



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
DIVORCE CAUSE NO. 93 OF 2015

BETWEEN

J N M.....PETITIONER/RESPONDENT

AND

J MRESPONDENT/APPLICANT

RULING

PLEADINGS

The Applicant J N M filed a petition for divorce styled Notice of Motion brought under **Sections 1A, 1B, 3, and 3A of the Civil Procedure Act** and other enabling laws. On 12th June 2015, the court granted the Applicant interim temporary orders restraining the Respondent from abusing his family, threatening the Applicant and from accessing the matrimonial home until hearing and determination of the Petition.

Through an Application by Notice of Motion filed on the 03rd June 2016 brought under **Sections 1A, 1B, and 3A of the Civil Procedure Act, and Orders 50 and 40 of the Civil Procedure Rules, 2010** the Applicant/Respondent J M sought the following orders:

- a) That the Application herein is certified as urgent and the matter be heard in the first instance.*
- b) That the orders granted on 02nd July 2015 by Hon. Justice Muigai be set aside.*
- c) That the Applicant/Respondent be granted leave to file his reply to Petition out of time.*
- d) That the Reply to Petition annexed hereto be deemed as duly filed and served.*
- e) That the cost of this application be provided for.*

The Applicant's application was based on the following grounds:

The Petitioner filed the Divorce Petition together with an Application for Injunctive Orders on the 02nd June 2015. The Petitioner obtained interim ex-parte Orders but did not serve the Respondent with either the Petition, the Application or orders.

It was not until 13th April 2016 at about 0715hours that a man walked into the Respondent's sitting

room and threw papers at him. The Respondent then found out that he had been served with a Divorce Petition filed by the Respondent and had obtained interim injunctive orders. The said Petition and Orders were served on the Respondent more than 9 months after the order was issued. The Respondent was not served with any summons to enter appearance.

On the 21st April 2016, the Respondent came to court to inquire about the case but was informed that the file could not be traced. On 22nd April 2016, the Respondent prepared a memorandum of appearance and once again was unable to trace the file.

The Petitioner has enjoyed adverse interim orders as against the Respondent and failed to serve the said orders within the stipulated time. The Petitioner also concealed the Petition, Application and Orders. The Respondent could therefore not file a reply or object to the issuance of the orders.

There was material non-disclosure of the facts by the Petitioner the consequence being that the Court issued the Orders without being presented with the said material facts.

The Applicant sought leave of Court to file Reply to petition out of time.

The matter was heard *inter-partes* on 29th September 2016.

APPLICANT'S CASE

The Applicant swore an affidavit in support of his application. In it he reiterated that on the 13th April 2016 at about 0715hrs a man walked into the family sitting room and threw papers at him and walked away. Upon perusal of the document the Applicant found that the Petitioner had filed a divorce petition and obtained interim orders.

The Applicant continued on saying that when he asked his wife the Petitioner/Respondent about the paper and its contents she kept quiet and didn't explain the matter to the Applicant. The Applicant came to court on the 21st April 2016 to inquire about the case but was informed that the file could not be traced. The Applicant pointed out that on the 22nd April 2016 he prepared a memorandum of appearance and once again was unable to file since the file could not be traced. He was advised by his advocate on record that the Petitioner had obtained interim orders and according to the Applicant had concealed the same from him with the intention of preventing him from objecting to the said orders. The Applicant asserted that the matters pleaded by the Petitioner were so grave that he needed to respond to them before orders were issued.

The Applicant argued that the Petitioner failed to inform the court that they have been married for almost 40 years; they have 4 children of the marriage and all their children are adults and there was no way that he could have been cruel to them, the youngest was born in 1986 and is an adult of 30 years. The Applicant presented evidence to support his claim that he has supported their daughter S W M who is mentally handicapped even through their adult years.

The applicant averred that he had not separated from the Respondent they lived together in the same house; he has never been violent, abusive to his family and has never threatened his family. The Applicant in his affidavit contends that the allegations made against him by the Petitioner are untrue and the Petitioner failed to disclose material facts to support her allegations. He sought that the interim orders issued on for the orders to be set aside as they ought to subsist for 4 days only. He is retired from employment.

RESPONDENT'S CASE

The Respondent stated through the Replying Affidavit filed on 20th June 2016 that they were married in 1976 and the Respondent supported the family up to 1998. After he retired the marital problems escalated. Meanwhile he abandoned the Respondent and the children and she struggled with them alone.

She took care of their youngest child who is mentally handicapped.

While he was away, she obtained a loan from National Bank and purchased the **PLOT NGONG/NGONG/ [particulars withheld]** and constructed the home which they moved into in 2007. The Respondent attached the loan forms and sale agreement to attest to this fact.

The Respondent stated that the Respondent sold off 6 properties they bought during their marriage and did not share the sale proceeds except this Plot as it was in her name.

