



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

MATRIMONIAL CAUSE NO. 2 OF 2017

PNK.....APPLICANT

VERSUS

FKK.....RESPONDENT

RULING

1. The applicant and respondent are *divorced*. A *decree absolute* was issued by the lower court on 1st August 2017 dissolving their customary union.
2. The applicant filed an *originating summons* dated 2nd August 2017 craving a *declaration* that the respondent holds the property known as Loc. 7/Gakoigo/[Particulars Withheld] in *trust* for her. The summons is pending for hearing. However, the High Court (Waweru J) granted an interlocutory injunction restraining the respondent from dealing with the property.
3. The respondent has in turn presented a *notice of motion* dated 17th April 2018 praying that the monthly rental income of Kshs 15,000 from the property be deposited in court pending the resolution of the *originating summons*.
4. The latest application is supported by a deposition of the respondent sworn on even date. He avers that the applicant did *not* contribute to the purchase of the property; and, that the property is *not* matrimonial property. It is deposed that the applicant has entered the property; and, is collecting the rent. He contends that it is only fair and just that the income be deposited in court.
5. The applicant contests the motion. There is a replying affidavit sworn on 19th April 2018. In a synopsis, the applicant claims that the rent has not been particularized; and, that the respondent has advised the tenants not to pay the rent to her. At paragraph 6, she avers that she contributed to the purchase of the suit property. She opines that the application is misconceived since she is entitled to *half* of the property; and, there is no allegation that she has mismanaged it.
6. At the hearing of the motion, the respondent submitted that he separated from the applicant for many years. The applicant reappeared in the year 2010 and moved into the premises. He instructed her to collect rent but she has converted it into her own use. In the year 2015, the applicant even placed a caveat on the property. The respondent fears that the applicant may never refund the rental income.
7. The applicant retorted that she needs the rental income for her sustenance. She said she only occupies three rooms. She contended that she would be prejudiced if the money is deposited in court.
8. I have considered the *notice of motion*, the depositions and rival arguments. Like I pointed out, the *originating summons* remains *unheard*. It would thus be premature and prejudicial to make any conclusive findings at this stage. That will be the true province of the trial court.
9. The core of this dispute is whether the suit property is a *matrimonial property*. The applicant claims to have *contributed* to its acquisition; the defendant flatly denies it. It will be for the trial court to unmask the truth on tested evidence.
10. This court is enjoined by Article 159(2) (d) of the Constitution to do *substantial justice* to the disputants. See *Edward Steven Mwiti v Peter Irungu & 2 others (No. 2)* Nairobi High Court ELC 105 of 2011[2012] eKLR. The court must also maintain a *level playing field* for both parties. This overriding objective was succinctly captured by the Court of Appeal in *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR-

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principal of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.”

11. The official search annexed to the applicant's original summons shows that the respondent is the *registered* owner. The applicant contends that the respondent holds the title in trust for her. In the interests of justice, I am prepared to allow the applicant to continue occupying the three rooms on the property. But it would be unjust for her to keep the entire rent before her claims are fully established. If she succeeds in the *originating summons*, the funds will still be safe in court. If she requires maintenance from the respondent, that is a subject that could have been determined in the course of the *divorce*; or, by a suitable application to court.

12. The upshot is that the *notice of motion* dated 17th April 2018 is allowed in the following terms-

- a. That the applicant shall continue to occupy free of any rent the *three rooms* she currently occupies on the property known as Loc. 7/Gakoigo/[Particulars Withheld].
- b. That the rental income from the remainder of the property shall be deposited in court pending the hearing and determination of the applicant's *originating summons* dated 2nd August 2017.
- c. That the interim order granted earlier by the court on 10th August 2017 is extended to the hearing date of the *originating summons*.
- d. That the *originating summons* shall be heard on priority.
- e. That I make no order on costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 19th day of June 2018.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

The applicant (in person)

The respondent (in person)

Ms. Dorcas and Mr. Kiberenge, Court Clerks.