



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS BUILDING
HCC. NO. 61 OF 2015 (O.S)
IN THE MATTER OF MATRIMONIAL PROPERTY ACT 2013
AND
IN THE MATTER OF AN APPLICATION FOR DECLARATION OF PROPERTY RIGHTS
BETWEEN
J G M.....APPLICANT
VERSUS
M W G..... RESPONDENT
RULING

PLEADINGS

By Notice of Motion filed on 12th December, 2015 the Applicant J G Msought from this Court against the Respondent M W G the following orders;

- a. That the application be certified urgent
- b. That an injunction is issued to restrain the Respondent, her agents/servants from evicting the servants, destroying crops or in any other way interfering with farming activities on **L. R. No. [particulars withheld]** until the hearing and determination of this application.

The application is premised on the following grounds;

- a. That this Court issued a Court order on 11th day of December, 2015 restraining the Respondent, himself or his agents/servants not to interfere, with dispose of or subdivide **L.R. No. [particulars withheld]** or evict the Applicant (herein the Respondent in this application).
- b. The Respondent chased away all the servants who have been working on the suit property.
- c. The Respondent is the only person authorized to sell the tea and has GA number
- d. The Respondent has been selling tea to unauthorized vendors which is illegal
- e. In the interest of justices the Court orders of 11th December, 2015 should be vacated.

The Applicant in his supporting affidavit averred as follows;

- a. That following the Court order of 11th December, 2015 which meant that the Applicant should not evict the Respondent herein from the suit property **L.R. [particulars withheld]** or to dispose, interfere with the legality of the title documents or subdivides the suit property.
- b. The Court order did not mean that the Respondent herein should enter into the farm and destroy the crops and send away servants who worked there for many years.
- c. The Court has not determined that the Respondent herein in the owner of the property **L. R. No. [particulars withheld]**.
- d. The Applicant did not have a problem with the Respondent living in the matrimonial home but she is not to interfere with the crops on the land. To do this would be to cause the Applicant a lot of harm and loss.

Another application in the same vein was filed under certificate of urgency on 11th January, 2016. The Applicant J G M deposed that the Respondent M W G used the interim orders issued on 11th December, 2015 to evict the Applicant herein and his servants from the suit property. The Applicant in the said application of 23rd October, 2015 that culminated to the Court orders of 11th December, 2015 concealed material facts. The Applicant therein vacated the suit property for the last 3 years she has not resided in the said premises. The Applicant took advantage of the Court orders to commit acts of waste on the suit property.

Another Application filed on 18th February, 2016 by different advocates was filed under certificate of urgency whereby the Applicant sought that the Court orders issued on 3rd December, 2015 be varied, set aside or stayed pending the hearing and determination of the Originating Summons filed on 23rd October, 2015. That an order of *status quo ante* the orders of 3rd December, 2015 be maintained. The *ex parte* order of injunction was bound to condemn the Respondent to denial of income deprivation and poverty and is prejudicial to the rights of the Respondent. The Applicant would not be prejudiced in any way if the Court order is set aside.

On 1st March, 2016, the Respondent M W G filed a Replying Affidavit to the applications as follows;

- a. That contrary to the averments by the Applicant that the Court orders of 3rd December, 2015 issued on 11th December, 2015 was *ex parte* it was in the presence of Counsel for the Applicant.
- b. Applicant filed the Originating Summons of 23rd October, 2015 but instead of the Respondent replying to it and the matter proceeds for hearing, there have been multiple applications that are pending and the Respondent has not filed a reply to the Originating Summons.
- c. The Respondent herein stated that between her and the Applicant they have seven (7) parcels of land which were acquired during the pendency of their marriage and they developed these properties.
- d. The Respondent herein resides only in one of the properties *[particulars withheld]* in the matrimonial home where she brought up their children. They have lived in home since 1973. The Applicant left the home in 2008 to live with one L W at *[particulars withheld]*. The Respondent planted the tea bushes and subsistence crops and continues to rely on them as a source of livelihood.
- e. The Applicant filed the application filed on 23rd October, 2015 seeking this Court to grant her interim orders as the Applicant is a violent man and there is an ongoing case at **Gatundu Magistrates Court Criminal Case 338 of 2013** and varying the orders would prejudice her. She is an elderly women of 70 years and if evicted she would be destitute.

