



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
JUDICIAL SEPARATION CAUSE NO 45 OF 2014

A N MPETITIONER/APPLICANT

VERSUS

J T M.....RESPONDENT

RULING

The parties to the present case, A N M (hereafter “the Petitioner”) and J T M (hereafter “the Respondent”) are husband and wife. They were married in 2000 and their marriage has been blessed with three (3) issues. The parties lived together as husband and wife in the matrimonial home in Westlands, but they have been living separately since December 2012 when the Petitioner moved out. In September 2013, the Petitioner transferred the certain properties to the Respondent as part of the separation settlement, including:

- a. L.R. No. *[particulars withheld]* (I.R. No. *[particulars withheld]*) Westlands
- b. C.R. *[particulars withheld]* Subdivision *[particulars withheld]*
- c. C.R. *[particulars withheld]* Subdivision *[particulars withheld]*
- d. Mavoko Town Block *[particulars withheld]*
- e. Machakos/Kiandani *[particulars withheld]*
- f. Mavoko Town Block *[particulars withheld]*
- g. Mavoko Town Block *[particulars withheld]*

By an application filed on 9th December 2014, the Respondent, sought, among others, orders that pending the hearing and final determination of the case the Petitioner be restrained from occupying, interfering or otherwise dealing with the following parcels of land which comprise the suit properties:

- a. L.R. No *[particulars withheld]* (I.R. No *[particulars withheld]*) Grevillea Park 32 Massionatte *[particulars withheld]*, *[particulars withheld]* in Westlands (hereafter “the Westlands home”)
- b. Mavoko Town Block *[particulars withheld]*
- c. Mavoko Town Block *[particulars withheld]*

The Respondent also sought to have the Petitioner’s agents or anyone claiming under him removed from the Westlands home, and also to have the Petitioner’s agents restrained from interfering with the suit properties.

The Respondent also sought the release of motor vehicles Reg *[particulars withheld]* and *[particulars withheld]* to her by the petitioner.

The Petitioner filed an application on 12th January 2015 seeking orders that pending the hearing and determination of the case the Court issues orders;

- a. That a caveat be registered by the Chief Land Registrar to register caveat over the suit properties to prevent any dealings with them by any other parties;
- b. He also sought an order directing the Registrar of Motor Vehicles to register a caveat preventing any transfer by the Respondent of motor vehicles Registration Number *[particulars withheld]* and *[particulars withheld]*; and
- c. He further sought to have the suit properties presently registered in the Respondent's name reversed to him.

The facts of this case disclose the following as issues for determination:

- a. Whether the Petitioner should be restrained from accessing or otherwise interfering with the matrimonial home.
- b. Whether third parties or agents of respective spouses have a better claim of rights and interests in matrimonial property over and above the rights and interests of the spouses.
- c. Whether the registration of matrimonial property in the name of one spouse excludes the other spouse from ownership.
- d. Whether there is any legal basis for the application by the Petitioner to have the registration of the matrimonial property in the sole name of the Respondent reversed.

The parties are married but currently separated. The Petitioner left the matrimonial home in December, 2012. The respondent left the country for Australia with the children on 5th November, 2014. The house is unoccupied but is the parties' matrimonial home and is matrimonial property within **section 6 of the Matrimonial Property Act of 2013 and whose distribution would be as follows;**

Section 12(1) of the Matrimonial Property Act 2013

An estate or interest in any matrimonial property shall not; during the subsistence of a monogamous marriage and without consent of both spouses; be alienated in any form whether by way of sale, gift, lease, mortgage or otherwise.

However, with regard to the matrimonial home;

Section 12(2) of the Matrimonial Property Act prescribes;

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 12 (4) of the Matrimonial Causes Act stipulates;

Subject to subsection (3) a spouse shall not be evicted from the matrimonial home by any person except;

- a. *On the sale of any estate or interest in the matrimonial home in execution of a decree;*
- b. *By a trustee in bankruptcy; or*
- c. *By a mortgagee or charge in exercise of a power of sale or other remedy given under any law.*

Section 12 (5) of the Matrimonial Property Act states;

The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.

The above provisions regulate the custody access and use of the matrimonial home by both spouses of a marriage irrespective of which of the spouses is the registered owner of the matrimonial home.

