



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MATRIMONIAL MISCELLANEOUS CASE NO.3 OF 2018

N W K.....APPLICANT

VERSUS

K W.....RESPONDENT

RULING

Back ground

1. The basic background to this suit is not contested. The Applicant (**NWK**) and the Respondent (**KW**) have been married since 13th December, 2008. Their marriage was solemnized at [particulars withheld] Catholic Church under the African Christian Marriage Act (now repealed). They are blessed with two issues, now aged about 9 and 4 years, with a third expected in July 2018.

2. The Applicant works as a Director in an NGO while the Respondent is a senior bank official. The couple has been in continuous cohabitation, initially in rented premises, until about 2015, when they moved into their own residence. There is no dispute that an incident occurred on 27th March 2018 in the family home, and subsequently the Applicant is no longer residing in the home. That the Respondent filed a **Children's cause no. 73 of 2018** before the Chief Magistrate's Court in Thika, and a consent order recorded, granting him custody of the two issues during week days and access to the Applicant over the weekend.

The Application

3. This incident of 27th March, 2018 prompted the Applicant to file an Originating Summons on 24th April, 2018 seeking *inter alia*, declarations that the home, described to be situate at [particulars withheld], and a vehicle **KBX** [particulars withheld], both registered in the Respondent's name are held in trust for the beneficial interest of the couple.

4. Also filed contemporaneously is the Notice of motion which is the subject of this ruling. Prayers 1,2,3,5 of the motion are spent.

The outstanding prayers seek

1. ".....

2.

3.

4. **That pending the hearing and determination of this Application, the Respondent and/or his agents or servants be restrained from evicting the Applicant and the children of the marriage from the matrimonial property situate at [particulars withheld]at Ruiru Eastern By Pass.**

5.

6. **That pending the hearing and determination of this Suit, the Respondent and/or his agents or servants be restrained from alienating, threatening, harassing and or in any way interfering with the Applicant and the children's peaceful occupation and enjoyment of the matrimonial property situate at [particulars withheld]at Ruiru By Pass.**

7. **That the Honourable court be pleased to issue an order directed to the O.C.S Ruiru Police Station and/or their officers to assist with the enforcement of the orders issued herein.**

8.”

5. The Motion is expressed to be brought under Article 45(2) of the Constitution and Sections 2,6,7,9 and 12 of the matrimonial Property Act, *inter alia*. The grounds on the face of the application and the affidavit sworn by the Applicant, and relied on in support of the instant Motion and the Originating motion mainly recite the background to the litigation. At paragraph 6 of the Affidavit of the Applicant, she depones that on the night 27th March 2018 “*the Respondent, without any justifiable cause forcefully evicted me from the matrimonial home*”.

6. The Applicant emphasizes that the said home was acquired jointly by the spouses. The Applicant complains that since the 27th March 2018 the Respondent has made it impossible for her to return to her home. That she has been denied her personal effects such as clothes, medication and facilities to prepare for the imminent birth of the third child. She depones that she is incapable of renting her own house and has been rendered destitute; that the children of the marriage have been denied access to their mother.

7. The Respondent swore a lengthy Replying affidavit, the bulk of which is devoted to demonstrating that the Respondents single-handedly acquired the home where the couple resided, without any contribution by the Applicant. He denies evicting the Applicant asserting that the Applicant left the home after “*she went on a rage and started throwing crockery in the kitchen as she displayed violent ungovernable temper, used strong, abusive and profane language..... switched on the gas threatening to burn the house down with the children inside*”. The Respondent views the spousal relationship as irretrievably broken. He also raises a litany of accusations, including infidelity and parental irresponsibility against the Applicant. He attached evidence to the effect that Applicant has a well-paying job and is residing with her mother in the Ruiru Kimbo neighborhood and that she is enjoying a medical cover provided by his employer.

8. The Applicant swore a further affidavit denying that she is residing with her mother, asserting that she is housed by her sister and a friend. She too accused the Respondent of having a post-separation relationship with a named woman.

The Arguments

9. The arguments of the parties took cue from the filed pleadings and affidavits, Miss Ngige for Applicant laying emphasis on Section 12 (3) of the Matrimonial Property Act, and the fact that the Applicant is expectant and entitled to access the matrimonial home.

10. Mr. Ndegwa for the Respondent emphasised the soured relationship between the parties and the fact that the Applicant is financially capable of finding her own accommodation as she only made a token contribution by way of the house help’s salary towards the upkeep of the children and has a medical cover.