HEARING

On 16th June, 2016 the Applicant through Learned Counsel Ms. Muigai told the Court that there is an *ex parte* order issued by this Court on 11th December, 2015 and although it is succinct and clear, the execution on the ground was misleading and misguided.

The Applicant in that application in issuance of the orders evicted the Respondent now Applicant from

the matrimonial property and she undertook management of the farm exclusively. The Court order was served to the Sub Chief who misinterpreted the order to evict the Applicant in the present application. The execution of the court order is at stake.

The Applicant J G M told the court that since the Court orders of 11th December, 2015 there were new developments. He was evicted out of the land and his daughter with the Applicant/Respondent herein came unto the land. The daughter took everything on the land. The Applicant came to Court so as to be able to access the land until the matter is heard and determined. He wants to go back to the farm and stay there. The Applicant left the land and matrimonial home as per the Court orders from the Gatundu Court. The Applicant is not on the land but he has no problem if she came back and they can live together until the matter is heard. He will not harm her as there are law enforcement officers.

The Applicant through Learned Counsel Mr. Kimathi told the Court that the Court orders of 3rd December, 2015 were not *ex parte* as they were issued when there was a lawyer for the Respondent, following his application to Court of prevailing circumstances that required urgent attention pending the hearing of the applications.

Counsel intimated to the Court that his client the Applicant is an elderly lady 70 years old, a farmer who had been in the suit property since the 1960's and brought up her family. She earns a living from the farm's produce. Her life is in danger from the Respondent's/Applicant herein who threatened to evict her from the matrimonial home. If evicted where would she go to? She would be destitute.

He urged this Court to hear the matter vide the Originating Summons so that this matter is settled once and for all.

Counsel stated that his client the Applicant in the previous application resides on the suit property. The Respondent the Applicant herein was not evicted at all. He left the Applicant in the matrimonial home and lives with the 2nd wife L W. The Applicant's daughter M is married in the nearby village and she is the one who comes to the suit property each day to take care of the Applicant. When she felled trees on the farm and she was arrested by the Police.

The Applicant herein has seven (7) parcels of land the Respondent herein seeks to reside only on one of these properties where there is the matrimonial home. The interim orders should be extended until the hearing and determination of the Originating summons of 23rd October, 2015.

P M the eldest son of the Applicant and Respondent told the Court that his mother the Respondent herein resides on the suit property.

DETERMINATION

On 3rd December, 2015, the Applicant through Counsel Mr. Kimathi was ready to proceed with the hearing of the Originating Summons filed on 23rd October, 2015 and had served to the Respondent.

The Respondent through Counsel Mr. Mugambi holding brief for Mr. Gathii informed the Court that he had not been invited to take the hearing date and he required 14 days to file a Replying Affidavit which the Court obliged. Parties were to obtain a hearing date from the Registry.

Thereafter Counsel for the Applicant informed the Court that his client aged 70 years old was threatened with eviction from the matrimonial home and subjected to violence by the Respondent who lives elsewhere. There were criminal proceedings ongoing. He applied for preservative orders restraining eviction and any disposal, transfer subdivision or sale of the suit property **L. R. No. [particulars withheld]**.

The Court relied on the application filed on 23rd October, 2015 and considered the pleadings which disclosed the following facts, the Applicant is an elderly woman with no home other than the matrimonial

home where the Respondent has threatened to evict her from. The Respondent has threatened to evict and sell to 3rd parties the land parcel [*particulars withheld*] which is a matrimonial home where the Applicant has resided for over 50 years. The Respondent has threatened to evict the Applicant and demolish her houses rendering her homeless and unless restrained by this Court the Applicant stands to suffer irreparable losses. There was no mention of a farm, tea bushes, felled trees, servants on the farm etc.

