



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

PETITION NO. 12 OF 2011

IN THE MATTER OF THE CONSTITUTION

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 28, 29 AND 53 OF THE CONSTITUTION**

AND

IN THE MATTER OF THE CHILDREN ACT, 2010

AND

IN THE MATTER OF N.K.K (A CHILD)

BETWEEN

C.J.K.....PETITIONER

VERSUS

K.K.....RESPONDENT

RULING

The petitioner's Chamber summons seeks the following orders:

- “1. That this court be pleased to certify this application as urgent and to dispense with service of the same at the first instance.**
- 2. That pending the hearing of this application the Respondent, his employee, servants or agents, howsoever be restrained from removing or in any way interfering with Petitioners and Child’s quiet possession, occupation and residency of the matrimonial home situated at LR No.[.....] Kilimani.**
- 3. That pending the hearing and determination of the petition filed herein, this honourable court be pleased to issue a conservatory relief order prohibiting the respondents by themselves, their organs, agents, servants or employees stopping or in any interfering with the respondent, his employee, servants or agents, howsoever from removing or in any way interfering with the petitioners and child’s occupation of the matrimonial home situated at LR No.[.....] Kilimani.**
- 4. That the court be pleased to issue any other or further orders for the expeditious hearing and determination of this petition.**
- 5. That the costs of this application be costs in the petition.”**

The application was made on the following grounds:

- “(a) The petitioner, respondent and the Child have been residing at the matrimonial home LR No. [.....] Kilimani for the last 10 years.**
- (b) The matrimonial home is owned by a Company owned and controlled wholly and substantially by the Respondent.**
- (c) The respondent has ordered the petitioner to vacate the home by 31st January 2011.**
- (d) As a result the fundamental rights of the petitioner and the Child are threatened and if the eviction is carried out the Petitioner and the child will suffer irreparable emotional and psychological harm.**
- (e) The orders sought are in the best interests of the child.”**

The application was supported by an affidavit sworn by the petitioner. The facts deposed thereto may be summarized as hereunder.

The petitioner and the respondent were married on 10th April, 1999 and out of the said marriage they have one child namely, **N.K. K**, who was born on 11th September, 2000. After marriage the couple first resided at B Apartments, Kilimani and then moved to LR No. [.....] in, Kilimani, hereinafter referred to as **“the suit property”**. This became their matrimonial home.

The petitioner alleged that during the currency of the marriage it was the habit of the respondent to conceal from her his business and property dealings. One of the companies which the respondent owns and controls is **C Investments Limited**, she alleged. The suit property is owned by the said company.

Currently there are divorce proceedings between the parties pending at **Milimani Chief Magistrate’s**

Court, Divorce Cause No. [.....] as well as proceedings in the Children's Court namely, **Children's Case No. 96 of 2011**. The child of the marriage attends C School which is situated about 15 minutes drive from the suit property. The child and mother have lived in the area for the last 10 years and has built friendships with the neighbour's children. The child also attends co-curricular activities at Kilimani K which is in the locality.

On 20th January, 2011 the petitioner received from the respondent a notice dated 1st December, 2010 addressed to the respondent by C Investments Limited requiring him to vacate the suit property by 1st February, 2011. The reason for the said notice was that the lease period had expired and the company wanted to carry out major renovations to the house. Accompanying the said notice was a note addressed to the petitioner as follows:

“Express (K) will cart away the furniture for storage on 31-01-2011. Ensure you have removed all your things by then.”

The petitioner believes that the notice and the said note amount to constructive eviction against her and the child and it is not only made in bad faith but also amounts to abuse, harassment and intended to subject her and the child to cruel and inhuman treatment for the following reasons:

“(a) At all material times the respondent had a substantial and beneficial interest in C Investments Limited, the company that owns the matrimonial home.

(b) In fact, I am aware that C Investments Limited is a vehicle for the respondent's property holdings and he is in full control of the said company.

(c) The notice dated 1st December, 2010 was sent to the respondent way back in December 2010 but he failed to disclose this fact to me in good time to enable me consider my options particularly as the primary care giver of the child.

(d) The notice was given to the petitioner on 20th January 2011 less than a fortnight before the expiry of the same.

(e) The respondent has already made arrangements for removal of furniture by Express (K) Limited without regard to the interests of the petitioner and the child.”

The respondent left the matrimonial home on 7th January, 2011 and has since then collected his belongings in full view of the child and neighbours which, according to the petitioner, is intended to cause her and the child emotional distress.

Unless the orders sought are granted, the petitioner stated, together with the child will be rendered homeless and will continue to suffer emotional and psychological turmoil. The petitioner added that it is in the best interests of the child that they continue to stay in the matrimonial home during pendency of the divorce proceedings in order to provide security and stability for the child.

The respondent filed a replying affidavit and raised the following preliminary objections:

“(a) The matters raised in the suit are *sub judice*.

