



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

DIVORCE CASE NO. 1 OF 2015

L M N ALIAIS L M S.....PLAINTIFF/APPLICANT

-VERSUS-

V S M.....RESPONDENT

RULING

1. Before this Court is a Notice of Motion dated 12th March, 2015 brought under **Section 1A, 1B** and **3A** of the **Civil Procedure Act** and under **Order 40 Rule 1** of the **Civil Procedure Rules**. Prayers 1 and 2 of the said application are spent and the remaining reliefs being sought are prayers 3, 4 and 5 which are as follows:

(3) That pending the hearing and determination of the petition herein, the Respondent be restrained by himself, servants, agents or anyone claiming under him from threatening, having, getting near to the person of the applicant, injuring, selling, alienating, blocking access to or in any other unlawful way interfering with the petitioner's/applicant's quiet possession and enjoyment of her proprietary rights over premises constructed on Plots No. Lock-up No. [particulars withheld] at Wanguru Township, Plot No. [particulars withheld] at Wanguru Township, and motor vehicle Registration No. [particulars withheld] Toyota station wagon.

(4) That the Officer Commanding Station Wanguru Police Station be duly authorized to enforce compliance of the court orders herein and ensure law and order is maintained.

(5) That costs of this application be provided for.

2. Background

The Petitioner is married to the Respondent after solemnizing their marriage on 14th March, 1999 and has brought up a petition for divorce on grounds of *inter alia* cruelty and the fact that the marriage has irretrievably broken down after reconciliation efforts turned fruitless. The Petitioner is also seeking sub-division of the following properties claiming that the same comprise matrimonial properties. The said properties are:

- i. Plot No. [particulars withheld] at Wanguru where the matrimonial house/home is located.
- ii. Plot No. [particulars withheld] at Wanguru Township.

3. The Respondent filed an answer to the petition and denied the averments from the Petitioner but admitted that the properties mentioned by the Petitioner are indeed matrimonial properties adding

that there are more matrimonial properties than the ones listed by the Petitioner which he listed as follows:

- i. Plot No. *[particulars withheld]* Lock Up at Wanguru Township.
- ii. Plot No. *[particulars withheld]* at Wanguru.
- iii. L.R. *[particulars withheld]*.
- iv. Business known as *[particulars withheld]*.
- v. Motor vehicle Registration No. *[particulars withheld]* Toyota Ipsum.

The above listed properties are the same properties that the Petitioner/applicant is seeking to prevent the Respondents in terms of the prayers sought in the application as highlighted above.

4. When the application came up for hearing both parties to the application agreed to file written submissions over the same and one of the issues raised by the Respondent which I have to consider first before any other issue in this application is the question of jurisdiction which is primary and preliminary to considering the application and the entire petition itself.
5. **Jurisdiction**

The Respondent herein raised the issue of jurisdiction by this Court to entertain the petition in his answer to the Divorce Petition pointing out that **Section 2 of Marriage Act 2014** upon which the petition is brought defines the court as;

“A resident magistrate’s court established under section 3 of the Magistrates Act.”

In his written submissions drawn through his learned counsel Mr. P. M. Muchira, the Respondent has argued that though **Article 165 (3)** of the Constitution of Kenya 2010, this Court has unlimited original jurisdiction in civil and criminal matters, the Marriage Act 2014 in his view shows that the application now before court being interlocutory should have been filed in the Resident Magistrate’s Court.

6. To begin with the contention of unlimited jurisdiction donated to this Court under **Article 165 (3) (a)** it is true that this Court enjoys unlimited original jurisdiction in criminal and civil matters save for matters that are exclusively reserved for the jurisdiction of the Supreme Court under the Constitution or matters that are reserved for industrial courts and Environment and Land courts. The jurisdiction of this Court to entertain any matter brought before it can only be limited by the Constitution itself otherwise the jurisdiction is as expressed in the Constitution – unlimited.
7. In the case of **S. H. H. -VS- M. H. Y. [2015] eKLR**, Hon. Justice C. W. Meoli sitting at Naivasha when called upon to determine an issue of jurisdiction by a party who contended that the matrimonial cause should have been filed in a Kadhi’s court because one of the parties professed Muslim faith, held as follows:

“The Marriage Act cannot be read in a manner to suggest that contrary to Article 170 (5) of the Constitution, a party who professes the Muslim faith is under compulsion to apply for maintenance before the Kadhi’s court.”

The same court further opined in obiter that though under the Marriage Act, a “court” refers to a resident magistrate’s court as established under **Section 3** of the Magistrates Court Act, the provision did not take away the unlimited original jurisdiction of the High Court in criminal and civil matters as contemplated under **Article 165 (3)** of the Constitution.

