



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 43 OF 2015 (OS)**

**I B.....APPLICANT**

**VERSUS**

**J D.....RESPONDENT**

**RULING**

1. The suit herein was commenced by an Originating Summons dated 11<sup>th</sup> May 2015, which seeks—
  - a. A declaration that there be a presumption that there is a marriage between the applicant and the defendant out of prolonged cohabitation;
  - b. A declaration that matrimonial property LR [Particulars Withheld], Karen was acquired during the prolonged cohabitation and although it is registered in the name of the respondent it ought to be declared to have been owned jointly and where not possible to subdivide the same the same be sold and the proceeds be shared equally between the parties;
  - c. A declaration that the rents from the property, as well as the household goods in the premises, be shared equally between the parties;
  - d. Injunctions to restrain alienation of the property and eviction of the applicant therefrom; and
  - e. An order for maintenance of the applicant by the respondent.
2. The applicant avers that she and the respondent have been living together in Kenya for ten (10) years as at 2015 as husband and wife. She alleges that she left her employment in the United Kingdom at the request of the respondent so as to join him in Kenya. The cohabitation is alleged to have produced two children, born in 2006 and 2009. There are pending proceedings in Nairobi Children's Court Case No. 1480 of 2013 over the said children. She avers to an attempt to have LR No. [Particulars Withheld], Karen shared out between them equally through an agreement drawn up by an advocate in 2010, but the said agreement was not finalized. She claims to have contributed to the developments on the property. She states that she runs a business which is not doing well, and has been dependent on the respondent for maintenance. She avers that the respondent has turned hostile and cruel to her, and plans to evict her from the matrimonial home.
3. The respondent swore an affidavit on 9<sup>th</sup> June 2015 in response. He denies the marriage relationship, asserting that the parties had agreed that they were not to get married. He explains that either of them was free to have other relationships, pointing to the applicant's liaison with a Damon. He avers that as there was no marriage between them, LR No. [Particulars Withheld], Karen cannot possibly be a matrimonial

home. He asserts that the property was gifted to him by his father, and therefore even if the applicant were to be his wife she would not in law be entitled to it in the circumstances. He adds that he holds the property in trust for his son and a nephew. He denies that the applicant played any role at all in its development. He concedes to providing maintenance for all residents in his household, but denies that he did so to the applicant in his capacity as a husband to her. He denies that he is obliged to maintain the applicant as she was not his wife, and points to a decision of the Children's Court in that respect. He denies attempting to evict her.

4. The matter was originally filed at the Civil Division as HCCC No. 176 of 2015 (OS). It was thereafter directed on 7<sup>th</sup> July 2015 that the matter be transferred to the Family Division. When it was transferred to the Family Division it was assigned a new number, HCCC No. 42 of 2015 (OS).

5. The application for determination is dated 1<sup>st</sup> December 2016. It is brought at the instance of the applicant. She seeks that the respondent provides accommodation for her and the children of their union pending payment of Kshs. 75, 000, 000.00, an order that the applicant and the children be allowed back on LR No [Particulars Withheld], Karen to occupy one of the houses therein, an order that the respondent be ordered to pay the applicant a sum of Kshs. 65, 000, 000.00 and an order that once the applicant and the children move into LR No. [Particulars Withheld], Karen there be no harassment from the respondent.

6. The background to the matter is that the applicant vacated LR No. [Particulars Withheld], Karen sometime in September 2016 allegedly to escape physical and psychological cruelty from the respondent. On 14<sup>th</sup> October 2016 the parties then met and agreed that the respondent would pay the applicant Kshs. 75, 000, 000.00 in full and final settlement of any claims that she might have against him. She avers that there was an understanding that she and the children were staying temporarily with a friend, and the respondent undertook not to allow her and the children to be homeless, and he assured that he would be able to sell the house and raise the money within three months. Her case is that their license to live with her friend was near its end and she feared that she and the children would be rendered homeless.

7. The applicant has attached several documents to her affidavit sworn on 1<sup>st</sup> December 2016. There is a consent dated 14<sup>th</sup> October 2016, duly executed by the parties and their counsel, and filed herein on 18<sup>th</sup> October 2016. The consent proposed to settle the suit on payment of Kshs. 75, 000, 000.00 by the respondent to the applicant, to be paid out of proceeds of sale of the Karen property. There is also copy of another consent signed on even date and lodged in Nairobi Children's Court Case No. 1480 of 2013 on 18<sup>th</sup> October 2016, with regard to the children. In that consent, the children's case was to be settled on terms that the children would be with the applicant for two weeks and two weeks with the respondent during school term, with school holidays and half terms shared equally. It was also agreed that the children would not be removed from Kenya without written consent of either parent or leave of court, the respondent was to meet their educational needs, he was also to continue providing groceries and fuel at a cost of Kshs 140, 000.00 to the applicant, to respect each other's privacy and to uphold the best interests of the children.

8. The application is opposed by the respondent. He swore an affidavit on 8<sup>th</sup> December 2016. He argues that the application is misconceived as the parties had already filed consent to settle the suit. Under the consent the applicant was set to receive a sum of Kshs. 75, 000, 000.00. No time limit had been set for payment of the money as the same was subject to the property being sold. He had placed it in the market and was waiting for offers. He states that the children's case had also been settled by consent, which was adopted by that court on 26<sup>th</sup> October 2016 he asserts that his responsibilities to the children were clear under the consent – to pay for their educational and health needs, and to meet any other needs during the period when the children are under his care. He adds he is still paying the sum of Kshs 140, 000.00 monthly for the children's fuel and grocery needs. He asserts further that the consents have not been varied and therefore there cannot be a re-entry with regard to these matters. He argues that she has moved on with Damon. He argues further that there is no marriage to provide a basis for the orders sought; otherwise she would not be asking the court to presume one. He explains that the parties were both living within LR No. [Particulars Withheld], Karen but in separate houses. Then on 2<sup>nd</sup> September 2016 the applicant's advocates wrote to his advocates indicating that she would move out with the children. While

the respondent was away, she did move out with the children. He states that he believes that she moved out in order to force him to settle the matter. He states that when the consents were being entered into the issue of her accommodation arrangements being temporary and the possibility of her needing accommodation in the near future did not arise. He denies ever promising to provide her with accommodation at the time the consents were being negotiated and executed.

9. The application was heard orally. Both parties gave oral testimonies and breathed life to the averments made in their respective affidavits.

10. This is a fairly straightforward matter. The parties have entered into two consents to dispose of the two suits between them. In both there is no provision that either should provide accommodation to the other. The assumption is that either of them would be able to take care of themselves. The consents were entered into after the applicant left LR No. [Particulars Withheld], Karen, yet no terms were inserted into the consents regarding accommodation. There is no issue as to the accommodation of the children; whichever parent has access to them is expected to cater for their accommodation. It is the accommodation of the applicant that is in issue. She concedes that there was no formal marriage between her and the respondent, hence her suit for presumption of marriage. She has moved on. She has consented to settling the suit on terms. The respondent had graciously accommodated her on LR No. [Particulars Withheld], Karen pending resolution of the issues, yet she, on her own volition, chose to move out. I do not think she can have her cake and eat it, or approbate and reprobate. She should have waited to be settled by the respondent before moving out without proper accommodation arrangements in place. She has made her bed, she should lie on it.

11. I find no merit whatsoever in the application dated 1<sup>st</sup> December 2016. The same is hereby dismissed. The respondent shall have the costs thereof.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>TH</sup> DAY OF SEPTEMBER, 2017.**

**W. MUSYOKA**

**JUDGE**