Analysis and Determination

11. The court has considered all the material canvassed by the parties in respect of the instant motion. It appeared however, that some of the parties depositions and arguments were made in anticipation made of the Originating Summons rather than the present application. For the purposes of this ruling, it is enough that the parties were in the material period cohabiting with their children in the home which is the subject of the Originating Summons, and which was utilized as family home.

12. The question whether and to what extent each spouse contributed to developing the home is a matter of evidence to be determined upon the hearing of the Originating Summons. Section 2 of the Matrimonial Property Act defines the term matrimonial home as follows:

“Matrimonial home”

“Means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”

Section 6 of the Act further defines matrimonial property to include a matrimonial home.

13. At this point therefore it is premature to canvass the question of contribution to the development of the matrimonial home in this case. Section 12 makes special provisions in respect of matrimonial property and with regard to the matrimonial home, Section 12(3) provides that:

“A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.”

14. Further protection to the matrimonial home is provided in section 12(5) which requires the written consent of both spouses for purposes or mortgaging or leasing a matrimonial home. The parties before me have exchanged accusations and counter accusations itself not surprising in circumstances where the relationship between spouses is strained. In this case, it is evident that the marriage between the parties is going through a very turbulent phase. Looking at the material proffered on each side, it is difficult to tell how exactly the Applicant left the matrimonial home. She says she was forcibly evicted, while the Respondent says she left on her own free will. Both agreed that an incident precipitating the departure.

15. Subsequently, the Respondent applied to the court regarding the custody of the spouses, two children. These children currently reside with the Respondent in the week and are taken to the home of Applicant’s mother on weekends, to facilitate access to the Applicant. The Applicant is in her last trimester of pregnancy. She obviously has a job with a reasonably good pay and medical cover. Whether or not she elects to live with her mother, siblings or friends, is a matter of choice. Because, her salary is adequate for securing accommodation for herself and the expected child. More so, as her contribution to the up keep of the two children in the Respondent’s custody appears fairly

minimal.

16. The Applicant is therefore not a destitute person devoid of options where housing is concerned. And while she may have a right to reside in the matrimonial home, this court does not consider that arrangements to be prudent in the current circumstances. The relationship between the Applicant and the Respondent at the moment is bad. It would not augur well for the two of them to live under one roof. It may not be beneficial for the children or the ideal setting for a newborn child or mother of such child. Thus, the court does not consider it prudent at this stage to grant an order that would compel the Respondent to give access to the Applicant to move back into the matrimonial home.

17. I note that prayers 4 and 6 as couched seek, *inter alia*, to prevent an event which has already occurred, as by the time the motion was filed the Applicant had already left the matrimonial home. Nonetheless, had the court been satisfied that the circumstances of the case justify some intervention with regard to the occupation of the matrimonial home, an appropriate order could have been crafted. I have said enough, I think to indicate that the court is reluctant to grant any order that would effectively force the spouses under the current circumstances, to reside together in the matrimonial home as such an order could easily lead to serious adverse consequences for the spouses and the children.

18. Having said so, it is my view that the Applicant is entitled to her personal effects such as clothes and personal documentation necessary for her day-to-day operations and for preparation for the imminent birth of the third child.

19. Evidently the Applicant's clothes and other personal effects have hitherto remained in the matrimonial home. I do therefore direct that the Applicant, if she is desirous of accessing the personal effects, draws a list of such effects and serves it upon the advocate for the Respondent within 7 days of today's date. Upon receipt of the list, the Respondent is to deliver the listed items to the Applicant, on a date to be agreed by the parties, in the presence of the OCS Ruiru Police station. For the avoidance of doubt the said handing over is to be done at the Ruiru Police Station under the supervision of the said OCS.

20. In light of the nature of the dispute I direct that parties bear own costs. The court also strongly recommends that the parties consider resolving this matter by way of a conciliation process, such as mediation, as anticipated under Section 64 of the Marriage Act. There will be a mention on 27th September, 2018 to confirm compliance with handing over orders and to receive the parties' views regarding the proposal for mediation.

Delivered and signed at Kiambu this 25th Day of June, 2018.

C. MEOLI

JUDGE

In the presence of:

Miss Ngige for the Applicant

Respondent - Absent.

Kelvin Court Assistant