8. A similar position was taken in the case of **I.N.K. –VS- P. J.K.N. & ANOR. [2015] eKLR** where Hon. Justice M. Mungai sitting in Milimani Law Courts while holding a similar view held that the divorce petition before her included a claim for division of matrimonial property which squarely brought in the operation of **Matrimonial Property Act 2013** that vested jurisdiction to the High Court.
9. The Petitioner’s petition and the application before this Court cannot fail for want of jurisdiction.

This Court is vested with unlimited jurisdiction by the Constitution and an Act of parliament in my view cannot oust the original jurisdiction of this Court. It is of course desirable and orderly for matters to be handled in the appropriate courts particularly where the law provides where such cases should be handled but having said so I wish to leave the matter at that at this stage and delve on the merit of the application before me.

10. The Petitioner/Applicant has based the reliefs sought in the application on the following grounds:

- i. ***That she is married to the respondent but are estranged due to alleged cruelty on the part of the respondent.***
- ii. ***That the respondent has thrown out the applicant from the matrimonial home which was allegedly put up jointly and that the respondent has proceeded to close other properties that comprises matrimonial properties.***
- iii. ***That the respondent has interfered with operation of the applicant's business located in leased premises by blocking her access with a view to crippling her financially.***
- iv. ***That the respondent has reportedly threatened her life and is hostile to her.***
- v. ***That the respondent has been trying to alienate some of the matrimonial properties in order to defeat the course of justice.***

11. In her supporting affidavit sworn on 12th March, 2015 she has deposed that she contributed more towards the acquisition of the matrimonial properties and that she solely obtained some through her own initiatives and hard work. She pointed out that the motor vehicle Registration No. ***[particulars withheld]*** and that property known as Plot No. ***[particulars withheld]*** at Wanguru are exclusively hers.

12. The Petitioner has further alleged that she had to move out of Plot No. 246 at Wanguru due to hostility and violence from the respondent which she states was reported at Wanguru Police Station. She has expressed fears that her business will be adversely affected owing to acts attributed to the respondent whom she accuses of misusing his position as a senior police officer to act with impunity.

The Petitioner/Applicant has further deposed vide further affidavit sworn on 17th April, 2015 that because she contributed more in acquiring the properties the same should be protected. She further gave a detailed account on how she contributed through her own efforts the acquisitions of various matrimonial properties. She has submitted that part of the properties like the Plot No. ***[particulars withheld]*** Wanguru Township and vehicle Registry No. ***[particulars withheld]*** are hers but are at risk of being alienated from her before the petition of divorce is heard and determined. She has sought to have uninterrupted access and utility of these properties pending the determination of the petition herein.

13. The respondent has opposed the application before court through a comprehensive affidavit sworn on 1st April, 2015 and a further affidavit sworn on 22nd April, 2015. In addition to these, he has also through learned counsel P.M. Muchira filed written submissions to oppose the said application.

14. The Respondent has mainly maintained that the properties listed above as matrimonial properties including the ones the Petitioner alleges are hers were obtained majorly through their joint efforts deposing that he had to take a number of loans and provided details in order to finance the acquisition of the properties. He has also been running various businesses including matatu business all of which provided income to the family.

15. The Respondent further deposed that he had to borrow a huge loan of Kshs.2,000,000/- from Neno Sacco Society Ltd. Which he alleges was used to develop the front part of Plot No. ***[particulars withheld]*** at Wanguru Township. This is besides other huge loans and other investments which he has deposed in his affidavit that he helped in either purchasing or management.

16. On the issue of threats to life, the Respondent has denied the same instead blaming the Applicant

for turning hostile to him from the time their daughter got pregnant. He has also faulted the Applicant for trying to wreck the marriage in order to unfairly benefit from the properties which he claims they acquired together.

17. The Respondent has also contended that the Applicant is asking to be allowed to stay in a secure location in Plot **[particulars withheld]** while she wants to have the Respondent stay in what he terms unsecured location in Plot **[particulars withheld]** at Wanguru.
18. The Respondent's further contention is that under **Article 45 (3)** of the Constitution parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and the dissolution of the same. He has argued therefore that the Applicant cannot seek to appropriate herself exclusive use and utility of premises constructed in Plot No. **[particulars withheld]** at Wanguru, Plot No. **[particulars withheld]** and **[particulars withheld]** at Wanguru Township and motor vehicle Registration No. **[particulars withheld]** pending the hearing and determination of the petition. The Respondent having denied cruelty, has submitted that in the event this Court orders that they live separately pending the determination of the divorce then he should be allowed to occupy Plot **[particulars withheld]** and not Plot **[particulars withheld]** at Wanguru in the meantime.
19. I have considered the application and the response made. The reliefs being sought in this motion are injunctive and the applicant by law is required to satisfy the conditions set by law and outlined in the celebrated case of **Giella -VS- Cassman Brown [1973] EA 358**. The same are;

