



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**Divorce Cause 1 of 2010**

PAW-M .....PETITIONER

VERSUS

CMAW-M..... RESPONDENT

**RULING**

The applicant/petitioner, filed a Chamber Summons application dated 03-03-10 made under Order XXXIX Rules 1 and 9 of the Civil Procedure Rules, Section 3A Civil Procedure Act, Rule 3 (3) of the Matrimonial Causes Act and section 3(3) (d) of the Foreign Judgment (Reciprocal Enforcement) Act, section 17 of the Married Women's Property Act 1882. The application seeks for;

- (1) A temporary injunction restraining the Respondent from transferring, selling, leasing, mortgaging, charging, alienating, vesting the property in the names of Trustees or otherwise dealing with the Title to plot No. [Particulars Withheld], Kilifi, until conclusion of the cause or other order of the court.
- (2) Alternatively, that this court do order that the status quo being the current status of registration of the land, be maintained pending interpartes hearing of the Chamber Summons.
- (3) The respondent be restrained from harassing or otherwise imposing his personage on the petitioner, and the petitioner be entitled to quiet enjoyment of the said property being Plot No. [Particulars Withheld]

It is premised on the grounds that:

- (a) The petitioner believes that the respondent intends to use any means whatsoever to evict her from the said property.
- (b) The respondent intends to continue to harass and abuse the petitioner so that she will concede to his being granted a divorce and that he be relieved from any financial obligation towards her.
- (c) The petitioner believes that respondent may be setting up a bogus Trust for the said property, thereby trying to prevent it from being enumerated in any financial settlement resultant upon divorce.
- (d) The Foreign Judgment (Reciprocal Enforcement Act), specifically excludes and retains exclusively jurisdiction to this court in any matrimonial cause or matter or for determining property rights in property arising out of a matrimonial relationship.
- (e) The petitioner, being a deserted wife is entitled to an equity whereby she may remain in exclusive possession free from harassment and quiet enjoyment.
- (f) If the respondent is allowed to alienate or dispose off the property, then the same may not be available for enumeration and consideration in deliberations leading to a financial settlement on divorce.
- (g) It is in the interest of justice that the petitioner's current possession or status quo be preserved pending interpartes hearing of the divorce proceedings.

In the affidavit supporting the application, the applicant P AW-M depones that she is the deserted wife of the applicant, and is in occupation of their matrimonial home Plot[Particulars Withheld].

The property initially belonged to the respondent's parent who upon death, left the property equally to the respondent and his brother IW-M.

The respondent bought out his brother's interest.

The respondent was then involved in a protracted divorce litigation with his first wife, in order to protect the property from his first wife's claims, he arranged a bogus Trust whereby May Helen Schalch and Anthony Gross Advocate, were appointed Trustees. A copy of the vesting assent of 2004 when the property was discharged from the bogus Trust is annexed and marked PAWM 1.

Eventually respondent married the applicant – and after 1993, the property was left to KEMRI until the end of 2006.

In January 2007, the applicant recommenced repairs and renewal of the house, at the request of the respondent – and this continued for the next three years.

In March 2009, the respondent left

Kenya and commenced an adulterous relationship with the said AB. The Respondent has now returned to Kenya, together with the said woman and Petitioner believes that he is taking steps to alienate or otherwise dispose off or transfer the property Plot[particulars withheld], so as to place it beyond the jurisdiction of this court. The respondent is determined to end their marriage and not pay petitioner any monies – which is a repeat of exactly what he did to his first wife.

Petitioner/applicant avers that she has devoted her time and finances into renovating the matrimonial home and wishes to make a claim on it and also exercise her deserted wife's equity to remain in the property free of harassment and with quiet enjoyment. She cites Saturday 27<sup>th</sup> February 2010, as the day when respondent endeavored to enter the house and proceeded to abuse and harass her in the presence of other persons.

In the replying affidavit, the respondent opposed the application – he admitted that he has filed divorce proceedings in the UK and avers that when the UK proceedings came up for hearing on 2-12-09 at the Royal Courts of Justice, the applicant made an undertaking that she would not issue any proceedings against the respondent in Kenya- a copy of the order is annexed as CMAWM1. It is his contention that, the petition in these proceedings were filed against the express order recorded by consent in the

UK proceedings and the petitioner/applicant failed to disclose this in her affidavit. Respondent states that it is expensive and oppressive for him to incur two sets of costs to his English solicitors and barristers as well as to his advocates in Kenya to litigate upon the same issue.