The Petitioner by affidavits annexed to the Respondent's application made a transfer of ownership of the matrimonial home attached as **Exhibit 2D**. However although the transfer bequeathed the Respondent with ownership rights as a matter of fact she is out of the country. Therefore, the other spouse is entitled to access and use of the home. Secondly, division of matrimonial property especially with regard to the matrimonial home should be dealt with where the marriage is dissolved. The application for judicial separation is pending. At the moment both spouses are entitled to the use and enjoyment of the matrimonial home as prescribed by the legal provisions cited. Thirdly, the Respondent is out of the country with the children of the marriage. It is not clear at this Interlocutory stage if they relocated to Australia or are staying there for a while and will come back and live in their home. The same is pending evidence from the parties to the marriage. If or when the Respondent returns and or the Children as the Petitioner's Counsel confirmed the matrimonial home is accessible and available to them. Fourthly, the ownership, transfer, access and use of the matrimonial home shall be determined on confirmation of the status of the marriage. This Court has not been privy to the Separation Settlement Agreement between the parties to the marriage and cannot confirm consents of both spouses on the issue of matrimonial home. Fifthly, the Respondent is in Australia and the Petitioner is living elsewhere than the matrimonial home. They are both entitled to access, use, maintenance, security and repair to the home until such time both parties agree and consent on the way forward. With respect, 3rd parties whether from the Petitioner or the Respondent cannot occupy the matrimonial home. It is due to these reasons that the Court Finds that the 3rd parties cannot have better rights than the spouses or with their consent or agreement. Despite the transfer, the Petitioner and Respondent are entitled to the matrimonial home equally. The interlocutory orders of maintenance of status quo will remain in force with regard to the matrimonial home.

On the other hand there have been complaints detailed in paragraphs 6 and 7 of the Notice of Motion filed on 10th January, 2015 that the Petitioner's agents at the Grevillea Park 32 Masionette No *[particulars withheld]*; Westlands have subjected other parties to harassment, abuse, bullying and threats and interference. The Court restrains the Petitioner's agents from abuse and unbecoming conduct while executing security, care and maintenance of the home.

With regard to the following properties;

- a. Mavoko Town Block *[particulars withheld]*
- b. Mavoko Town Block *[particulars withheld]*

These are properties obtained during the marriage of the parties and form part of matrimonial property which ought to be divided upon the dissolution of the marriage. The matrimonial property acquired during the marriage shall be presumed to belong to both parties as envisaged by **Section 14 of the Matrimonial Property Act, 2013**.

However, in **Section 15 of the Matrimonial Property Act** envisages that where a spouse gives [transfers] any property to the other spouse as a gift during the subsistence of the marriage, there shall be a rebuttable presumption that the property thereafter belongs absolutely to the recipient.

In the instant application the above-mentioned properties were transferred to the Respondent by the Petitioner as evidenced by affidavits annexed to the Respondent's application marked **Exhibit 2A 2B & 2C** and consequently registration of the properties in the Respondent's name **Exhibit 2E & 2F** Therefore; the only rebuttable presumption is that it was for the Respondent to hold in trust for children of the marriage which in this instance the children are in her custody. The transfer, negates the matrimonial aspect of the properties as the Petitioner voluntarily gave up his spousal interest to the Respondent and the children. The operative law that allows the Respondent to exercise her ownership rights and enjoy the bundle of rights is now within the land laws.

The applicable law regarding the above issues is **Section 24(a)** of the **Land Registration Act of 2012** which provides:

The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

Section 26 of the **Land Registration Act, 2012** titled “**Certificate of title to be held as conclusive evidence of proprietorship**”, is also applicable to the facts of the present case, and it provides that:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

- a. *on the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b. *where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.*

The facts before this Court make clear that the Respondent is the registered owner of the suit properties.

An important question that this Court needs to answer is whether the suit properties constitute matrimonial property. The applicable law in this regard is **Section 6(1)** of the **Matrimonial Property Act** which defines matrimonial property as follows:

For the purposes of this Act, matrimonial property means?

- a. *the matrimonial home or homes;*
- b. *household goods and effects in the matrimonial home or homes; or*
- c. *Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.*

Accordingly, the properties that are the subject of the dispute between the parties constitute matrimonial property within the meaning of the above provision. However, the Petitioner conclusively transferred ownership of the properties to the Respondent and he confirmed the same in an affidavit sworn by him.

In this regard, the provisions of **Section 93(1)** of the **Land Registration Act**, which states as follows apply:

Subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or, all the spouses ?

- a. *there shall be a presumption that the spouses shall hold the land as joint tenants unless ?*
 - i. *a provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in, his or her name only, or that the spouses are taking the land as joint tenants; or*
 - ii. *the presumption is rebutted in the manner stated in this subsection; and*
- b. *The Registrar shall register the spouses as joint tenants.*

The evidence before this Court demonstrates that the Petitioner intended that the properties be transferred exclusively to the Respondent. This makes clear that although the properties are matrimonial property, the Respondent is the sole registered owner of the same. On this basis the presumption in **Section 93(1)** of the **Land Registration Act** that the suit properties are held or jointly owned by the parties is rebutted.

It is also clear that the properties were transferred by the Petitioner to the Respondent, and this is evidenced by the fact that the titles to the suit properties are in the name of the Petitioner. Copies of the title documents are on the Court's record. The evidence from the affidavits sworn by the Petitioner where he states;

‘‘That I am transferring the above properties out of my own free will’’

Indicates that the Petitioner willingly transferred the property to the Respondent, and it has not been claimed that the said transfer was in any way occasioned by fraud, misrepresentation or corrupt designs. Indeed, the petitioner admits that some of the properties are supposed to be held by the Respondent in trust for the children of the marriage. Nowhere has it been claimed that the suit properties came to be registered in the Respondent's name by way of fraud or misrepresentation.