1. **An applicant is required to satisfy the court that he/she has a prima facie case with probability of success.**
2. **That the applicant is likely to suffer irreparable loss which may not be compensated by damages.**
3. **If the court is in doubt in the first then the matter is decided on the balance of convenience.**

Now applying the above principles in this case it is difficult at this stage to make any decision on the question of prima facie case with claims and counter claims made by both spouses on who contributed what for the acquisition of the properties. The position of the petitioner on the acquisition of various properties is at variance with the respondent and at this stage it is not possible to interrogate the facts put forward by the respective parties before a full trial. Both the Applicant and the Respondent have gone to great lengths to demonstrate how each contributed to the acquisition of the properties in contention. They have nonetheless both agreed that they are husband and wife and blessed with three (3) children. In my view the issue of acquisition of the various properties alluded in the petition and how they were acquired is a matter to be ventilated at the later stage at the hearing of this petition. This Court cannot be called upon at this stage to consider the contribution made by each spouse. This as I have said is premature and could result in injustice as all the contested issues have to be interrogated in a more detailed manner which is not possible at this interlocutory stage. Only a full hearing in my view can bring out facts clearly to enable the Court determine with finality who between the spouses contributed what and who is entitled to which property *et cetera*.

20. This Court has also considered the response made by the Respondent and agrees that it may be prejudicial to either of the spouses to be given an advantage at this stage by being given exclusive use and utility of more properties than the other spouse in view of the constitutional provision under **Article 45 (3)** that grants equal rights to either spouse to the matrimonial property. It is however, in the interest of justice to preserve the properties in the current state until the disposal of the petition.
21. This Court is however, minded about the security of the Petitioner who has deposed that her life is under threat. This is an issue which this Court is unable to disregard owing to the judicial notice which I must take that estranged spouses are not the best of friends and creating an environment where one can sneak or intrude into where the other one stays can spell disaster. The Respondent has of course denied being hostile but it is safe and in the interest of justice to have them live separately until all the issues in this petition are resolved. I find that the balance of convenience tilts in that direction.

22. This Court did issue interim orders which were a product of compromise and negotiations between the parties herein. So far the orders have served the two may be albeit with some discomfort or dissatisfaction but at least there is some parity. This Court also notes that there are children to this union and although none of the parties addressed me on their upkeep and status it is important to note that the interests of those children are important and have to be factored in any decision. However this Court assumes that the children are well provided and if there are any issues concerning them, then the children's court should be moved to make the requisite orders.

From the foregoing, the Notice of Motion dated 12th March, 2015 is allowed partly and only on the following terms:

- a. That the Petitioner/Applicant shall continue to occupy **Plot No. [particulars withheld]** Wanguru Township while the Respondent shall continue occupying **Plot [particulars withheld]** at Wanguru pending the hearing and determination of the petition of divorce herein. Either party is in this regard and in the meantime restrained either by himself, herself or servants and or agents from going over to where the partner has been allowed to occupy pending the determination of the divorce petition herein.
- b. In addition the Respondent is restrained by way of a temporary injunction by himself, servants or agents from threatening or going near the applicant pending the hearing and determination of the petition.
- c. The applicant is at liberty to continue utilizing the services of motor vehicle Registration No. **[particulars withheld]** but she is restrained from disposing the same pending hearing and determination of the petition herein.
- d. Any rents accruing from any of the properties in Plot No. **[particulars withheld]** Wanguru Township, **Plot No. [particulars withheld]** Wanguru Township and **[particulars withheld]** shall be kept in joint account of counsels on record pending the hearing and determination of the petition. Both parties are given liberty to agree if they can on how they would want to utilize the rent. All the properties listed by both parties shall remain in the current state until the hearing and determination of the petition.
- e. The Applicant is also granted liberty to continue uninterrupted by the Respondent in her present businesses pending the hearing and determination of the petition herein.
- f. I shall make no order as to costs at this stage. Any party aggrieved by actions of either party is at liberty to apply to effect any of the orders I have issued
- g. The Petitioner/Applicant is directed to move with speed to fix the matter for directions in order to facilitate timely disposal of this Petition. It is so ordered.

Dated and delivered at Kerugoya this 27th day of October, 2015.

R. K. LIMO

JUDGE

27.10.2015

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Kahiga for petitioner/applicant present

Mr. Muchira for Respondent present

COURT: Ruling signed, dated and delivered in the open court in the presence of Kahiga for applicant and Muchira for Respondent.

R. K. LIMO

JUDGE

27.10.2015