



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CIVIL APPEAL NO. 29 OF 2010.

N.A.: APPLICANT.

VERSUS

J.A.O.: RESPONDENT.

R U L I N G.

1. By way of restating a very brief background of this matter, **J.A.O.** petitioned for an order of judicial separation against **N.A.** the respondent herein. The petition was made before the Magistrate's court and by a decree issued on 3rd May, 2010; the petitioner was granted the prayers sought in the petition for separation. The applicant has now filed a notice of motion under rules 42 (6) of the Civil Procedure Rules and sections 1 (A) and 1 (B) of the Civil Procedure Act as well as section 38 of the Matrimonial Causes Act.

2. The applicant is seeking for a stay of execution of the decree issued in **Kitale CMCC Div. cause No. [...]** pending the hearing and determination of another suit/ appeal in Kitale HCCA No. 29 of 2010. This application is supported by the grounds that the appellant filed an appeal against the decree in CMCCC No.[...]. It is contended that the decree alters the status quo in respect of the matrimonial home. Further it was argued that the decree determines the property rights of the parties, the property rights fall within the province of Section 17 of 1882 Married Women's Property Act of England. Moreover, unless the order of stay is granted, the applicant will be evicted from the matrimonial home and he would thus be rendered homeless. This application is also supported by the applicant's affidavit. He has also annexed the memorandum of appeal which stipulates the grounds of appeal. **Mr. Wanyonyi**, learned counsel for the applicant submitted that the Principal Magistrate had no jurisdiction to determine the issue of ownership of the suit premises.

3. On the part of the respondent, this application was opposed; **Mr. Kidiavai** learned counsel for the respondent relied on the replying affidavits sworn by the respondent on 31st March, 2011 and a further affidavit sworn with the leave of the court on 4th May, 2011. According to the respondent, the orders which were granted by Principal Magistrate were in respect of the property known as **Kitale Municipality Block [...]**. The respondent annexed a copy of the amended petition which was amended on 5th November, 2008 by consent of the parties. The petition was amended, and the suit property was amended to read plot no.[...] instead of plot no. [...]. The respondent denied any interference with plot No. 149.

4. In further arguments, counsel for the respondent submitted that when the Principal Magistrate decided on the issue of separation, it was incumbent on the court to determine the issue of occupation of the matrimonial home by the respondent. According to **Mr. Kidiavai**, the issue of ownership of the matrimonial property was not determined, but only the right to occupy it was given to the respondent. There was no prayer for the distribution of the matrimonial property. It is only an order of occupation which was granted to the respondent to the exclusion of the applicant. In any event the applicant is the registered proprietor of plot no.[...]which is larger than plot no.[...]Plot no.[...]is also in the name of the respondent, therefore the applicant cannot suffer any prejudice.

5. The applicant has filed an appeal against the decree issued by the learned trial magistrate in CMCC Div. Cause No. [...]. Although the applicant did not provide the judgment by the trial court, the decree that is annexed shows that the petitioner was granted the prayers sought in the petition. According to the amended petition that was provided to this court by the counsel for the petitioner, the petition was amended and as I understand it, the following orders which were sought were granted as follows:-

- (a) *That this honourable court be pleased to grant orders of judicial separation to the petitioner separating her from the respondent.*
- (b) *That the petitioner to be granted an order to occupy her matrimonial home on L.R. No. Kitale Municipality Block [...] to the exclusion of the respondent either by himself, his agents or relatives or any other person under his instructions.*
- (c) *That this honourable court be pleased to issue orders restraining the respondent from harassing the petitioner or in any way interfering with the petitioner's peaceful occupation of L.R. No. Kitale Municipality Block [.....]*
- (d) *The respondent to maintain the children of the marriage before and after hearing and determination of this suit.*
- (e) *Costs.*

6. The respondent has annexed a copy of the title in respect of plot No.[...] which is registered in her name. The dilemma I have is that the applicant did not annex a copy of the judgment that is being appealed against. I am alive to the fact that the subordinate court has jurisdiction to determine an issue of separation. This is both under the African Christian Marriage and Divorce Act and the subordinate courts Separation and Maintenance Act. The court can make an order that a wife is no longer bound to cohabit with the husband which in effect is an order of judicial separation. The court can also order the custody of the children and can make an order for the provision of reasonable maintenance to the wife.

7. The applicant's main complaint is that the court determined the property rights between him and the respondent which is within the realm of the 1882 Married Women's Property Act. However, looking at the above decree which I have reproduced above, the court merely granted an order of separation, an order excluding the applicant from occupying Kitale Municipality Block [.....]and the respondent was given the right to occupy it. The applicant was also restrained from harassing the respondent or interfering with her peaceful occupation of the plot. That decree in my humble opinion does not determine the property rights of the applicant and the respondent.

8. The learned trial Magistrate who heard the petition decided the orders to grant to the petitioner, this was obviously following the evidence which was before that court. The proceedings and the judgment of the learned trial Magistrate are not before me thus, I cannot assume the reasons that made the court exclude the applicant from the matrimonial home. It follows that at this stage, it is not possible for me to grant the orders sought by the applicant going by the facts before me. This finding is further reinforced by the fact that the plot in question is in the name of the respondent. For the aforesaid reasons, I find no merit in the notice of motion dated 25th March, 2011 which I hereby dismiss with costs to the respondent.

Ruling read and signed this 8th day of July, 2011.

MARTHA KOOME.

JUDGE.