Accordingly, on the basis of the facts in issue, this Court has formed the opinion that the property in the ownership of the Respondent is not in danger of being alienated or disposed of. In this regard, this Court is disinclined to grant the Petitioner's prayer to have the ownership of the property reversed to him. There is no compelling basis in fact and in law to support such a move.

This Court is guided by the decision of *Kasango J* in the case of ***Ethics and Anti-Corruption Commission & 3 Others v African Safari Club Ltd & 2 Others [2013] eKLR*** where it was observed that:

Under Section 23 of the Registration of Titles Act, a certificate of title issued by the Registrar to any purchaser of land was to be taken by the Courts as conclusive evidence that the person named therein was the absolute and indefeasible owner thereof. That title was not subject to challenge except on the ground of fraud or misrepresentation to which the purchaser was a party. In this instance, it was not disputed that the first Respondent had purchased land for valuable consideration and that the land had been duly registered in its favor. There was no allegation that the company was a party to any fraud or misrepresentation perpetrated on the Appellants.

In the above regard, this Court finds that the properties should remain in the Respondent's ownership unless any compelling evidence can be produced to justify otherwise.

An important factor that this Court has considered is the objective of transfer by the Petitioner of the properties to the Respondent. It was the intention of the Petitioner to have the property held in trust for the children. This Court is also guided by the mandatory import of the principle of the best interests of the child. **Section 4(2) & (3) of the Children Act** provides:

(2) In all action concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to –

- a. ***safeguard and promote the rights and welfare of the child;***
- b. ***conserve and promote the welfare of the child; ...***

In the above regard, the best interests of the children of the marriage and the ends of justice will not be served well if the properties should be transferred back to the Petitioner. On the contrary, it is the finding of this Court that the properties should remain in the ownership of the Respondent.

The Petitioner swore an affidavit in which he gave his free consent and disclaimed any interest in the suit properties. His deposition is in the Court's record. He cannot now be heard to claim that the suit

properties should be returned to him. To deprive the Respondent ownership of properties which were willingly and procedurally transferred to her for the purpose of holding them in trust for the children is not justified especially when she currently has custody of the children of the marriage. No evidence has been tendered by the Petitioner to suggest that there are any suspicious dealings by the Respondent concerning the property. Hence, this Court is persuaded by the Respondent's argument that the registration of caveats and the reversal of registration of the suit properties cannot find support in the applicable law.

Moreover, such a course of action is would be too soon in the proceedings since the present case is still at an interlocutory stage where orders of such finality cannot be granted. This Court finds that an order for the reversal of the ownership of the suit properties would be so drastic a move at so early a stage in the proceedings in this case. Reversing the ownership of the land would amount to making a definitive and conclusive move towards divesting the Respondent of her ownership, and this is not warranted in the present case. This Court has the discretionary power to grant the prayers sought by the parties but the exercise of this authority has to be guided by the evidence. Upon a close examination of the disputed propositions contained in the respective pleadings of the parties herein, this Court finds that there is no compelling legal basis on which to support the reversal of the registration of the suit properties.

The Court also considered the ownership of motor vehicle Reg **[particulars withheld]**. The Registration Certificate annexed as Exhibit 4 of the Respondent's affidavit shows the Respondent as the registered owner. The motor vehicle Reg. **[particulars withheld]** is not shown in the pleadings as belonging to the Respondent save for a payment receipt attached which is not conclusive of ownership. Therefore this Court allows and orders release of motor vehicle Reg. **[particulars withheld]**.

This Court has considered the rival submissions of the parties and it finds that being a court of law and equity the ends of justice will best be served by restraining the Petitioner's agents from interfering with the Respondent's enjoyment of her exclusive ownership of the properties. And the car. All other transfers or division of matrimonial property shall be determined upon presentation of the Matrimonial Property Settlement to Court. If the division of matrimonial property shall ensue the transferred properties shall be taken into account amongst other relevant circumstances of the parties.

In the premises therefore, this Court orders as follows:

- a. That the property L.R. no **[particulars withheld]** (IR NO **[particulars withheld]** Grevillea Park 32 Masionatte **[particulars withheld]**] Grevillea Grove Westlands is the parties matrimonial home and both spouses have equal rights to the home. Division or Transfer of the home will by consent and agreement by both parties and or after determination of the status of marriage or separation of the parties.
- b. That the suit properties namely LR No **[particulars withheld]**, Mavoko Town Block **[particulars withheld]** and Mavoko Town Block **[particulars withheld]** shall remain in the exclusive ownership of the Respondent.
- c. That the Petitioner's agents are restrained from assaulting, harassing, threatening, bullying and or blackmailing other parties while executing duties of security of the matrimonial home.
- d. That the motor vehicle registration number **[particulars withheld]** be released to the Respondent for her use, but their ownership shall not be transferred to any other person.
- e. Each party is at liberty to apply.
- f. No orders as to costs.

It is so ordered.

DATED AT NAIROBI THIS DAY 24TH OF MARCH 2015

M. MUIGAI

JUDGE

