



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT 55 OF 2015

J M O.....APPLICANT

VERSUS

C K O.....RESPONDENT

RULING

PLEADINGS

By an application brought under certificate of urgency under **Section 80 & 3A of Civil Procedure Act & Order 45 Rule 1 (1) of Civil Procedure Rules**; filed on 4th November 2015 the Respondent/Applicant sought;

- a. The court stays execution of the Court's Ruling of 29th October 2015
- b. The Court Ruling of 29th October 2015 be reviewed and/or set aside
- c. The Court grants such orders and directions as the Court deems fit.

APPLICANT'S CASE

The Applicant informed the Court that the basis for setting aside, reviewing and staying execution were based on the following grounds;

- a) The order of this Court of 29th October 2015 granted any party to apply to Court
- b) The matter was for a mention and not a hearing as shown by the Cause List attached to the pleadings. The Orders were issued on a mention date, the applicant did not expect such orders and he had not prepared to proceed with the matter on the said date. The law is clear that substantive orders ought not to be granted on a mention date.

The Applicant relied on the cases of **INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION VS OTEDI 1977 KLR 101 AT PAGE 103** **REPUBLIC VS SURGIPHARM LIMITED 2014 ECLR**

The Applicant expected the application of 14th September 2015 be heard and determined and it had not been heard. In the application the Respondent /Applicant did not ask the Court to give her accommodation, yet when she addressed the Court, she said she was homeless and then the Court granted her accommodation.

The orders she applied for and the Court granted were not in consonance with what she pleaded for. A party is bound by the pleadings as elucidated in the case of;

MCK vs GVK CIVIL CASE NUMBER 66 OF 2014, which states that the Court should not make a finding on, matters not pleaded.

On the said day, the Applicant addressed Court and the Respondent was not in Court and he wanted to controvert what was stated in Court. He would have been given a chance to address the Court and the Court would not have reached the decision it made.

The Applicant deposed that he solely built the matrimonial home in Karen and bought the Apartment in Kileleshwa. The Respondent did not contribute to the purchase of the 2 properties.

The Applicant deposed that he did not send or chase the Respondent away but rather she left on her own free will.

She was and is free to return to the matrimonial home.

The Respondent is not destitute and /or homeless as she convinced the Court. She is working and earns reasonable salary to sustain her in the rented flat in Westlands.

On the other hand he is retired and relies solely on the rent receivables from the Apartment Number 6 at **[Particulars Withheld]**;

The Court cannot distribute matrimonial property until there has been a divorce. This Court by its orders distributed matrimonial property.

The Respondent misused, the Court orders of 29th October 2015 to harass, molest and intimidate the Applicant.

The Applicant alleged, that even before the said orders were served to the Respondent, their eldest daughter, L A emboldened by these orders and at the directions of the Respondent, she visited her father at the matrimonial home in Karen and beat and assaulted the Applicant threatening to kill him and evict him from the home.

RESPONDENT'S CASE

The Respondent filed Replying Affidavit on 1st December 2015 and opposed the application on the following grounds;

The application of 4th November 2015 is to unjustifiably forestall enforcement of Court orders of 30th October 2015.

The Respondent sought to be granted alternative accommodation pending hearing and determination of her application filed on 14th September 2015 which sought among other orders, injunctive orders against the Applicant not to interfere with matrimonial property and to provide her with alternative accommodation.

This application was first heard *ex parte* on 21st September 2015 and the Duty Court directed the application be served and heard on 30st September 2015. The Court did not sit and the Deputy registrar gave the date 6th October 2015.

On 6th October, 2015 the Court noted that the matter of accommodation was urgent and requested parties to amicably discuss and agree on the way forward.

Her advocate wrote to the Applicant's advocate as shown by the letter attached and was assured that once the Applicant was back in Nairobi they would revert on the matter. They never did.

On 22nd October 2015, the matter was not heard as the parties were not in Court. Her advocate went to the Deputy Registrar and obtained the date of 26th October 2015. The Applicant's advocate was served with the notice.

On 26th October 2015 the Applicant's advocate was not available and holding brief Counsel had limited instructions. The Court directed the matter be mentioned on 29th October 2015.

