



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CIVIL APPEAL NO.12 OF 2016

BETWEEN

J A O APPELLANT

AND

J M A RESPONDENT

(Being an appeal from the judgment and orders of the Resident

Magistrate's Court at Homa bay in Homa Bay Divorce

Cause No.17 of 2014 dated 9th May, 2016 – Hon. N. Kariuki, RM)

RULING

1. By a notice of motion dated 30/11/2016 the applicant prays for orders to stay execution of the judgment and/or decree delivered on 9th May 2016 pending hearing and determination of the appeal.
2. The respondent prayed for divorce and obtained judgment in his favour annulling his marriage to the applicant where the court dissolved the union and issued a permanent order of injunction, restraining the appellant by herself and or her servant/agents from entering the respondent's rural home, work place, rental home or in any other way interfering with him or his 2nd wife, child or her parents.
3. The applicant is apprehensive that she will not recover from such loss if the decree is executed. She contends that her appeal has overwhelming chances of success and should the execution be carried out, then the appeal will be rendered nugatory.
4. The applicant deposes in her supporting affidavit dated 31st November 2016 that the respondent may dispose of their rental property (one of which she occupies) once he evicts her therefrom.
5. In opposing the application the respondent deposes in the replying affidavit that the court arrived at a fair judgment and that the applicant is only interested in property which he solely acquired by seeking to obtain injunctive orders. He pointed out that the applicant had even informed the trial court that she was ready to divorce him and all she wanted was a share of the matrimonial property. The respondent argues that sharing of matrimonial property is a separate cause which should not be entertained in this application. He points out that the court issued those orders to protect him, his current wife, child, parents and tenants from the appellant's hostility, embarrassment and threats, and if the orders sought are granted, he will suffer irreparably.

6. At the hearing of this application, Mr. Nyauke submitted on behalf of the applicant that if the lower court's orders are effected, the applicant will have nowhere to live in as she will have been evicted from the matrimonial home.

7. However, the respondent argued that the applicant was a threat to his life and that of his child and other wife. He stated that when the restraining orders were given, she was actually staying in Rongo in a rental premises where she was paying rent. He endeavoured to demonstrate that the applicant is capable of paying her own rent as she is a businesswoman who initially did tailoring work before venturing into shop keeping.

8. He explained that the house which the applicant seeks to remain in is actually a mabati structure at **GOT RABUOR** (popularly known as **KAUNDA**) where the family has kept household items, and the other units are occupied by tenants. In Homa Bay he lives at **ASEGO** in Government premises, while his rural home is at **KABAR** in **NORTH EAST KANO**.

9. In response **MR. NYAUKE** submitted that the applicant in fact lives in that mabati structure, and that when the relationship became strained, it is the respondent who took off and went to live in a rented house in **RODI**. He alluded to the fact that because the applicant suffers from breast cancer, she moved out of her Homa Bay premises and rented a house in Rongo, but after some time she returned to Homa Bay to live within the compound where the respondent has houses. However since there was a tenant in the other house, she moved into the mabati structure where they all keep their property. It is her contention that she came back to those premises before the court issued the restraining orders.

10. I have considered the submissions made and also read through the trial court's judgment leading to issuance of the orders. The trial magistrate pointed out that there had been allegations of the applicant attacking her co-wife and child at their home in Kano and that she had threatened to burn down the matrimonial home – and the court considered these incidents to amount to misconduct of a grave nature **“which could lead to possibility of real physical injury upon the petitioner”** (now respondent). The marriage was found to have broken down irretrievably.

11. It is not in dispute that the premises where the applicant currently stays is used as a store by the entire family to keep their household items. They have a matrimonial home within the same compound but it has a tenant living there. I note that the applicant carefully avoids to mention the date of her return from **RONGO** to **HOMA BAY** – was it after the orders were issued, or in the course of the proceedings?

12. However of greater significance is the practical reality of the effects of such an order. The parties are openly hostile and uncivil to each other. There were claims made before the trial court that in a fit of anger the applicant had at one time threatened to burn down their matrimonial home. Now being the **“store”** where all the family members have kept their property actually gives her an easy access to deal adversely with the respondent's property which is inside the premises.

13. Whereas I greatly sympathise with her medical condition, it is not alleged that she cannot get alternative accommodation within Homa Bay and still get access to medical facilities.

14. Her fears that the applicant could easily dispose of the property once she vacates, can be stemmed by her filing a suit seeking distribution of their matrimonial property and indeed pray for orders restraining the respondent from disposing of the same.

15. Under **Order 42 Rule 6 (1)** no order for stay of execution shall be made unless –

a) The court is satisfied that substantial loss may result to the applicant.

16. The applicant has by her own admission demonstrated that she is capable of living on her own and paying for her upkeep. She does not deny that she is a business woman. Indeed the respondent's apprehension as to his loss should the orders be granted, in my mind are not necessarily financial loss for prosecuting the suit, but material loss, in the event that the applicant becomes sufficiently enraged as to

damage whatever property he is keeping in that structure.

17. Consequently the court declines to grant the application and is dismissed. Each party shall bear its own costs for this application.

Delivered and dated this 30th day of March, 2017 at Homa Bay

H. A. OMONDI

JUDGE