



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CONSTITUTIONAL PETITION NO. 6 OF 2013

L M OPETITIONER

VERSUS

J BRESPONDENT

RULING

1. These proceedings were initiated through a Petition filed on 11th April, 2013 by L M O. The Petition is brought against J B. Prayers 1-4 of the Petition seek:

“1. A declaration that on the basis of the averments set out in paragraph 3, 4, and 5 hereinabove the Petitioner and the Respondent are husband and wife by operation of law in the legal doctrine of “Presumption of Marriage” and/or in accordance with Kisii Customary law.

2. **Dissolution of marriage aforesaid**
3. **A mandatory injunction against the Respondent allowing the Petitioner to reside in the matrimonial home [*Particulars withheld*] village situated at Fisheries, Lamu.**
4. **An injunction restraining the Respondent from molesting, intimidating and/or harassing the Petitioner”**
2. Filed contemporaneously with the said Petition was the petitioner's Notice of Motion expressed to be brought under Articles 11, 27 28, 45 and 48 of the Constitution as well as Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act, inter alia. The Notice of Motion contains six prayers the key ones being as listed below:
 1. **“THAT this application be certified as urgent and service be dispensed with at first instance.**
 2. **THAT the petitioner does forthwith release to the Petitioner/Applicant all her personal documents including but not limited to her identification documents and passport and all her education certificates and testimonials in the illegal custody of the respondent pending the hearing and determination of this application and petition.**
 3. **THAT an interim mandatory injunction against the Respondent allowing the petition to access to the matrimonial home [*particulars withheld*] Villa situated at Fishers, Lamu pending the hearing and deterioration of this petition be issued.**
 4. **THAT the respondent be ordered to make monthly payments by way of interim**

maintenance in the sum of Kshs. 250,000/= or such other sum as this honorable court may deem fit to grant pending the hearing and determination of this petition.”

3. The Notice of Motion is based on the affidavit of the Petitioner. The Respondent filed a replying affidavit on 27th May, 2013. Parties agreed to dispose of the application by way of written submissions.
4. I have read the pleadings, affidavits and submissions on record. Clearly, the Petitioner's case is that having cohabited with the Respondent over a period of 10 years, she is entitled to a presumption that she was his wife. Hence her ejection from the “family” home at **[particulars withheld]** Villa and business in 2011 by the Respondent was unlawful. The prayers sought flow from her alleged status as the Respondent's wife.
5. The Respondent argues that the present suit involves private law and raises no constitutional issue. The Respondent denies that he was married to the Petitioner and asserts that he is married to one N A K. That the Petitioner was merely an employee at one of his hotels, before her services were terminated. He points out that a similar suit brought in Mombasa CMCC 40 of 2011 was earlier filed by the Petitioner but was struck out.
6. In my considered view, this matter turns on one main question, namely the propriety of the Petitioner's approach of the court.
7. The Respondent has annexed to his replying affidavit, pleadings filed by the Petitioner in Mombasa CMCC 40 of 2011. Although there is no evidence that the said suit was struck out as asserted by the Respondent, it is evident that the present petition relates to the same subject matter, namely, a matrimonial dispute. There exists a clear procedure for dealing with such disputes. Although every dispute involves litigation over a right recognized or underpinned by the Constitution, not every dispute raises constitutional issues. I agree with the Respondent's objection on that account.
8. The above position was succinctly stated by Nyamu J (as he then was) and Wendo J. in the case of **Alphonse Mwangemi Munga & Others v African Safari Club Ltd. Constitutional Petition No. 564 of 2005.** The Petitioners therein, like the present Petitioner attempted to enforce “individual private rights through ...public law” when a proper procedure exists for the enforcement of private rights
9. This petition is therefore incompetent and borders on abuse of the court process as other proceedings had earlier been commenced over the same subject matter. I therefore order the Petition struck out with costs.

Delivered and signed at Malindi this **27th** day of **November, 2013** in the presence of Mr. Ole Kina holding brief for Mr. Gicharu for Petitioner.

Court Clerk – Samwel

C. W. Meoli

JUDGE