



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI

CIVIL APPEAL NO. 67 OF 2010

S N T.....APPELLANT

VERSUS

R W K.....RESPONDENT

JUDGEMENT

1. The appeal herein arises from an interlocutory decision made on 18th November 2010 by J. Ragot, Principal Magistrate, on an application dated 21st May 2010.
2. The said application was by the appellant herein, who was the respondent in Nairobi Milimani Divorce Cause (DC) No. 114 of 2010. The application made four principal prayers:-
 - (a) an order to restrain the respondent herein, the petitioner, in the divorce cause from taking her personal effects and belongings from the appellant's home at Ol Kalau until she had provided a list of her personal effects and belongings at the Ol Kalau home.
 - (b) an order to restrain the respondent from harassing and intimidating the appellant through telephone calls and text messages and from approaching or getting near the appellant after the respondent had collected her personal effects and belongings from the appellant.
 - (c) an order that the respondent Do prepare and submit before court a list of all her personal effects and belongings that she left at the *[particulars withheld]* house and the *[particulars withheld]* home when she moved out on or about 24th February 2010 and that the respondent be allowed to take only her personal effects and belongings listed from the *[particulars withheld]* home.
 - (d) an order that the respondent provide an inventory of the household property she took away from the *[particulars withheld]* house on 22nd May 2010 and be ordered to return the ones that belong the appellant.
3. The appellant's case in that application was that the respondent had collected his property when she went to collect her personal effects and belongings from the *[particulars withheld]* home, which was in breach of the order that allowed her to collect her personal belongings. He feared that she would do the same when she would go to *[particulars withheld]* to collect her personal effects and belongings from the matrimonial house there. He also complained that she had been sending him threatening text messages about sending him to jail and causing his sacking from employment.
4. On her part, the respondent denied having carried away any property belonging to the appellant. She also denied sending threatening messages to the appellant, and instead accused the appellant of sending to

her such messages. She also accused him of threatening to shoot her. She argued that orders to restrain her from approaching or coming near him would interfere with her freedom of movement and association. She appended her a reply list of the items she had collected from the *[particulars withheld]* house, the items that were still uncollected from that house and at the *[particulars withheld]* home.

5. The appellant countered the respondent's case by arguing that the items collected from *[particulars withheld]* the home were not the respondent's personal property, but family property. In his view personal effects and belongings include items of clothing and personal use, and not furniture and household goods. He stated that the respondent should be ordered to return the family household goods collected from the *[particulars withheld]* house, and if she had a claim over them then she should have moved the High Court for distribution of matrimonial property.

6. After hearing these rival arguments, the court concluded that the principal dispute related to property, yet the court was seized not of a matrimonial property dispute but a divorce cause. It was held that the jurisdiction over division of matrimonial property lay with the High Court and not the subordinate court. On the prayer to restrain the respondent approaching or coming near the appellant, the court held that making such an order might interfere with the respondent's freedom of association and worship.

7. The appellant was aggrieved by the said decision and lodged the instant appeal. The Memorandum of Appeal dated 10th December 2010 was filed in court on the same date. In it he argues that the court erred in holding that only the High Court had jurisdiction over division of matrimonial property. He complains that the primary court had erred in finding that the order to restrain the respondent from harassing and intimidating him would violate her freedom.

8. The primary cause in Nairobi **Milimani Chief Magistrates Court Divorce Cause No.114 of 2010** was for the dissolution of marriage contracted between the appellant and the respondent. The petition dated 21st April 2010 seeks only two prayers – dissolution of marriage and costs of the petition. There is no prayer for settlement of the wife's property.

9. I have noted from the record that there were two interlocutory applications, dated 21st April 2010 and 27th May 2010 in filed in the primary cause. They dealt with what is described as personal effects and belongings. The respondent had moved the court by the application dated 21st April 2010 asking to be allowed to access the matrimonial homes for the purpose of collecting her personal effects and belongings. The order was granted and certain items of property were collected by the respondent from the *[particulars withheld]* home. This prompted the appellant to move the court in the application dated 27th May 2010 complaining that some of the items collected were not personal but family property. I have seen the list of the items allegedly removed from the *[particulars withheld]* home. Most of the items in that list do not qualify to be personal effects or belongings. Personal effects and belongings refer to personal items such as clothing, ornaments, cosmetics, perfumes, shoes and like items. It does not refer to furniture, kitchenware, carpets, carvings, weighing machines, beds and curtains. An order to collect personal items is not authority to remove what is clearly family property.

10. The two applications bring out the dispute between the two parties over matrimonial property. One of the matters that will need to be dealt with is the demarcation between personal effects and belongings on the one hand and matrimonial or family property on the other. These are not matters for determination by a court seized of a divorce matter. These are matters that fall for determination under the Married Women's Property Act, 1882. This then means that the divorce court has no jurisdiction to devolve into them. Both parties appear to have claims over certain items of property, and therefore either of them is at liberty to move the High Court under the Married Women's Property Act, 1882. I agree with the primary court that there was no jurisdiction in that court to deal with that matter.

11. On the prayer for orders to restrain the respondent from intimidating and threatening the appellant through telephone calls, I find no material upon which the primary court could have exercised discretion in favour of the appellant. No evidence was presented relating to the numbers of the telephones used, when the calls were made or the texts sent, the contents of the alleged messages, among others. In this

day and age it is possible to get transcripts of the alleged text messages from the mobile phone service providers.

12. On the prayer for orders to restrain the respondent from approaching or coming near the appellant, no basis was laid to support the prayer. No material was laid before the primary court to assist it in deciding whether or not to grant the order. What would happen, for example, if the respondent approached or came near the appellant? Was there a history of events where such approach or coming near the appellant had led to unpleasant consequences or occurrences? No such material was brought forth. I agree with the primary court that this prayer was not justified.

13. Having gone through the record and the analysis by the primary court of the facts placed before it, I do not find anything that I can fault in the decision of the said court of 18th November 2010. In the event, this appeal is without merit and I hereby dismiss it with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 31st DAY OF January, 2014.

W. M. MUSYOKA

JUDGE