



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 91 OF 2011

MARY WANJIRU MATHENGE.....PLAINTIFF

VERSUS

SAMUEL MATHENGE NGATIA.....DEFENDANT

RULING

Mary Wanjiru Mathenge, the Applicant, by a Notice of Motion dated 19th April 2010, and filed on 21st April 2011, sought orders to restrain Samuel Mathenge Ngatia (*the Defendant/Applicant*) from occupying their matrimonial home situate on a parcel of land known as Title Number Nyandarua/Njabini/2009 pending the determination of this suit.

In her Supporting Affidavit and grounds, the Applicant avers that the Respondent has been her husband of 19 years, that he is a violent man, that he has ejected her from the matrimonial home, that he suffers from a form of psychological disorder, a dangerous individual and suffers from a violent irritating character, that the Respondent is a nuisance and that she cannot take it any more, and she decided to move away from the home. She would only return to the matrimonial home if the Respondent is ejected there from by an order of court supervised by the OCS, Njabini Police Station.

The Respondent has in his lengthy, and rather eloquent Replying Affidavit sworn on 13th May 2011 and filed on 16th May 2011, specifically replied to, and denied all of the Applicants claims, and says in paragraphs 16, 20 and 21 thereof -

"(1) *That I have not stopped the Applicant from plying her trade and profession and I am not aware of any irreparable loss and damage that she is in fear of (para. 16),*

(2) *That at any rate issues of determination of who owns what cannot surely be subject to determination at interlocutory stage of proceedings.*

(3) *That I am surprised that a spouse who had moved out can ask the court to order the other spouse to move out so that she returns, and all this at interlocutory stages of the case."*

In addition to the grounds, Supporting and Replying Affidavits, counsel for the Applicant and Respondent also filed written submissions essentially reiterating their respective positions in the grounds, supporting affidavit.

I have considered the parties rival contentions. In my view the Application by the Applicant fails

on two grounds.

Firstly, no party is allowed to depart from his pleadings unless those pleadings are first amended. That principle was contained in Order VI, rule 6 of the former Civil Procedure Rules. That rule states that -

"6(1) No party may in any make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.

(2) allowed some party to amend his pleading."

This rule is retained and is reiterated in Order 2 rule 6(1) of the Civil Procedure Rules 2010 (*LNN 151 of 2010*) which came into force on 10th September 2010.

In her plaint dated 19th April 2011 and filed on 21st April 2011, the Plaintiff sought -

(1) *permanent orders barring the Respondent from evicting the plaintiff from the matrimonial home,*

(2) *permanent orders compelling the Respondent to return specific assets of the business known as FARMLANDS SERVICES & SUPPLIES, and*

(3) *separation orders giving the Applicant the matrimonial home.*

In her Notice of Motion the subject of this Ruling, the Applicant seeks the same mandatory orders under Order 40 of the Civil Procedure Rules - which is entitled, TEMPORARY INJUNCTIONS and INTERLOCUTORY ORDERS.

Reliefs under that order are only granted for a temporary period of 14 days where it is shown that the property in issue is being wasted, damaged or alienated by any party to the suit or wrongfully in execution of a decree, or that the defendant threatens to remove or dispose the property to in circumstances affording a probability that the Plaintiff/Applicant may be obstructed or delayed in execution of a decree.

The Plaintiff/Applicant has not pleaded any of those circumstances. The Plaintiff/Applicant's plea is to have the Defendant/Respondent removed from the matrimonial home, and she settles in without him, and at her convenience. That is indeed what the applicant may desire, and may well have been advised.

Whereas under the Family Law Act 1996, Part IV (*in force since 1997*), the court may, in cases involving threatened or actual domestic violence, grant one of a series of "*occupational orders*" requiring that the Respondent permit the applicant to enter and remain in the dwelling house, or that the Respondent leave the dwelling house or part of it, under S.33 of that Act, no such law exists in Kenya.

For the applicant to get such orders, the applicant will need to prosecute her and prove her case entirely.

Whereas it is correct that mandatory injunctions may be given at an interlocutory stage, the applicant in such case must show exceptional circumstances which dictate that unless the orders sought are granted, the applicant will be ruined in her business.

In this case the Applicant claims that the Respondent has been cruel to her, is a nuisance, has an irritating character, and is disposed to violence. The Respondent has denied all these claims, and challenged the Applicant to prove them on oath by way of further affidavit. The applicant declined to do so. Under our law, that the Applicant's prayers could considered only under the Matrimonial Causes Act (*Cap. 152, Laws of Kenya*), by way of a suit for separation and divorce under that Act. The Applicant has come by the back-door. I do not think her claims are ripe for adjudication. I find no merit in this, and the

application dated 19th and filed on 21st April 2010 is dismissed.

I prefer not to make any order of costs, as this is a case of an estranged wife, and a perplexed husband. Each one of them will bear his/her own costs.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 1st day of July, 2011

M. J. ANYARA EMUKULE
JUDGE