(b) The petitioner is non-suited against the respondent.

- (c) This court lacks jurisdiction to hear the matter.**
- (d) The filing of the cause as a constitutional application is an abuse of the court process.**
- (e) The constitution has established the proper courts for the proper adjudication of family and children matters.**
- (f) The pleadings do not disclose a cause of action against the respondent.”**

The respondent further stated that the directors and shareholders of a company are distinct from the company. Regarding C Investments Limited, he exhibited a letter from the Assistant Registrar of Companies dated 11th February, 2011 addressed to his advocates which shows that the directors of the company are **C.B** of P.O. Box 50637, Nairobi and **Beatrice Kosgei** of the same address. The company was incorporated on 17th March, 1998 before the petitioner and the respondent married.

He stated that together with the petitioner they are the sole shareholders and directors of a company known as Naivasha Cottages Limited and annexed to his affidavit a Certificate of Incorporation of the said company as well as its Memorandum and Articles of Association.

Regarding the divorce proceedings and the proceedings before the Children’s Court, the respondent stated that he had made sufficient and more than generous provision for their child. He had in particular made an offer to the petitioner respecting the child in the following terms:

- (a) Joint custody with care and control to the petitioner and unlimited access to the respondent.**
- (b) Pay the child’s educational costs, reasonable accommodation, security, utility bills, clothing, health cover and holidays at the cost of a maximum of Kshs.1 Million per year.**
- (c) A dedicated vehicle to transport the child.**
- (d) A vehicle to the petitioner.**

The respondent had also offered to provide accommodation expenses amounting to Kshs.100,000/= per month. The said amount is sufficient to rent a residence in the vicinity or neighbourhood of C School or any other location of the petitioner’s choice, the respondent added. In his view, the offer made to the petitioner was reasonable and generous but the petitioner is using the child to achieve a collateral goal.

The respondent further stated that the petitioner can make any and all claims in respect of the child and herself before the Children’s Court and the Family Division of this court. He further stated that this court is neither the proper nor convenient forum to consider the circumstances leading to the divorce petition herein, the respective rights of parties in the divorce proceedings, custody and maintenance of the child and distribution of matrimonial property since there are specialized courts which handle the said matters.

The petitioner filed a supplementary affidavit and stated that this court has jurisdiction to determine the matters in issue in so far as they relate to the protection of fundamental rights and freedoms. She further stated that C Investments Limited is being used by the respondent to evade parental and constitutional obligations to herself and the child.

Regarding the offer of money for alternative accommodation made by the petitioner, the respondent stated that it does take into account the special and best interests of the child.

When the application came up *ex parte* before Mwera J. on 28th January, 2011, the court certified it urgent and granted interim orders in terms of prayer 2 thereof and fixed the application for inter partes hearing on 3rd February, 2011.

Parties filed their respective submissions which I have carefully perused.

The petitioner is seeking a conservatory relief order to prohibit the respondent from removing or interfering with their occupation of the suit property pending hearing and determination of the petition. In **CHRISTOPHER NDARATHI MURUNGARU vs KENYA ANTI-CORRUPTION AUTHORITY & ANOTHER Civil Suit No. 54 of 2006 (unreported)**, Nyamu J, (as he then was), held:

“The considerations which go into whether or not a court should grant an injunction are different from those relating to grant of conservatory orders. Section 84 does not lay or prescribe the conditions and for this matter the court does have considerable latitude on whether or not to grant conservatory orders. In other words the court has to exercise its discretion based on the peculiarities of the case before it.”

I would add that the discretion must be exercised judicially and with due regard to the facts and the applicable law relating to the matter under consideration. A court must, for example, ask itself whether the substantive suit or petition discloses a *prima facie* case with a likelihood of success. The prayers sought in the petition are as follows:

- “1. A declaration that the respondent by his conduct has acted in breach of the petitioner and child’s fundamental rights and freedoms and has acted contrary to the provisions of Articles 28, 29 and 53 of the Constitution.**
- 2. A declaration that the petitioner and the child are entitled to reside and occupy LR No. [...] Kilimani.**
- 3. An order restraining the respondent, his employees, servants or agents howsoever from removing or in any way interfering with the petitioner’s and child’s quiet possession, occupation and residence of the matrimonial home situated at LR No.[PARTICULARS WITHHELD].**
- 4. An order restraining the defendant, his employees, servants and/or agents from transferring, charging or in any way dealing with his interest in LR No. [...] Kilimani to the detriment of the petitioner and the child or in a manner resulting in the petitioner’s and child’s loss of residence.**
- 5. Costs of the petition.”**

This is not an ordinary civil matter, it was brought as a constitutional petition where the petitioner is alleging that the respondent has breached or is threatening to breach her fundamental rights as well as those of their child and therefore seeks this court’s intervention. It is therefore necessary to interrogate the petitioner’s application in light of the prayers sought in the petition to see whether it discloses any threat or violation of her fundamental rights and freedoms as well as that of the child.

