



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 17 OF 2017

M W R.....PLAINTIFF/APPLICANT

Versus

P M.....DEFENDANT/RESPONDENT

RULING

This is an application in which M W R, the applicant filed a certificate of urgency dated 11/10/2017 seeking:

Interim orders of injunction against P M, the respondent to restrain him against evicting her from the shop located within the matrimonial property which she has been operating during the subsistence of the marriage.

The application brought pursuant to the accompanying notice of motion is premised under section 1Am 1B, 3A of the Civil Procedure Rules and Article 53 of the constitution. The application though served upon the respondent was not opposed. According to the applicant's supporting affidavit she was married to the respondent under Kikuyu customary law. In the course of the marriage they were blessed with three children namely; B.K. born in 1999. V.R born 2001 and M.K. born in 2010.

From the averments and papers before me there is no doubt what was once a working marriage relationship has now broken down irretrievably. The dispute ended up in a court of law where the issuance of the divorce and a decree nisi dated 4/9/2017 was the last nail to once happy marriage. The issuance of the decree nisi was a sequence of an unfortunate event in which the respondent had the applicant evicted from the only shop which was a source of income for herself and the children.

As a result of the above action the applicant under certificate of urgency proceedings has moved this court for relief that she be allowed to continue operating the shop pending the outcome of matrimonial property dispute as particularized in the originating summons in Civil Suit No. 17 of 2017. The applicant avers that the relief and protection order sought from this court is in the best interest of the children and herself.

ANALYSIS AND DETERMINATION:

The Matrimonial Property Act which recognizes the rights of women and men in the relationship in the nature of a marriage to matrimonial home and property is underpinned under Article 45 of the Constitution. It is also crystal clear under the provisions of Article 27 of the Constitution there is prohibition to discriminate on grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Thus the constitution itself under Article 45 (3) and 53 provides special provisions touching on women and children rights. The explicit support of the constitution recognition of the parties to a marriage being

entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage was meant to redress the structural and historical roots of discrimination against women.

In my view construing these constitutional provisions the right to residence is part and parcel of a wife's right to maintenance either during the marriage or at the dissolution of the marriage. That right cannot be defeated by virtue of the fact that the husband and wife are separated or divorced.

In the instant application and on the materials placed before me there is no dispute that both parties have just divorced as evidenced by the decree nisi dated 4/9/2017. The respondent's retaliation to deprive the applicant of the roof and source of income over her head without alternative accommodation is discriminatory.

I am of the conceded view that the applicant's application under Order 40 sub rule 2, 3 & 4 of the Civil Procedure Rules as supported by the averments in the affidavit has demonstrated that the respondent action is aimed at dispossessing her of the current premises. She has also contended that the property in question which she is claiming right of residence was acquired during the subsistence of the marriage, but registered in the name of the respondent.

It is trite that an applicant seeking relief of temporary injunction ought to establish a prima facie case. In making a determination of existence of a prima facie case I am not required to examine the merits of the case rather the basic facts surrounding the dispute.

The discretion of the court is exercised to grant temporary injunction only when the following threshold has been made as stated in ***Giella v Cassman Brown*** case. In the classic case ***of Giella v Cassman Brown Ltd EA [1973]*** the court opined the threshold to be met by an applicant before grant of injunctive orders namely:

“First the applicant must establish a prima facie case with a probability of success.

Secondly, an injunction will not normally be granted unless otherwise the applicant has shown that he will suffer irreparable loss which will not be adequately compensated in damages.

Thirdly, if the court is in doubt it will decide the application on a balance of convenience.”

The Court of Appeal in the case of ***Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125*** defined what will constitute a prima facie case in this context as follows:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The question then to be answered is whether the applicant has put forth a prima facie case?

Testing the present case in the light of materials and disposition in the affidavit and the above legal principles, I am satisfied that the applicant has discharged the burden of proof on the requirements of a prima facie case with a probability of success in her favour. The applicant has a right of access and residence in suit property referenced as Plot No. 244 Embul-bul pending the outcome of the originating summons No. 17 of 2017. The respondent's acts of eviction have infringed on the applicant's right to a roof under her head and also right to maintenance for herself and the children. The applicant has an arguable claim against the respondent which she has a right to protect. The applicant has filed an originating summons and this temporary injunction is based on the main action dated 11/10/2017.

I am also mindful of the fact that the respondent was duly served with the applicant's certificate of urgency but opted not to file any rejoinder to the matter. Considering the level of hardship being experienced by the applicant and the respondent reluctance to solve the issue, an equitable remedy of the

nature being sought is warranted.

That pursuant to these findings;

(1) The respondent or his agents, servants, employees is hereby restrained by way of injunction under Order 40 rule 2, 3, 4 of the Civil Procedure Rules from interfering with the quiet and peaceful enjoyment of the portion of property described as Plot No. [particulars withheld] Embul-bul more specifically the space for her business and residence pending the final determination of the originating summons.

(2) That the court bailiffs with assistance of the OCS Ngong police station do provide security, execute this order on behalf of the applicant to gain access and place her *insitu* in the premises forthwith.

(3) That the respondent is hereby restrained from any acts of violence, disturbance or conduct which jeopardizes or threatens the safety and security of the applicant.

(4) That the originating summons before this court be set down for hearing upon completion of discovery and pretrial conference.

(5) The costs of this application be in the cause.

Dated, delivered and signed in open court at Kajiado this 18th day of October, 2017

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R. NYAKUNDI

JUDGE

In the presence of:

Applicant present

Ms. Kariuki for Kathambi for the applicant

Mr. Mateli Court Assistant