**

**JUDGE**

