



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 77 OF 2014

**IN THE MATTER OF SECTION 2, 6(1), 7, 9, 14 AND 17(1) OF THE MATRIMONIAL
PROPERTY ACT NO. 49 OF 2013 AND SEC 123 OF THE LANDS ACT.**

S W KAPPLICANT

-VERUS-

P K K.....RESPONDENT

RULING

1. S W K hereinafter referred to as the applicant filed the application dated the 15th of December 2014. The application is brought under Section 3 of the Civil Procedure Act, Order 37 Rules 1, 7 and 8 of the Civil Procedure Rules, Order 51 of the Civil *Procedure* Rules and Section 2, 6(1), 7, 9, 14 and 17 of the Matrimonial Property Act No. 49 of 2013. Prayers I to 4 are spent. The applicant seeks the following orders;
 - v. That an order do issue directing the Respondent to furnish accounts for rental proceeds from **L.R. Kabete/Lower Kabete/[T. *particulars withheld*]** for the period running from January 2001 to date and to further that 50% or such higher sums from the rental proceeds therein be apportioned to the applicant.
 - vi. That an order do issue restraining the Respondent from collecting and utilizing rental proceeds from **L.R. Kabete/Lower Kabete/T. *particulars withheld*]** pending the hearing of this application.
 - vii. That an order do issue restraining the Respondent from collecting and utilizing the rental proceeds from **L.R. Kabete/Lower Kabete/T. *particulars withheld*]** pending the hearing of this suit.
 - viii. That an order do issue that the rental proceeds from **L.R. Kabete/Lower Kabete/T. *particulars withheld*]** be deposited in the escrow account.
 - ix. That an order do issue directing that the rental proceeds from **L.R. Kabete/Lower Kabete/T. *particulars withheld*]** deposited in an escrow account pending the hearing of this suit.
2. The application is based on grounds that she got married to the respondent on 5th May 1979 but the same was dissolved on 5th December 2013. That the properties in question were acquired and developed during the subsistence of the marriage and through joint efforts of both the applicant and respondent. That the respondent has denied the applicant entry to the matrimonial home to collect her personal items and that it is necessary that the court orders that she be allowed to access the matrimonial home. Further that the respondent has denied the respondent use and enjoyment of the income made from jointly owned properties herein and the said proceeds are

used and enjoyed solely by the respondent to the detriment of the applicant and her children. That she is apprehensive that the respondent will dispose off the properties secretly unless this court issues conservatory orders and that she stands to suffer irreparable loss as her beneficial interest stands to be prejudiced.

3. The application is supported by the affidavit of S W K sworn in support of the Originating Summons. She depones that between 1973 and April 1997 she worked with **[particulars withheld]** Bank earning a decent salary able to meet family obligations and contributed towards acquisition of the properties subject matter in this suit. After the said marriage the respondent left for the United States of America for further studies and she was left with 4 children until 1997 when she resigned and joined her husband in the US. Later in 2006 they moved to Canada for better opportunities and in 2007 their marriage begun facing difficulties and the respondent was compelled to leave their matrimonial home with her son. The respondent instituted divorce proceedings without her knowledge and their marriage was dissolved on 5th December 2013 and a decree absolute issued on 7th April 2014. That she and the respondent acquired the suit properties **L.R. Kabete/Lower Kabete/T.[particulars withheld]** and **L.R. Kabete/Lower Kabete/T. [particulars withheld]** and extensively developed the same jointly and they together with their children lived there for about 15 years before they left for the United States of America. That the said properties were acquired through loan proceeds from Housing Finance of Kenya with the financing being done by both parties but it is the respondent who is solely benefiting. That she has great sentimental attachment to property **L.R. Kabete/Lower Kabete/T.[particulars withheld]** as it is where her children were born and grew up. That the respondent has since re-married and is living with his new wife in the said house and that she is apprehensive that unless this honorable Court intervenes she is likely to lose not only the house but also other valuable things. That the respondent has been in occupation of the matrimonial home while she continues paying for her accommodation and providing for the children of the marriage. That she contributed Kshs.1,141,200/- as a loan from her employer toward property **L.R. Kabete/Lower Kabete/T. [particulars withheld]** and deductions were made from her salary to paid off the same. That the said property has attracted income of about Kshs. 7,300,000/- and she believes that she is entitled to 50% of the said sum or higher sum. That the said property be severed and a title be given in her name for her contribution towards the acquisition and development of the suit property. In 1997 they acquired a house at the United States of America and it was her final dues from Central Bank that paid for it. That they were making payments together until the respondent moved back to Kenya in 2010 and stopped paying.
4. The respondent **Peter Kiiru Kariuki** in his replying affidavit dated the 28th January 2015 opposed the application. He concurred with the applicant on details of their marriage, children and acquisition of the property. He admits to being in occupation of the property T.69 and adds that the applicant is in control of their house in the United States. Further that the parties were advised to do valuation of the property to enable them settle the issue. That **L.R. Kabete/Lower Kabete/T. [particulars withheld]** and **L.R. Kabete/Lower Kabete/T.[particulars withheld]** were valued at Kshs. 4,000,000 and Kshs. 5,000,000/- respectively. He added that after he come back to Kenya he took out a loan of Kshs. 2,000,000/- to improve the home where he lives and also sunk bore holes and is still servicing the said loan at Kshs. 60,000/- per month. That on 24th February 2008 the parties sought to resolve the problem and agreed that the applicant gets **L.R. Kabete/Lower Kabete/T.[particulars withheld]** and that he would get **L.R. Kabete/Lower Kabete/T.[particulars withheld]** with the difference in value being compensated and income collected addressed. The house in Missouri was to be sold. He added that issuing an injunction against him collecting rent could force the bank to foreclose on the property and the same to go into disrepair.
5. The respondent in a further affidavit filed on 13th April 2015 avers that he left for the US in June 1996 and the applicant joined him after a year in May 1997 after selling off all immovable properties. That the matrimonial home was occupied by the applicant's brother vacant from 1997 to 2001 and remained vacant till 2010 when he returned. He added that he continued servicing the loan of Kshs. 2,000,000/- he had borrowed from Equity Bank with the applicant's consent after