On 29th October 2015, Counsel for the Applicant intimated to Court that his client would not agree to discussions about the Respondent's accommodation. The matter proceeded at 11.30 am as Counsel was attending to another Court. Later, the Court heard both sides. The Respondent addressed Court on her predicament.

It was not necessary for the Applicant to be present in Court, the matter was not a full hearing and Counsel of both parties presented their client's version. She informed the Court of her dire situation.

The Respondent alleged that the Applicant evicted the Respondent from the matrimonial home on 11th January 2015 in the middle of the night and she reported the matter to Hardy Police Station OB: 18/14/1/2015.

She had to look for alternative accommodation. She could not return to the home due to the Applicant's violent disposition. She stayed in a hotel for a week and it was very expensive, she moved in with her niece and later to an apartment in Westlands.

The Respondent works as a lecturer at the University and earns a modest salary. Her net pay is KSHS 175,583.50 and rent monthly is KSHS 120,000/- it is not possible to survive on the balance of her salary once rent is paid.

The Applicant is though unemployed is not relying only on rent proceeds from the Apartment. He conducts consultancies and travels to Ghana.

With regard to the scuffle between the Applicant and their daughter, she did not instigate her to visit the father and make any demands or engage in disagreement. She learnt of the incident from KK Security Services.

L A K filed her affidavit on 1st December 2015 and narrated what according to her happened. She visited her father, the Applicant at their Karen home after she wrote him emails to allow her to come home. The email is attached and he agreed he would be back on 30th October 2015 from a small consulting assignment.

On arrival, security guards blocked her entry on instructions from the Applicant. She called her father and he allowed her to come in.

The Applicant gave her, her documents and she asked to attend to personal matters in the house and suddenly they begun to quarrel and it turned into a physical altercation. The taxi driver and security guards intervened. The Applicant locked her, the taxi driver and 2 security guards in the house. The Applicant came back with Police.

P M filed his affidavit on 1st December 2015, and narrated the events of that day, when he drove the daughter of the Applicant and Respondent to their home in Karen. They were refused entry until the Applicant allowed them in. He was left outside and he heard screams and rushed inside and found the Applicant and Linda in physical altercation and rushed to separate them. They were locked in the house and later Police came and took over the matter.

ISSUE

1. Should the Court orders of 29th October 2015 be set aside, vacated, varied, amended and or stay of execution granted?

DETERMINATION

The first issue raised is that the matter was scheduled for a mention and this court granted substantive orders without giving the Respondent a hearing as he was not in court. The Court record confirms that on 6th October 2015, Counsel for the Applicant stated the application of 14th September 2015 was under certificate of urgency and his client was evicted from the matrimonial home and had run out of resources and the matter was being deliberately delayed. Counsel for the Applicant asked for time to file a Replying affidavit to the said Application.

The Court granted the same and took note of the Applicant's situation and requested parties to resolve the issue of accommodation amicably pending hearing *interpartes* of the said application. The matter was stood over to 22nd October 2015.

On 22nd October, 2015 none of the parties appeared in Court. On 26th October 2015, the parties took the date from the Registry. The Applicant's advocate informed Court that there was no agreement on the issue of Applicant's accommodation. This Court adjourned to the 29th October 2015 for all parties to attend and further orders be issued.

On 29th October 2015 both Counsel for the parties were present. Counsel for the Applicant informed Court that he informed his client and it is an issue they were unable to agree on. Counsel for the Applicant reiterated the urgent need to intervene as the applicant was destitute. The Court decided to address the pressing issue of accommodation.

Counsel for the Respondent indicated he had to go to another Court and the matter was to proceed on this issue at 11am. The Court heard from both Counsel and asked the Respondent to return to the matrimonial home. At that point she raised her hand the Court allowed her to address the Court. The Respondent informed Court she would not go back to the home as she was scared for her life due to what happened in the last 4 years culminating to the eviction from the matrimonial home on the night of 11th January 2015 as deponed in her pleadings.

