Case Number:	Civil Case 1676 of 1995
Date Delivered:	24 Oct 1995
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Aaron Gitonga Ringera
Citation:	rosemary wanjiku kinyanjui VS martin wainaina kinyajui [1995] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1676 OF 1995

ROSEMARY WANJIKU KINYANJUI ……...PLAINTIFF

VERSUS

MARTIN WAINAINA KINYAJUI…….....…RESPONDENT

RULING OF THE COURT

Before the 24th October, 1995, I had considered the application before me and said as follows:

“The parties herein have been in matrimony for thirty one years. They have materially prospered together and can without embellishment be said to be quite rich. However, their relationship has been diminishing emotionally. Both of them are truly poor in that respect. Their marriage, if it exists, is definitely on the rocks. I use the words “if it exists” advisedly for there are rival contentions on that aspect. The husband says he is married according to Kikuyu Customary Law and he has divorced the wife in accordance therewith. The wife waves a certificate and proclaims loudly that she is married under statue and her marriage is alive in law. Whether the marriage is alive in law or not, it is not in dispute that the wife has been shown the door out of the matrimonial home in the posh residential area of Karen-Langata and is now living in the not so congenial area of Dagoretti market. She used to drive a Mercedes Benz saloon. She is now without benefit of that limousine. In these premises, she has taken out an originating summons under the provisions of section 17 of Married Women Property Act of 1882 asking for declarations to the effect that she is co-owner to the extent of one half of such other extent as the court shall determine of all her husband’s immovable property including the matrimonial home as well as all his equity in company stock and all his motor vehicles. And they are several. She also prays that he be restrained from alienating encumbering or otherwise dealing with them to her prejudice pending the determination of the originating summons. Simultaneously with the originating summons she has filed an order of this court that he be restrained from keeping her out and denying her access to the matrimonial home. She also wants him restrained from denying her access to and use of her usual Mercedes Benz limousine. It is the latter application that is before me for determination.

I remind myself that an injunction is a great and beneficial equitable remedy. It is granted in order that the risk of serious prejudice to the applicant’s legal rights between the time of the application and the time of trial may be forestalled. And it has the effect of preventing or compelling the respondent from doing or to do some act or thing which on conclusion of the suit the court may well find that he had a right to do or not to do. This latter consideration should caution the court not to grant an interlocutory injunction as a matter of course or lightly. The first consideration impels a court to grant the relief in a deserving case. And a case is deserving if it is found to be within the parameters set by the East African Court of Appeal in Giella v Cassman Brown Co Ltd [1973] EA 358. That case spells out the necessary conditions for the grant of the relief. Those conditions are however not necessarily sufficient and accordingly if the respondent satisfies the court that the applicant is not by virtue of his conduct deserving of equitable relief, the injunction will not issue even if the necessary conditions have been satisfied. In the case referred to, Spry v P set out the necessary conditions in the following words:

“The conditions for the grant of an interlocutory injunction are now 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 no 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."

These words have been echoed with approval in other decisions of both the former Court of Appeal for East Africa and the Court of Appeal for Kenya (see Nsubuga v Mutawe) [1974] EA 487, Abel Salim and Ohters v Okongo & Others 1976 KLR 42, and Teresa Shitakha v Mary Mwamodo & Others [1982-88] 1 KAR 965). In short, interlocutory injunctive relief will be available only to either those with demonstrable legal or equitable rights in danger of violation or which have actually been violated in situations where damages would be an inadequate remedy, or to those who are favoured by the balance of convenience in situations where as a result of serious conflict of affidavit evidence on material propositions of fact or law there is a reasonable doubt on either the prima facie existence of the right asserted or of its violation or of both, or of the adequacy of the remedy of damages. And in either scenario, the applicant's conduct should meet the approval of the eye of equity. I will decide this application applying the above principles.

What the wife/applicant is asserting in this case is that she has a proprietary and hence possessory right to the matrimonial home just like the husband/respondent. She is saying that as co-owner of property, she cannot be kept out of it by the other co-owner. She bases her claim on the provisions of section 17 of the Married Women Property Act of 1882 which she claims is a statute of general application on the authority of I v I [1971] EA 28, Karanja v Karanja [1976] LKR 307 and Kivuity v Kivuitu [1988-1992] 2 KAR 241. She emphasises that whether her marriage is statutory or customary matters naught. And she claims a right to use the car on the strength of the same argument about ownership and also that she has always used it as a personal vehicle. The husband's assertion is that she is a customary wife who is now lawfully divorced and the nature of the interest she may have in the matrimonial home and in the car (his counsel does not deny that the wife has some interest in the property) together with the incidents of such an interest can only be determined in accordance with Kikuyu Customary Law at the trial of the originating summons. Such a determination, he says, need not be inconsistent with the Married Women Property Act of 1882.