In MATIBA vs ATTORNEY GENERAL High Court Miscellaneous 666 of 1990, it was held:

“An applicant in an application under section 84(1) of the Constitution is obliged to state his complaint, the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the section. It is not enough to allege infringement without particularizing the details and the manner of infringement.”

Although the petition and the application herein were filed after promulgation of the **Constitution of Kenya, 2010**, commonly referred to as **“the new Constitution”**, the aforesaid principles still apply. It is not enough for an applicant to allege that a constitutional right or freedom has been infringed, that must be amply demonstrated. The applicant must cite the specific provision of the Constitution that guarantees the alleged right and/or freedom and bring it within the facts of the matter. That must be done with a reasonable degree of precision. In ANARITA KARIMI NJERU vs REPUBLIC [1979] KLR 154, the court held:

“If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains the provisions said to be infringed and the manner in which they are alleged to be infringed.”

In this application, the petitioner alleged that her right to inherent dignity and to have that dignity respected and protected as stated under **Article 28** is likely to be violated if together with the child they are moved out of the suit property. She also cited **Article 53** of the Constitution which guarantees every child various rights including the right to basic nutrition, shelter and healthcare. **Article 53(1) (e)** further guarantees every child the right to parental care and protection which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.

The petitioner therefore stated that together with the child are entitled to reside in the suit property which she said is owned by a company that is controlled by the respondent and by taking steps to remove them without lawful cause or excuse, the respondent is in breach of the aforesaid constitutional provisions.

The question that must be determined is whether moving a spouse and a child from one house to another amounts to constitutional breach of the person’s inherent dignity in terms of **Article 28** of the Constitution. In other words, is a person’s inherent dignity tied to a particular property? If for example, a family owns or has leased a house in a certain area of Nairobi and have lived there for ten years or more and for some reason one spouse and a child are required by the other or by the owner of the house (if it is a rented one) to move out, can that spouse who has been so required to vacate his/her accommodation allege that their constitutional right to inherent dignity has been violated? It is not necessarily so, it will depend on the facts of the case and particularly on the reasons thereof and ownership of the property in question. For an action to amount to violation of one’s inherent dignity it must be demonstrated, *inter alia*, that such action has been taken by another, intentionally, maliciously or spitefully calculated to injure the other person’s sense of self-respect or worthiness in a manner that will lower his or her standing in society, for that is what dignity entails.

As regards the provisions of **Article 53** of the **Constitution**, it was not demonstrated that the respondent intends to deny the child the basic right nutrition, shelter and healthcare. To the contrary, it is not denied that the respondent had made a generous offer of alternative accommodation, upkeep and healthcare to the child. This is in the pending divorce proceedings. I agree that a monthly sum of Kshs.100,000/= is sufficient to rent alternative accommodation within the vicinity of C School.

I am not satisfied that the petitioner has demonstrated that any of her constitutional right or that of the child are likely to be violated if they are to move from the suit premises to another house of more or less the same standard as the one they are currently occupying.

Turning to the issue of ownership of the suit property, although the petitioner alleges that the same is owned by C Investments Limited which she alleges the respondent has a substantial direct and beneficial interest in, the respondent adduced sufficient evidence that the suit property is indeed owned by C Investments Limited where the directors are C.B and B.K. That in law cannot be disputed. The said company stated in its letter dated 1st December, 2010 that the lease which it entered into with the respondent in respect of the suit property had expired and it required vacant possession by 1st February, 2011 to undertake major refurbishment works. At the time of forwarding that notice to the petitioner the respondent was not residing in the suit property. That notwithstanding, his offer of paying Kshs.100,000/= per month for alternative accommodation was still in force.

It was not demonstrated that the respondent is one of the shareholders or directors of C Investments Limited. But even if he is, shareholders and directors of a company are distinct and separate from the company. That is a settled principle of law as per **SALMON v SALMON [1897] AC 22**. C Investments Limited is not party to these proceedings. It has constitutional right to own property as provided under **Article 40** of the **Constitution of Kenya, 2010** and those rights must be respected and protected under the law. If this court were to make an order against the respondent with regard to the suit property, such an order would not be binding upon C Investments Limited as the registered proprietor of the suit property.

In light of the foregoing, I find and hold that the petitioner has not demonstrated that she has a *prima facie* case with any likelihood of success against the respondent. It is my considered view that she is not therefore entitled to the conservatory orders sought. I must therefore dismiss the application but with no order as to costs.

However, the petitioner and the child are not without a remedy. In the event that the respondent does not provide them with alternative accommodation in terms of his aforesaid offer the petitioner can seek appropriate relief in the divorce cause or from the Children's Court where the other proceedings are pending.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2011.

D. MUSINGA
JUDGE

In the presence of:

Nazi – court clerk

Mr. Majanja for the Petitioner

No appearance for the Respondent