This Court granted orders that the Respondent reside in the **[Particulars Withheld]** Apartment Kileleshwa pending hearing of the matter *interpartes* or receiving rent to rent elsewhere as the Applicant resides in the matrimonial home in Karen.

This Court granted the orders on the following grounds;

- a. The issue of accommodation was raised in Court as an urgent matter from 16th September, 6th October, 26th October and 29th October 2015 and all this time the matter was adjourned and an amicable solution was not forthcoming.
- b. The matter was for mention due to the fact Counsel for the Applicant did not attend Court on 26th October 2015 when the parties obtained the date from the Registry.
- c. The pleadings were closed as the Replying affidavit was filed on 22nd October 2015
- d. This Court was moved to address a pressing and urgent matter as confirmed from the Court record
- e. The Court restored the prevailing position before this matter arose, that both the Applicant and Respondent were in a home in respect of fear of safety, the Court allowed the Respondent to reside in the other property.
- f. These are interim orders pending hearing and determination of the substantive application of 14th September 2015

This Court relied on the following provisions of law in hearing the urgent matter at the mention stage;

- a. **Article 159(2) (a-e) Constitution 2010** justice be done to all irrespective of status, justice may not be delayed, alternative forms of dispute resolution be pursued, justice shall be administered without undue regard to procedural technicalities and purposes and principles of the Constitution shall be protected and promoted.
- b. **Article 27 of the Constitution 2010** every person has the right to equal protection and benefit of the law. The Applicant is entitled to be heard as a rule of natural justice (**Article 50(1)**) that is why he had time to file the Replying affidavit. When the issue was raised of the Respondent's abode was raised for the 3rd time, he was represented by Counsel who informed the Court that the parties could not agree. Similarly, the Respondent is entitled to shelter, accessible and adequate housing (**Article 43**) right to life (**Article 26**) and human dignity (**Article 28**) of Constitution 2010.
- c. **Section 12 (3) of Matrimonial Property Act 2013 provides;**

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

The Respondent was evicted from the Karen home on 11th January 2015. A report was made at Hardy Police Station. The affidavits of the Applicant's daughter and taxi driver strongly suggest violence in the home and therefore the Respondent was apprehensive and feared for her life to return to the matrimonial home. By virtue of this provision this Court restored the parties to *status quo ante* as an auxiliary relief; their original position but in another property pending hearing and final determination of the application. These factors necessitated the matter being dealt with at the mention stage.

The 2nd issue raised is that the Court granted orders that were not sought and or pleaded by the Respondent. A party is bound by their pleadings. The Respondent did not plead to be accommodated at the Apartment in [**Particulars Withheld**] but to have the Applicant evicted from the matrimonial home so as to occupy it.

The Application of 14th September 2015, the Notice of Motion filed on 17th September 2015 at paragraph 9, 10 and 11 the Respondent seeks the Court to compel the Applicant to relinquish possession and occupation of Apartment 6 of [**Particulars Withheld**] to her pending hearing and determination of the Application and OCS Langata to effect service to ensure compliance.

The 3rd issue is that Counsel for the Respondent informed this Court that pursuant to the Orders of 29th October 2015, the Respondent moved to the Duty Court in an urgent application and Hon. L.J R.Ougo granted orders on 22nd January, 2016 to the effect that OCS Kileleshwa was to assist in vacant possession of the Apartment which is now occupied by the Respondent.

This Court being of equal and competent jurisdiction cannot set aside the Court orders of 22nd January 2016.

The 4th issue is that this Court distributed matrimonial property by the orders of 29th October 2015. **Section 7 of Matrimonial Property Act 2013** envisages such an exercise upon dissolution of marriage. All this Court did is to ensure safety and shelter to one spouse of this union who was destitute until this matter is heard and determined.

On the issues raised that these orders prejudice the Applicant, he was not heard, he requires the rent from the Apartment for his subsistence as he is retired and the respondent is working, they cannot be determined at this stage as there are varied versions and claims. The Court shall not disturb the present status quo but have the parties obtain a hearing date in the Registry for hearing *inter partes* of the application of 14th September 2015.

For the above reasons the Application of 4th November 2015 is dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2016

M. MUIGAI

JUDGE

In the presence of:

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