the same was transferred to his employer's loan scheme which had a lower interest and the same was recovered from his salary adding that the applicant has remained silent on the account regarding the house in the US.

6. When the matter came up for hearing on 16th April 2015 parties reiterated the averment of their affidavits.
7. The applicant raises issue with two properties ***L.R. Kabete/Lower Kabete/T.[particulars withheld] and L.R. Kabete/Lower Kabete/T.[particulars withheld]*** which she claims were jointly acquired by the parties during the subsistence of the marriage. The respondent does not dispute acquisition or contribution of the applicant towards the said properties but only raises issue with money he had put in improving the said properties which he claims were in a state of disrepair and that he needed to sink bore holes to attract tenants.
8. The respondent argues that the parties on advisement of their advocate had carried a valuation with an aim to settle the issue on distribution of the same. ***L.R. Kabete/Lower Kabete/T.[particulars withheld]*** and ***L.R. Kabete/Lower Kabete/T.[particulars withheld]*** were valued at Kshs. 4,000,000 and Kshs. 5,000,000/- respectively. That the parties on 24th February 2008 the parties sought to resolve the problem and had agreed that the applicant gets ***L.R. Kabete/Lower Kabete/T.[particulars withheld]*** and the respondent gets ***L.R. Kabete/Lower Kabete/T.[particulars withheld]*** with the difference in value being compensated and income collected addressed. It had also been agreed that the house jointly owned in Missouri be sold. In regards to the income collected he added that he used the same to pay for the repairs and maintenance of the said two properties. In support of this he has annexed a bill of quantities from Hydro Water Well (K) Limited for Kshs. 1,485,000/- and copies of 3 cheques amounting to Kshs.1,200,000/- payable to the said company for their services. He has also attached a copy of statement of account from the said company showing his payments from 1st January 2012 to 4th April 2012 the same showed that Kshs. 400,000/- was still owing.
9. I have considered the parties affidavits and submissions and cases cited. The orders sought by the applicant border on mandatory orders which can only be given in the clearest of cases, (see **Kenya Breweries Ltd and another v. Washington Okeyo (2002) 1 E.A. 109** The applicant at prayer 5 seeks orders directing the Respondent to furnish accounts for rental proceeds from ***L.R. Kabete/Lower Kabete/T.[particulars withheld]*** for the period running from January 2001 to date and to further that 50% or such higher sums from the rental proceeds therein be apportioned to the applicant. This I find borders on mandatory orders and the same cannot be granted at this interlocutory stage. I also find that it is not in order to restrain the respondent from collecting rent or utilizing rental proceeds as this will interfere with the smooth running of the management of the properties in issue. However I find that it is in order that the rental proceeds obtained from ***L.R. Kabete/Lower Kabete/T.[particulars withheld]*** be deposited in the escrow account pending the hearing and determination of the Originating Summons. The applicant and respondent through their counsels shall open a joint escrow account within 30 days and the rent proceeds received shall be deposited in the said account as from the date of this ruling. Parties shall agree on how to maintain the premises.
10. The applicant and respondent should endeavor to set this matter down for full hearing within 60 days after directions are taken in this matter. Pending the hearing of this suit I find it expedient that the applicant and respondent engage the services of a certified public accountant to do the necessary accounting on the rental proceeds from the suit properties. I further order that the applicant should declare on her part the status of the house in the United States of America jointly mortgaged by both the applicant and respondent and give the relevant statements of account on payments made so far and the amount outstanding. I find that a valuation of the same should be carried out to establish the amount the same would fetch in the event that it has to be sold. This will enable the Court to move swiftly and conclude this matter without much delay when the same came for hearing. It is so ordered.

Dated, signed and delivered this 18th day of June 2015.

R. E. OUGO

JUDGE

In the presence of:-

.....**For the Applicant**

.....**For the Respondent**

.....**Court Clerk**