The Applicant was violent and assaulted the Respondent in April 2015 and threatened to kill her. She reported the incident to the Chief. He held a meeting with the Applicant and Respondent and later advised the Respondent to report the incident to the Police. She reported the matter to Rongai Police Station and the report was recorded as OB NO [Particulars withheld]. The Applicant attached the letter from the Chief to her petition. The police advised her to go to Court. She filed the Petition and sought the interim orders against the Applicant. She has lived in fear for her life and feels she is in danger. The applicant abuses her and threatens to kill her.

The Respondent informed this Court that the Respondent could not be served Court orders, as he was not found. She sought a Process Server who tried to serve him and he could not find him. She gave copies of the orders to the Chief who agreed to serve him.

The Respondent and Applicant do not communicate; he comes to the house at night and leaves in the morning. Since the incident, she was afraid to serve the Applicant until he was served at home.

ISSUE

The issue for analysis and determination is whether the interim orders issued *ex parte* on 12th June 2015 should be vacated, specifically Order 4 that prevents and restrains the Applicant from accessing the matrimonial home until the application is heard and determined.

DETERMINATION

The Applicant and Respondent pleadings and testimony in Court confirm that there has been acrimony and tension in the family. Whereas the issue is and can only be addressed by both parties, what concerns this Court is the allegation of threat to life by the Applicant to the Respondent. Secondly threat to violence and abuse is not conducive environment for their disabled child who resides in the matrimonial home.

The Applicant denied this allegation, but did not controvert the claim of Police report and meeting at the Chief's office over the dispute at home. The letter from the Assistant Chief Upper Nkoroi Sub location is detailed and instructive of the matter at hand. Suffice is to state that it was recommended that the Applicant and Respondent live apart for some time and see if matters would simmer down and parties to explore amicable resolution of the dispute.

The Court concedes that interim orders can only remain in force for 14 days and thereafter vacate or the matter is heard and determined on its merits. The orders of 12th June 2015 were explicit that the Respondent was to be served. The fact that it was not complied with is clearly unfair and prejudicial to the applicant. Further that on being served, the Applicant tried to retrieve the Court file to file the Reply to the Petition but it was an uphill task. Again the Applicant was prejudiced. Unfortunately, the Court was not party to the lack of service or misplacing the Court file. As such the petition would have been heard as soon as parties had filed pleadings and were ready for hearing of the matter. For the reason of delay and lack of availability of the Court file, the Applicant is granted leave of Court and shall file Answer to Petition out of time.

With regard to vacating the interim orders issued *ex parte* on 12th June 2015; the law is as follows;

Section 12 (3) of the 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 the Court.

Section 84 (1) of the Marriage Act, 2014 provides;

The court may order a party to refrain from molesting a spouse or former spouse

In the instant case, the Applicant husband to the Respondent has been living in the matrimonial home intermittently. The Respondent's Application that culminated to the Court's *ex parte* orders was detailed with activities that strongly suggest threat and or actual violence in the home. although the Respondent /Applicant has not filed a reply to the application, this Court was mandated to err on the fact that if this was a possibility, the Court would grant orders to safeguard and protect the Applicant/Respondent and their Disabled child and ensure a safe and protected environment.

The Chief's letter, the police Report on alleged assault by the Respondent Applicant confirmed a prima facie case that at the *ex parte* stage warranted the safety of the Applicant and child from threat of violence and/ or actual violence with regard to enforcing **Article 26** and **Article 54 (1) (a)** of the **Constitution** that override **Section 12** of the **Matrimonial Act, 2013**.

It is conceded that legally *ex parte* orders ought to vacate after 14 days unless extended by the Court. The Applicant gave a detailed account on lack of service of the Court orders and loss and /or misplacement of the Court file by this Court. this Court appreciates the unfortunate circumstances and the Applicant ought to have raised the issue with the Deputy Registrar Family Court for assistance. Be that as it may, the rights of the child of the marriage who is challenged takes priority to the rights of the Applicant and Respondent. This Person requires a stable environment which is not possible if both the Applicant and Respondent are in the same residence.

Therefore pending the hearing and determination of the Divorce Petition, the *ex parte* orders of 12th June 2015 shall remain in force.

DISPOSITION

After hearing of the instant application and considering the pleadings on record this Court orders as follows:

- 1. The *ex parte* Court orders of 12th June 2015 shall remain in force due to the special circumstances of this case explained above; the safety and protection of the disabled child of the marriage.**
- 2. The Court grants the Applicant leave to file the Answer to petition attached to the application filed on 3rd June 2016. The same is considered filed and served.**
- 3. The Parties to obtain a hearing date for the divorce petition which only after that can the issue of division of matrimonial property be visited as prescribed by Section 7 of the Matrimonial Property Act, 2013.**
- 4. The Applicant shall access the matrimonial home to see their child on agreed and supervised visits by the Area Chief until hearing and determination of the petition.**
- 5. Each party to bear own costs.**

DELIVERED, SIGNED & DATED ON 31ST OCTOBER 2016 IN OPEN COURT

M.W. MUIGAI

JUDGE

In the presence of;