Respondent's view is that the petition is filed for the purpose of obtaining exclusive use of the house and property in Kilifi – which is property registered in his name. He admits going to the property on 27-2-10 at 3.00pm but says applicant created drama by calling security guards and threatening to call police, and warning him not to return to the property. She subsequently sent him correspondence (CMAWM6) in which;

- (a) she accused him of having sold her house in the UK — which he denies, saying the property he sold in July 2009 is his, yet applicant now stakes a claim on the proceeds of sale
- (b) On 10-3-10 when respondent went to the property on prior arrangements concerning his car and camera, applicant again summoned security guards to keep respondent out of the property.

Respondent depones that filing of the petition for Divorce does not amount to transfer of his property to applicant and he sees the petitioner in a deliberate attempt to keep him out of his property and away from his movable assets including a Ford Range Rover which applicant is using without his permission. He denies threatening to evict applicant from the property insisting that it is the petitioner who has used KK security guards to keep him away from the property.

He disputes claims that applicant has spent her monies on improving the property in dispute saying he had left funds with her for the repair and renovation of that property and that applicant in fact obtained court order in the UK, requiring respondent to pay the contractor's bill as shown in annexures CMAWM 8. He says applicant cannot spend his own money, obtain court orders compelling him to pay further contractor's charges, then turn around and claim an interest in the property under the Married Women's Property Act.

He denies ever harassing applicant or that he is setting up any Trust for the Kilifi property. He explains that in any event, the Kilifi property will not form part of any financial settlement and he is under no obligation to make any financial settlement for the petitioner's benefit.

Respondent further states that no property has arisen out of the marriage between him and the applicant and applicant has her own property in the UK from which she derives income and an independent pension, to which respondent has no interest and likewise applicant ought not to claim any interest in property respondent had before the marriage. He denies that the Kilifi property is the matrimonial home, saying it was let out to KEMRI.

Respondent indicates that he does not at present intend to live in the property with the petitioner, but he wishes to inspect it and verify that the funds he had sent for repairs and renovations were indeed used for that purpose.

Respondent had filed an application dated 12-03-10 which the court directed was to be argued simultaneously with the petitioner's application because its content really was a reply to the petitioner's application – respondent's prayer is that the petitioner's application be struck out with costs. He also urged the court to discharge the ex parte injunctive orders which had been made in favour of the applicant as they are being used to keep respondent away from his property.

In response to the respondent's application and claims, petitioner states that since the Kilifi Property is in

Kenya, then she has to file proceedings in the jurisdiction where the property is situated – hence the concurrent suits in England and Kenya

— she refers to the case of **Robert Francis Shaw v Judith Deborah Cave Shaw CA 157 of 2004**. Further, that the Foreign Judgment (Reciprocal Enforcement) Act, Cap 43 Laws of Kenya section 3(3) (d) excludes matrimonial causes or matters from the effect of any foreign judgment and therefore orders made in other jurisdiction have no bearing nor are they binding in proceedings in Kenya.

Her contention is that from January 2007, the house at Kilifi became their matrimonial home and remained so until the respondent deserted her in March 2009 when he went to England.

She draws this court's attention to correspondence by respondent to her, dated 5<sup>th</sup> May 2010 (e-mail) by the respondent's counsel directing her to vacate the property by 30<sup>th</sup> May 2010 and that is her basis for alleging threats to evict her.