Therefore this Court considered the life and safety of the Applicant which was of immediate concern and ensuring she is not destitute. This Court granted interim orders to prevent eviction of the Applicant from the matrimonial home situated in this suit property [*particulars withheld*] pending the hearing of the application.

The issues raised are subsequent to the application of 17th December, 2015, 11th January, 2016 and 18th February, 2016 which brought to the fore, new facts and developments that came up after and emanating from the orders of 3rd December, 2015 and extracted on 11th December, 2015.

The Court orders were to safeguard the Applicant's life from any danger and to preserve the matrimonial home and did not at any point infer and relate to the farm, the tea bushes, subsistence crops, trees, etc until it was brought to the fore during the hearing of the present application.

This Court has noted the following facts from the Court record;

1. The Applicant and Respondent were married under Kikuyu Customary Law in 1963 and in 1965 they solemnized their marriage in the Anglican Church at Kanjuku Kiambu District.
2. The Applicant and the Respondent had four (4) children. The Applicant married L W in 1978 as 2nd wife. They had a blended family of three (3) children.
3. The evidence on record is contradicting, as per the Applicant herein; the Respondent fled from the matrimonial home four (4) years ago and lives with her children. According to the Respondent the Applicant chased her from the matrimonial home in 2013 and assaulted her. She has been residing in the said home despite threats of eviction from the matrimonial home.
4. The Respondent filed a petition for divorce in **Divorce Cause No. 4 of 2013** and they were granted divorce on 9th July, 2015.
5. The Respondent filed Originating Summons on 23rd October, 2015 for declaration of rights over the matrimonial property and division of matrimonial property consisting of seven (7) parcels of land that is pending to date.

These factors depict a more protracted dispute between the Applicant and Respondent that can only be resolved through a full hearing *viva voce* evidence so as to confirm the truth from the rival submissions and inform the Court on the appropriate orders to issue on the dispute. The evidence on record is contradictory and insufficient for this Court to grant/issue final orders to settle the dispute at this stage.

The interim orders of 3rd December, 2015 – 11th December, 2015 in this Court's view, do not determine the proprietary and/or possessory rights of the parties with regard to the suit property **L. R. No. [*particulars withheld*]** but are only to safeguard the Applicant's life and stay in the matrimonial home until the ownership of the suit property and determination of the matrimonial property is heard and determined. The interim order of 3rd December – 11th December, 2015 does not vitiate rights of each party to the suit property but restrain the Respondent from evicting her from the matrimonial home.

COURT ORDERS

1. **The Court maintains and extends the interim order of 3rd December, 2015 extracted on 11th December, 2015 that the Applicant, M W G shall not be evicted from her matrimonial home situated on L. R. No. [*particulars withheld*] until the hearing and determination of the Originating Summons filed on 23rd October, 2015.**
2. **The Respondent shall not either by himself/servants/agents/relatives dispose, subdivide, demolish houses, transfer or sell the suit property L. R. No. [*particulars withheld*] until**

hearing and determination of the Originating Summons filed on 23rd October, 2015.

3. The Applicant and Respondent shall have access and use of the farm jointly and equally until hearing and determination of this matter.
4. The parties and Counsel may consider Court Annexed Mediation process to discuss and determine the various issues and if so, they may appear before Deputy Registrar Family Division with Counsel for screening for the said mediation as provided under Article 159 of Constitution 2010.
5. In default, the parties to obtain a hearing date for *viva voce* interpartes hearing on the Originating Summons filed on 23rd October, 2015 in any Court within the division.
6. Each party to bear its own costs.

DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 21ST DAY OF JUNE, 2016

M.W. MUIGAI

JUDGE

In the presence of;

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