In my discernment of the law, whether the parties marriage is customary or statutory, the preponderance of authority in this jurisdiction leads me to the conclusion that the wife is likely to prevail at the trial in her contention that she has proprietory interest in both the matrimonial home and that car. And it is highly unlikely that the husband whose name has been inscribed in the register of marriages side by side with the name of the wife for over ten years now with his full knowledge and without protest will not be found estopped from denying that his marriage is a statutory one. The customary law marriage which he would rather it governed his personal affairs is likely to be found to have been superseded and subsumed in the subsequent statutory marriage. Being of that mental inclination I find that the wife has a prima facie case with a probability of success at the trial to the effect that she is co-owner of the matrimonial home and the motor vehicle and that accordingly she is entitled to access and use them. I am also of the view that for a person who is used to life in a posh residential area and to the amenity of locomotion by Mercedes Benz saloon her present consignment to Dagoretti a psychological torture and, as such, an injury that cannot be compensated for by an award of damages. I need not in view of the foregoing consider the balance of convenience. That is not to say I have no views on it. The husband's contention is that if the injunction is granted it will in effect be an order that two incompatible adults share the same roof. He says there is likely to be violence. The wife contends that to accede to the husband's urging would be to let him retain advantage of his own wrong in showing her out of the matrimonial home and in denying here the usual means of locomotion. Both contents are, I must say, quite appealing on their face. However, I am of the firm view that for a court of law to shirk from its constitutional duty of granting relief to a deserving suitor because of fear that the effect would be to engender serious ill will and

probable violence between the parties or indeed any other consequences would be to sacrifice the principle of legality and the dictates of the rule of law at the altar of convenience. It would be to give succour and sustenance to all who can threaten with sufficient menaces that they cannot live with and under the law. It would be to elevate perceived might to a legal advantage. This court will not do any of those things. If the husband cannot live peacefully with the wife under the same roof but in different chambers in their matrimonial home pending the hearing and determination of the property suit he had better look for alternative accommodation. I have no doubt from the depositions on record that that would be financially easy for him. If he does not, and if he is unable to restrain himself from visiting personal violence on her he will discover that in the armoury of the law sufficient weapons exist to deal decisively with those who would transgress it. And I need scarcely add that should the wife be tempted to harm her husband, as he fears she may, she will learn the lesson that the law is no respecter of gender. Of course the refusal of an injunction in this case would be to perpetuate the wife's resented absence from the matrimonial home and her non use of her usual personal care. It would be to condemn her to reside in Dagoretti and to use unfamiliar contraptions for locomotion. To grant the injunction would unhappily puncture the ego of the husband and make him quite miserable by compelling him to share the same roof with someone he no longer loves. However, I have not lost sight of the fact that he has endured such misery since 1992. Considering all that I am of the opinion that the inconvenience which the applicant will suffer by the refusal of injunction is greater than that which the respondent will suffer if it is granted. Finally I am of the opinion that the non-disclosure of prior proceedings which no stand withdrawn is not sufficiently material to impel me to view the wife's present application with disfavour.

In the result, I grant the orders prayed for in terms of prayers (3)(4) and (5) on page two of the chamber summons dated 29th May, 1995. Mrs Kinyanjui is at liberty to return to her matrimonial home and to take possession of and use her usual Mercedes Benz. The costs of this application will be in the cause.

Now having heard the advocates for the parties further and bearing in mind the uncontroverted fact that after I reserved my ruling in this matter the applicant/wife went to the subordinate court and obtained an order for maintenance in the not insubstantial sum of Kshs 50,000/- per month. I am of the firm view that it would be inadequate to grant her the injunctive relief prayed for. I am appalled by her conduct and as a court of equity, I shall not shut my mind and eyes to it. The justice of this matter now impels me to dismiss the application dated 29th May, 1995. I order it so dismissed.

The costs will be in the cause.

DATED and delivered at Nairiobi this 24th day of October, 1995.

A.G RINGERA

JUDGE