REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 111 OF 2019

FK .....APPELLANT

VERSUS

CMM.....RESPONDENT

(An appeal from the Ruling and Orders of Hon. G. Sogomo PM made on 27/8/2019 and 29/8/2019 in Tigania PMCC No. 74 of 2019)

J U D G M E N T

1. On 23/8/2019, the Respondent lodged before the trial Court a Motion on Notice dated 20/8/2019 under ***sections 8, 13 and 24 of the Protection Against Domestic Violence Act No. 2 of 2015.*** In the Motion, she sought an interim order of exclusive occupation against the appellant to be enforced by OCS Mikinduri Police Station.

2. When the Motion came up for *inter partes* hearing on 28/9/2019, Counsel for the appellant applied for adjournment which the trial Court allowed. In addition, the trial Court granted an interim order of exclusive occupation and directed that the matter be heard the following day.

3. When the parties appeared on the following day, the respondent informed the Court that the appellant had not complied with the order of exclusive possession and the Court thereby ordered that the same be enforced by the OCS, Mikinduri Police Station.

4. Aggrieved by the said orders, the appellant preferred the present appeal setting out 10 grounds which can be summarized into three as follows: -

> **a. That the trial Court erred in granting an interim order of exclusive possession which was in the nature of a mandatory injunction of eviction at an interim stage;**
>
> **b. That the trial Court erred in granting radical and drastic orders without giving reasons or giving the appellant a hearing;**
>
> **c. That the trial Court was biased against the appellant and refused to record the submissions of the appellant's advocate.**

5. It was submitted for the appellant that the allegations of cruelty and assault were not proved against him. That the respondent was not entitled to the exclusive possession of **land parcel no. 9934, Antuamburi Adjudication Section** as the same was the appellant's home. The cases of **Agnes Nanjala William v. Jacob Petrus Nicolas Vander Goes CA No. 127 of 2011 (UR)** and **Gituanja v. Gituanja [1983] KLR 575** were relied on in support of those submissions.

6. For the respondent, it was submitted that the property in respect of which the order was made was known. That the trial Court properly interpreted and applied the provisions of ***section 19 of the Protection Against Domestic Violence Act.*** It was further submitted that the trial Court considered the need to ensure protection of the victim, the welfare of the affected child and the accommodation needs of the respondent. According to the respondent, the orders were properly granted.

7. The parties duly filed their respective submissions. From the said submissions, the respective Counsels dwelt at length on the merits of the application which is still pending before the trial Court. I will however, avoid addressing the said application as it is yet to be heard. Any comment thereon, by this Court may be prejudicial as the trial Court is yet to exercise its judicial mind on it. I will therefore address the grounds of appeal as set out above and will avoid to comment on Counsel's submissions.

8. The first and second ground are intertwined. This was that the trial Court erred in granting an interim order of exclusive possession which

was in the nature of a mandatory injunction of eviction at an interim stage without giving the appellant a hearing.

9. As already set out above, when the matter came up for *inter partes* hearing on the 28/8/2019, the advocate for the appellant was not ready. He applied for leave to file a replying affidavit. The Court then granted the leave and prayer number 2 of the subject Motion. The matter was adjourned to the following day when prayer number 3 was also granted.

10. The two orders that were granted on 27th and 28th August, 2019, respectively were in the following terms: -

> **"a) That an interim Exclusive occupation order be and is hereby issued against the defendant by himself, his agents, servants, employees pending hearing and determination of the application.**
>
> **b. That the orders be and are hereby directed to the OCS Mikinduri police station to ensure compliance of the court orders and supervised (sic) transition by the applicant into the residence".**

c. It is clear from the foregoing that the appellant was required to give exclusive occupation of the subject property. The respondent had not stated anywhere in her affidavit where she was living at the time. However, in paragraphs 6 and 7 of the plaint, she had indicated that the appellant had chased her and the children from that property on 29/3/2019 at 19.30hrs after assaulting her.

d. She also produced a letter dated 05/08/2019 from the Chief of Anjuki Location wherein he wrote of the respondent as follows: -

> **"The above named person is well known to me and hails from my area of jurisdiction. She has been married to one FKK for a period of five years, but as a result of domestic conflict with the said husband, she was pushed out of her matrimonial home <u>for a period of four months, and lives in a rented premises with her children.</u>**
>
> **…".**

e. The letter of the Chief continued to state that although the appellant was married to two other women, he had continued to be in occupation of the matrimonial house between him and the respondent.

f. The foregoing shows that the complaint by the appellant that he was being evicted at an interlocutory stage without being heard was not without a basis. It is not clear from the record why the trial Court was in a hurry to give an exclusive occupation without first hearing the appellant. This is so considering that there was material on record to show that the respondent had been out of that premises for quite some time.

g. This Court does not see any prejudice that would have been suffered had the Court waited for a short period to hear the appellant before granting the orders. In any event, by invoking the coercive powers of the state, through the OCS Mikinduri, before hearing the appellant, the trial Court clearly fell into error. The first ground succeeds.

h. As regards the reasons for the orders, I have already found that the appellant was not given a hearing before the orders were granted. The trial Court did not give reasons why it granted the order, albeit ex-parte, without hearing the appellant.

i. In this Court's view, considering the drastic nature of the orders the trial Court gave, it called for reasons to be advanced. It is admitted that the trial Court, for good reasons, had certified the application as urgent. However, it was incumbent upon it to give reasons why it had to give the orders before hearing the appellant. This is so considering that by the 29/8/2019 when the trial Court involved the police, the appellant's replying affidavit was already on record.

j. It is a cardinal principal of our law that, no one should be condemned unheard. The orders granted were final in nature. They had the effect of drastically changing the appellant's circumstances yet he was ready to be heard. In this regard, I find ground numbers 1 and 2 to be meritorious and they succeed.

k. The last ground was that the trial Court was biased against the appellant and that the Court failed to record the submissions of the appellant's advocate. The record is silent as to whether there were any submissions by any of the advocates. All that is recorded is the appellant's advocate applying for leave to file a replying affidavit and the respondent's advocate informing the Court that its order made on 28/8/2019 had not been implemented.

l. It is therefore difficult to say that the submissions of the appellant's advocate were ignored. If however, it is true that the trial Court failed or ignored to record the submissions of any party, that would be most unfortunate. It is the cardinal duty of every Court to record clearly the representations of the parties before it for record purposes.

m. As regards the alleged bias, there is nothing on record to show that the trial Court was biased in its dealing with the matter. It may have erred in the way it handled the matter, but that *per se* cannot be said to be evidence of bias. That ground fails.

n. In view of the foregoing, I find that the appeal is meritorious and is hereby allowed. The orders of the trial Court made on 28th and 29th August, 2019 are hereby set aside. The application is remitted back to the trial Court to hear the application dated 20/8/2019 on merit forthwith and without any delay.

o. In the meantime, the Court gives its apologies for the delay in delivering this Judgment. The Judgment was due and ready for

delivery on 19/3/2020 but for the Covid-19 pandemic.

DATED and **DELIVERED electronically this 29th day of April, 2020.**

A. MABEYA

JUDGE