At the hearing of the application, Mr. Osmond submitted on behalf of the applicant that the court has power compel a husband to allow the wife to remain in his house even if he is the owner or is a paying tenant, pending determination of divorce proceedings, he urged the court to consider the case of **Jones v Jones 1971 2ALL ER pg 737** where a wife applied for injunction orders for the husband and his mistress to leave the matrimonial home, and that he be restrained from preventing the wife's return – it was held that;

***“pending divorce to grant an injunction to compel a husband to allow a wife to remain in the matrimonial home and where he had been guilty of adultery or cruelty, to exclude him from the home, even though the husband was the legal owner or tenant...the principle that pending the hearing of a petition, the court should protect the right of the wife to live in the matrimonial home as well as her right to maintenance.”***

On the issue of jurisdiction, Mr. Osmond urged this court to be guided by the provisions of Cap 43. Foreign Judgments (Reciprocal Enforcement) Act on jurisdiction in matrimonial causes and determining matrimonial property – section 3(3) (d) of Cap 43 reads as follows;

***“This Act does not apply to a judgment or order in a matrimonial cause or matter arising out of a matrimonial relationship. It is Mr. Osmond's argument that since the parties own property both in Kenya and the UK, then it means that they have to institute concurrent proceedings in the different jurisdictions – to buttress this point he relies on the Court of Appeal decision of Robert Shaw v Deborah Shaw CA No. 157 of 2004.”***

He therefore justifies applicant's decision to file another suit in

Kenya although there is another one pending in the UK. He submits that applicant's fears of what respondent intends to do with the property is well founded, as this is not the respondent's first divorce, and by past conduct, he may wish to have the house completely out of the applicant's reach, so it is essential that the property be safe guarded. It is further pointed out that the house in Kilifi is the matrimonial house in Kilifi and between March 2009 when the respondent deserted the petitioner, he sold their former matrimonial home in England.

As to the refrain that applicant has a house in the UK and she can go and live there, Mr. Osmond submits that the applicant has acquired a domicile of choice in Kenya, and she wishes to continue living in Kenya in the house at Kilifi and he urges this court to confirm the injunction and prevent the respondent from evicting her.

In reply, Mr. Kinyua for the respondent submits that applicant has failed to meet the conditions set out in **Giella V Cassman Brown Case**, since the application is made under Order XXXIX of the Civil Procedure Rules. It is his contention that an injunction cannot issue just because the union has gone sour and the applicant is entertaining some beliefs as to what action the respondent may be contemplating whether it is setting up a trust or alienating. Further that the claim about continuous harassment and abuse is not supported by a single cited incident.

It is Mr. Kinyua's submission that the issue of foreign judgment has nothing to do with injunctions as Cap 43 just relates to enforcement of certain orders by courts outside Kenya.

On describing herself as a deserted wife, Mr. Kinyua's response is that desertion is a legal conclusion which has a prescribed period under section 8 (b) of the Matrimonial Causes Act, so applicant cannot simply announce that she has been deserted and obtain an injunction.

It is also argued on behalf of the respondent that, having an adulterous relationship is not a reason to obtain an injunction and it is not as though the respondent has moved the said woman into the matrimonial house.

Mr. Kinyua also draws this court's attention to the memo of appearance under protest made under Rule 3(3) and 13(1) of the Matrimonial Causes Act in which the respondent has protested to the filing of this suit saying.

- (1) There is already a petition for dissolution of the same marriage proceeding in the Royal Courts of Justice in the UK
- (2) The applicant had recorded a consent not to issue any proceedings in Kenya against the respondent and the order is still in force.

In addition to this, Mr. Kinyua submits that jurisdiction is challenged because;

- (a) No certified copy of the petition has to date been served as required under Rule 8(a) and (c) of the Matrimonial Causes Rules which provides as follows:-
- (b) The petition which was served on the respondent was not certified under Matrimonial Causes Rules, which provides as follows:-

***“person's service shall in no case be effected by the petitioner or the intended petitioner”***

Mr. Kinyua also refers to Rule 10 of the Matrimonial Causes Act which provides that:

***“unless otherwise directed, a petitioner shall not proceed to trial unless the respondent and every co-respondent thereto ... (a) has entered an appearance or (b) is shown by affidavit in form 7 in the application, which shall be filed, to have been served with the petition, (c) has returned to the advocate for petition or petition, on acknowledgment of service”***

And argues that Respondent has to enter appearance and he must be shown to have been served personally. Mr. Kinyua further urges this court that if the court rules that it has jurisdiction in this matter, then the court should limit the order as to the time it should apply (since the respondent is domiciled and resident in the UK) and that the orders should not restrain respondent from entering the property. Mr. Kinyua qualifies this by specifying that the court may order Respondent to keep away from the bedroom and bathroom, but the court must consider that he will need to file an affidavit of means and to do so he would have to go to the house so as to prepare an inventory of the items he owns, and he will also need a valuer to value the house.

