



**Wachuka v Ndungu (Family Originating Summons E007 of 2024)
[2024] KEHC 16823 (KLR) (Family) (12 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 16823 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY ORIGINATING SUMMONS E007 OF 2024
BM MUSYOKI, J
AUGUST 12, 2024**

BETWEEN

LUCY WACHUKA APPLICANT

AND

DAVID NDUNGU RESPONDENT

RULING

1. The applicant has by notice of motion dated 23rd January 2024 approached this court and craved for the following orders;
 1. Spent.
 2. Spent.
 3. An urgent temporary injunction do issue restraining the respondent, his servants and/or agents from denying the applicant entry and quiet possession of the matrimonial property referred to as Kikuyu/Kikuyu/Block 1/515 pending the hearing and determination of the originating summons.
 4. Spent.
 5. An urgent temporary injunction do issue restraining the respondent, his servants and/or agents from wasting, damaging or alienating and/or otherwise interfering with the matrimonial property referred to as Kikuyu/Kikuyu/Block 1/515 pending the hearing and determination of the originating summons.
 6. The OCS Kikuyu police station assist in ensuring compliance of these orders.
 7. The costs of the application be provided for.



2. The application is supported by affidavit of the applicant sworn on 22nd January 2024. The applicant avers that she was married to the respondent in 1970s and the two later solemnised their marriage on 2-12-1989. Prior to this date, they had been blessed with four children who are now adults. It is her averments that before the solemnisation of marriage, the parties had jointly purchased the suit property in which they have been living as husband and wife until the applicant removed her belongings from the main house and moved them to a small portion of the home.
3. According to the applicant, the respondent removed her property from the main house after she went to visit their youngest son in the United Kingdom in August 2023. Upon returning from the United Kingdom on 5-01-2024, the applicant returned her belongings to the main house but in the evening of 9th January 2014, the respondent forcefully moved the same back to the small portion of the property which forced her to seek refuge in their daughter's home. Since then, the respondent has refused to allow the applicant back. She maintains that she has a stake in the property despite the same having been registered in the respondent's name because she made contribution to its acquisition and development.
4. The respondent has opposed the application through replying affidavit sworn on 2nd May 2014. In it, he depones that the respondent left the matrimonial home without informing him and has not been aware of her whereabouts until she returned to the country. He avers that he did not send the applicant out of the matrimonial homes but moved her to a house next to the main house which is still part of the matrimonial home due to the existing disharmony and conflicts which might compromise each other's security. He states that the disharmony was caused by the act of the applicant of moving to United Kingdom without informing him. He avers further that the house he moved the respondent to is of similar standards and has the same facilities as the main house. According to the respondent, there is another 2 bedroomed unit in the same property which had a tenant and he allowed the applicant to collect rent from it and claims that he had asked the tenant in this house to leave to enable the applicant live in the same for purposes of peace and harmony. The respondent further states that the two can not live under the same roof because they are not in talking terms and there is no harmony. He adds that since they are still legally married, the issue of equal share of the property does not arise and in the circumstances, there is no reasonable cause of action.
5. I have noted that there is no dispute that the suit property is a matrimonial property. The applicant has averred that she made contribution to the acquisition and development of the property. The respondent has not refuted this fact. He has in fact acknowledged the same. His only defence in this application is that he has not sent the applicant out of the property but rather moved her to another house which is sufficient and satisfactory for her use. The reason for him doing so is the alleged disharmony and lack of peace between them.
6. The respondent maintains that there has been any violence or threat to violence between the parties but he fears that there could be harm because the parties are not in talking terms. From this scenario, it appears to me that the respondent's only reason for sending the applicant out of the house was her alleged travelling to the United Kingdom without informing the applicant. I am not convinced that the applicant was not aware of the respondent's whereabouts for the entire five months she was away. It is not logical for a spouse to stay for five years without knowing the whereabouts of the other and fail to file a missing person report, especially when the couple has been married for over four decades. The applicant may not have been happy with the applicant travelling but that did not justify his act of sending her out of the house she had lived in for 30 plus years.
7. Although there is no evidence that the respondent has intention of selling, alienating or interfering with the property, the fact that the respondent has made unilateral decision of who lives in which part



of the property shows that he may make other decisions affecting the property without consulting the respondent which may compromise the applicant's rights and interest in the property.

8. Since there is no dispute on ownership of the property and status of the parties, it is my opinion that both have equal right to use, occupy, live and stay in any part of the property. None of them has a right to force the other to use a particular part of the property. None of the parties has adduced evidenced to convince me that there has been threat of life or health of any of them from the other. In the circumstances, no party should unilaterally decide which part of the property either of them should live in. the fact that there are two or more houses in the same property does not make the respondent superior to the applicant in terms of decision of which of the houses she should use. Article 45 (3) of *the Constitution* provides that;

‘Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.’

9. It is a common ground that there has been no divorce between the parties. Whether or not the applicant seeks sharing of the matrimonial property is a matter for trial and I do not think that I should make consideration of the same at this stage. Based on the above, I find and hold that the applicant has established a prima facie case with a probability of success.
10. The second limb is the principle of irreparable damages. I do not think that it is possible to quantify damages the applicant is likely to suffer in the event the application is not granted. In my view, no quantum of damages will be adequate to compensate the applicant for the emotional stress, embarrassment and inconveniences she may suffer for living out of the home she has known for three decades. She participated in acquiring and building the home obviously identifying and preparing her preferences in the home. She is now forced to live and seek refuge in her daughter's home at the age she should be retiring to enjoy the lifetime work of her hands.
11. The respondent has stated that he has no issue with the applicant living in the property but in a separate house. It is not for me to decide who lives in which house. The applicant has prayed that the respondent be restrained from interfering with the suit property. I find that it is prudent that the property be preserved pending determination of the parties' rights in the main originating summons. There seems to be no other matrimonial home for the parties.
12. Having found that the applicant has established a prima facie case with a probability of success and that an award of damages will not be adequate to compensate the applicant, I do not find it necessary to consider the third principle of balance of conveniences.
13. I find the application merited safe do add that I do not see the need for involving the police in this civil matrimonial dispute. The applicant has other options of enforcing the court orders in the event the respondent is not willing to comply. The prayer for supervision by the police is therefore declined.
14. The upshot of the above is that the application dated 23rd January 2024 is allowed in the following terms;
 - a. A temporary injunction is hereby issued restraining the respondent, his servants and/or agents from denying the applicant entry and quiet possession of all that property known as Kikuyu/Kikuyu/Block 1/515 pending the hearing and final determination of the originating summons.
 - b. A temporary injunction is hereby issued restraining the respondent, his servants and/or agents from wasting, damaging, alienating and/or otherwise interfering with all that property



known as Kikuyu/Kikuyu/Block 1/515 pending the hearing and final determination of the originating summons.

c. The costs of the application shall be in the cause.

This matter had been referred to mediation but on 6-06-2024, the mediator returned a negative result stating that the parties have not reached a settlement. This court still encourages parties to pursue more mediations in order to settle the matter out of court. Reading the affidavits of the parties, none of them seems to have intention of severing the marital relationship. In such circumstances, an alternative means of settling the disputes between the parties is the best option.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF AUGUST 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Miss Wanjala holding brief for Miss Nderu for the Applicant and in the absence of the Counsel for the Respondent.

