



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

Miscellaneous 120 of 2009

C K APPLICANT

~VRS~

K M.....RESPONDENT

AND

M MCO-RESPONDENT

RULING

This application dated 24/08/2009 brought by the Petitioner C K against the Respondent K M and the Co-Respondent M M seeks for three main prayers:

1. That the Defendant be ordered to grant the Petitioner an unconditional access to the matrimonial home in [particulars withheld] without threats, insecurity to enable the Petitioner/Applicant to visit and stay at the matrimonial home which she owns with the Respondent pending hearing and determination of the petition.
2. That the Co-Respondent be restrained by herself, her agents, relatives, brothers and sisters from interfering with the Petitioner/Applicant while at her home in [particulars withheld] town or at any other place and or from insulting the Petitioner and or the children of the marriage, and further be ordered to keep a safe distance from the Petitioner pending hearing and determination of the petition.
3. That the Respondents be restrained from living together as husband and wife and or being seen in public together pending the hearing and determination of the petition.

The facts of this application are that the Petitioner and the Respondent got married on the 7th day of April 1979 under the Marriage Act Cap 150 of the Laws of Kenya. The couple has two matrimonial homes one at Nang'oto village, Webuye and another at [particulars withheld]. Their three issues of marriage are all adults having been born in 1979, 1985 and 1987. The parties lived peacefully until the year 2008 when the Respondent deserted the Petitioner. Currently, the Respondent is living with the Co-Respondent at the [particulars withheld] home and has since then changed the door locks thus completely denying access to the Petitioner and her children.

The Respondent in his replying affidavit depones that the Petitioner lives at their Webuye matrimonial home which fact she failed to disclose to the court. The [particulars withheld] home is the ancestral home of the respondent where he has put up a house according to Luhya customs. He accused the Petitioner of cruelty having assaulted him severally occasioning bodily harm. Due to the cruelty of the

Petitioner, the Respondent has deserted her to live in peace. He denies having threatened to kill the Petitioner at any one time.

Mrs Mumalasi for the Petitioner submitted that as an African, the Petitioner has sentimental value and attachment to her matrimonial home at [particulars withheld]. Being denied access to the home has caused psychological torture to the Petitioner. A child of the couple does not contain these facts surprisingly. This court is of the view that such matters ought to have been included in the Petitioner's affidavit. Failure to do that reduces them to just statements from the bar.

Ms Andia for the respondent submitted that the orders sought if granted may not be enforceable. The Petitioner is already staying in the matrimonial home at [particulars withheld]. The Respondent has explained that the Petitioner is extremely irritant and has caused him stress and mental torture. This is evidence that the couple cannot live peacefully together. The Respondent has no objection to the Petitioner remaining at the [particulars withheld]home while the respondent continues staying at [particularfs withheld].

In this application, the issue of where each party is residing is of crucial importance. I note with concern that the Petitioner who wants to be granted access to the [particulars withheld]home has not disclosed where she is residing. The Respondent admits he lives at the home while the Petitioner lives at their matrimonial home at Webuye. The [particulars withheld] home is the ancestral home of the Respondent. This is supported by the fact that prayer 3 seeks to restrain the respondent and his siblings and other relatives from interfering with the Petitioner while at the [particulars withheld] home. The Respondent accuses the Petitioner of cruelty and violence. He gives references of Police Occurrence Book reports that he has made to the police after being assaulted by the Petitioner. The Petitioner did not file a further affidavit to deny these allegations. The Petitioner has not reported to the police the threats to kill her by the Respondent. It is difficulty therefore for her to convince the court of that allegation.

The prayers sought are intended to restrain the Respondent as well as his relatives from interfering with the Petitioner's peaceful stay at [particulars withheld]. The said relatives have not been named or joined in this application.

If such an order is issued, it would be difficulty to enforce against third parties who were not called to defend themselves. It would also be against the rules of natural justice to condemn any person unheard. The Petitioner is dishonest for failure to disclose that she lives in the [particulars withheld]home. She has not shown that any harm or disadvantage will be caused to her by living in that home while the Respondent remains in the [particulars withheld] home. This court has not been convinced that there is any need to grant the orders sought. All the children are over 18 years and are not a subject in this application.

It is my finding that this application has no merit and I dismiss it with costs.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Bungoma this 9th day of February, 2010.

In the presence of M/S Andia for the Respondent.