Mr. Osmond's response is that the argument on jurisdiction has been settled by the Court of Appeal in **Owens v Owens 1959 EA pg 909** where a husband had filed a petition for divorce in

Kenya, whilst the wife had petitioned for divorce in the UK. It was held that:

**“There was no danger of inconsistent decrees being made since if either court decreed the dissolution of the marriage the proceedings in the other jurisdiction would be brought to an end, on the ground that the marriage had already been dissolved”** – this recognizes concurrent petitions in different jurisdictions.

Mr. Osmond submits that Mr. Kinyua seems to be equating matrimonial jurisdiction with common law jurisdiction and avoids answering principles set out in ***Jones V Jones*** which made it clear that court has jurisdiction in such instances.

He explains that legal definition of desertion only relates to filing of the petition, but the act of desertion begins from the moment a party leaves the other. His contention is that once the court signs and seals the various notices, it means that pleadings have been certified. Mr. Osmond also points out that the appearance in protest requires summons for directions, yet the Chamber Summons filed here has no request for directions at all and they should now not seek refuge about seeking directions from court.

He argues that the principles in *Giella* do not apply in matrimonial Law.

The issues are:

- (a) Is the petitioner entitled to file a matrimonial suit in Kenya when there is another matrimonial suit pending in the UK.
- (b) What is the effect of the consent entered in the UK where applicant undertook not to issue any other proceedings in Kenya.
- (c) Does the fact that applicant has not filed an answer to the petition and has instead filed an appearance in protest bar the applicant from seeking the prayers sought and that directions must first be taken.
- (d) Has the applicant made out a case to warrant granting of an injunction?

I propose to deal with the matter in two parts, as the issues are largely based on (a) procedure or procedural law (b) substantive matters.

From the onset what is proceeding currently is NOT the petition as envisaged under rule 10 of the Matrimonial Causes Rules – we are dealing with interim orders which were sought by the applicant/petitioner and secondly Rule 10 has three parts which are in the alternative – using the word or – so that even if respondent has not entered appearance yet, having elected to file appearance in protest, then part (b) of Rule 10 comes in – that Respondent is shown to have been served with the petition – indeed respondent does not deny this service.

My view is that Rule 10 of the Matrimonial Causes Rules, is not a bar to the application herein being heard. Third is the issue as to whether this court ought to hear this matter since there is another petition filed in the UK – the same has a two pronged antennae – (a) that it is burdensome and expensive for the respondent to have to bear costs of litigation in Kenya and the UK

- (b)The petitioner had entered into a consent not to file any other related proceedings in Kenya. Mr. Osmond’s argument is that the petitioner/applicant has a right to file these proceedings as the property which forms subject this petition is situate in Kenya and the court with appropriate jurisdiction is the Kenyan court.

Although reference is made to annexure CMAWM 1 – I am totally unable to locate it in the court file – what I refer to is CMAWM 2 being that is orders made in the High Court Division in the UK indicating that **“the following relates to respondent’s and petitioner’s property in the UK (inclusive of funds) and sums any in respect of work done on the Kilifi property and house insurance in respect of the Kilifi Property.”**

There is an undertaking by respondent to continue paying monthly maintenance to the petitioner/applicant herein, and an undertaking that petitioner/applicant will not dispose of the respondent’s assets in

Kenya or issue any proceedings in Kenya against the respondent.

Of interest is that the issue of jurisdiction is a matter for consideration even in the UK case.

Is the house in Kilifi a subject of the

UK suit? It doesn't seem quite so, issues revolve around it in terms of construction costs, ....but it seems to end there – so what is the applicant supposed to do?

Case law seems to state that parties can file matrimonial suits concurrently in separate jurisdiction – that was the approach by the Court of Appeal sitting at Nairobi in 1959 in case of James Owens v Margaret Owens 1959 EALR pg 909 – where the husband petitioned for divorce in Kenya, whilst the wife had filed a petition for divorce in England and the earlier court had ordered that the husband's petition be adjourned sine die until the proceedings in England should be determined, on the ground that inconsistent decrees might otherwise be made in Kenya and England.

On appeal it was held that there was no danger of inconsistent decrees being made, since if either court decreed the dissolution of the marriage, the proceedings in the other court would be brought to an end on grounds that the marriage had already been dissolved.

This position was repeated by the Court of Appeal presided over by Judges Omolo, Bosire and Githinji in CA No. 1157 of 2004 Robert Francis Shaw v Judith Deobrah Cave Shaw when they approved Waweru J's holding that Kenyan courts do not have jurisdiction over property situated in Scotland – and I think the converse is also true.

Then there is the consent entered into by the parties- that was not a judgment – it was an order made in court – section 3(3) (d) of The Foreign Judgments (Recipricol Enforcement) Act states as follows;

***“This Act does not apply to a judgment or order in a matrimonial cause or matter, or determining rights in property arising out of a matrimonial relationship”***

- That puts to rest the twin issues of concurrent petitions and the undertaking – that consent order has no reciprocal effect.

Then the substantive part – applicant's fears as to what respondent is likely to do with the property stems from past experience – which is confirmed by the respondent's definite attitude that he has no obligation to provide for her, she has a house of her own in the UK where she can go to live, the Kilifi house is his to do as he pleases – the fear and belief is not just a whimsical thought, it has proper foundations – I note that respondent does not deny having used such tactics in the past to escape his first wife's claims on his property.

The applicant is claiming right to remain in the house pending determination of the matter – she refers to the house as matrimonial house and asks for restraining orders against the respondent.

In Rayden's Law and Practice in Divorce and Family matters in All Courts Twelfth Edition Vol 1 Text (London Butterworths 1974) at pg 66 – the right of occupation of a spouse who has no proprietary, contractual or statutory right in the matrimonial home is recognized as a common law right which she may seek to enforce. At paragraph 19 page 672 of the same text, it is discussed that if one of the parties has good grounds for fearing that the other will dispose of the property pending the litigation, an injunction to prevent this may be obtained as a matter of urgency. This position was confirmed by the decision in Jones v Jones.

But Respondent is saying – this is not the matrimonial home – that it had been let out to KEMRI – for crying out loud – the respondent is playing musical chairs – in one breath he says it was let out to KEMRI and in the next breath he says his property is at that residence – and

pray at what point then did petitioner get to be in occupation and oust KEMRI, since he does not allege that she forcefully moved into occupation – and how did his personal property such as camera and car find its way into the premises?

He also says she has no right to even seek for restraining orders- because the property is registered in his own name, so how can the applicant stop him from dealing with his own property in whichever way he pleases. What constitutes a matrimonial home has been discussed in many decisions including the cited one of **Jones v Jones** and **Shaw v Shaw** – the mere fact that the husband is the registered owner, or the statutory owner, or the one paying the rent, does not unveil the status of the property and make it any less of a matrimonial home.

Applicant says she contributed in improving the house using her own funds – respondent says no – he sent the funds to her – he does not deny that she had a role in facilitating the works, whether that was in kind or indirectly and that is an issue that can only be determined upon trial. She is in occupation and that Status must be preserved pending hearing and determination of the suit.

Respondent says he does not intend to evict applicant, yet it is not lost to me even from the correspondence exchanged, that tension is so high between them that the best way to handle the situation is by reducing contact and interaction it cant be that the respondent (who in any event says he doesn't wish to live in the premises, for as long as petitioner is still in occupation), should be allowed to conduct a silent war of mental guise by appearing willy nilly as he pleases, on condition that he doesn't go to the bedroom or bathroom, from what is presented I am persuaded that restraining orders are appropriate and must issue. In the event that respondent wishes to access the premises to collect his property or take inventory then due notice must be given to the applicant's counsel at least seven days before such visit is made, so that appropriate arrangements can be put in place.

Does the test in Giella apply in a matrimonial cause – I think Jones case gives the answer – No it doesn't.

I grant orders of injunction as sought. Each party shall bear its own costs of this application.

Delivered on this 23<sup>rd</sup> day of **June 2010** at Malindi.

**H A OMONDI**  
**JUDGE**