



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 11 OF 2010 (OS)

IN THE MATTER OF AN APPLICATION BY SIMON MUTHAA MWANGI

UNDER SECTION 17 OF THE MARRIED WOMEN PROPERTY ACT, 1882.

SIMON MUTHAA MWANGI:::APPLICANT

VERSUS

KELLEN NYAMBURA NJOROGE:::RESPONDENT

RULING

The Plaintiff/Applicant moved to this court, and filed an originating summons dated 1st April, 2010 and filed on the 7th day of April 2010. It is brought under the Married Women Property Act 1882 of England and section 3 (1) of the Judicature Act, chapter 8 of the laws of Kenya. The reliefs sought are:-

1. *A declaration that the property known as LR. NO. Kiambu/Municipality Block 5 (Kiamumbi) 223 is wholly owned by the Applicant or such order as to the ownership thereof as may be just.*
2. *A declaration that the items listed in the scheduled here to are the property of the Applicant herein.*
3. *That the Respondent do pay the costs of these proceedings.*

On the said originating summons was anchored an interim chamber summons brought under order XXXIX rules, and 2 of the Civil Procedure Rules, section 17, of the Married Women Property Act 1882, section 3A of the Civil Procedure Act. Five reliefs are sought.

1. *"Spent*
2. *That there be a temporary injunction on the Respondent against transferring LR. NO. Kiambu/Municipality/Block 5 (Kiamumbi) 1223 pending the hearing and determination of this suit.*
3. *That there be an injunction restraining both the Applicant and the Respondent from howsoever disposing or selling off all the properties belonging to the matrimonial home as specified in the schedule.*
4. *That an injunction be issued against the Respondent of ever to dubiously attempt to interfere with*

Applicants' occupation of the matrimonial home.

5. *That the costs of this application be in the cause.*"

The grounds in support are set out in the body of the application and the supporting affidavit. On 6/5/2010 parties entered into a consent on prayer 2 and 3 leaving prayer 4 and 5. The relevant grounds are as follows:-

- That there is a marriage between them which has broken down and the Respondent and her siblings are threatening to Marshal support and kick him out of the matrimonial home.
- There is fear that the Defendant may dispose off the property to the detriment of the applicant.
- The couple has three children between them specified in paragraph 2 of the supporting affidavit.
- Besides the subject property, they had other properties through their joint efforts some of which they have disposed off jointly.
- That the Respondent packed her things and left the matrimonial home in February 2010.
- The Respondent has even instigated criminal investigation and prosecution just to malign him.
- That since the Respondent left the matrimonial home, the Applicant has been receiving calls from unknown persons telling him to vacate the house.

The Respondent entered appearance on 22/7/2010 and then filed a replying affidavit deponed on the same 22nd day of April 2010. The salient features are:-

- She is the proprietor of the suit property which she purchased using a loan from her former employer Barclays Bank (K) Limited which loan was settled by deduction from her salary.
- It is her assertion that she fully paid off the indebtedness to the employers mortgage and the Plaintiff/Applicant never contributed anything either directly or indirectly towards the said purchase.
- That in the month of February 2010, the Plaintiff/Applicant violently assaulted the Respondent and her daughter and ordered her and the children out of the matrimonial home.
- That the Plaintiff/Applicant has been charged with a criminal offence.
- That she is the one who has been paying fees for the children.
- That she has no intention of disposing off the property as this is the only home she has.
- She has no objection to the court issuing preservative orders preserving the property but she prays that the Applicant should be ordered to vacate the house.

Parties filed written submissions. Those for the Applicant are dated 17th May 2010 and filed on the same date. The following are stressed:-

- The interim application seeks to preserve the matrimonial property pending hearing and determination of the originating summons.

- That the Respondent is interfering with the Applicants quiet possession of the said house.
- That the preservation orders have already been granted by consent what is left is the issue of the occupation of the house.
- That there may have been disagreements between the two but there is nothing to show that the Applicant is violent to the Respondent as she left the house of her own volition and when she returned to the house to collect her belongings the Applicant did not display any violence.
- Issues of assault cannot be ruled upon now as they are subject of court proceedings elsewhere save to say that subject to proof the same to be taken with caution considering the fact that treatment for the assault was not taken at the nearest health facility but went to a facility where a close relative may be perceived to be having influence.
- That the question of who is entitled to sole proprietorship of the suit property is a matter for interrogation at a later stage and not now.
- The court to bear in mind the fact that the Applicant is currently not in any gainful employment. As such relation may cause unnecessary hardship on him, more so when the Respondent has not given any suggestion of an other alternative place he can be relocated to.
- In contrast the Respondent relocated elsewhere.
- The order to lock the Applicant out of the matrimonial home cannot issue because neither party has filed a petition for judicial separation.
- Since there is no proof that the Plaintiff/Applicant is likely to use violence against the Respondent, and since the house is three bed roomed, there is nothing to prevent co existence. As such there is no need for this court, to issue an order of eviction against the applicant,

The Respondents submissions are dated 25th day of May 2010 and filed on the 25th day of May 2010. The following are stressed.

- The Plaintiff/Applicant has presented to court, an originating summons on which has been anchored an application for preservatory orders.
- A consent having been recorded on prayers 2 and 3 of the said application, the only issue that remains for determination is prayer 4.
- The Respondent has deponed that she has no intention of disposing off the house, she is the sole proprietor of and the only home for her self and her children.
- The Respondent is opposed to the applicants continued occupation which should be discontinued and he be excluded from the home pending the hearing and the determination of the suit.
- Concedes that the issue of who is the rightful beneficial owner of the suit property will be decided at

the hearing.

- That having conceded to the preservation order, it is sufficient proof that the Applicant concedes that the Respondent is the proper person to occupy the said property.
- The Respondent is the proper person to occupy the said house because she solely financed the purchase of the suit property for herself and her minor children aged 11, 6 and four.
- The court is invited to note that the Respondent is un employed and depends on well wishers for survival.
- Since the Applicant has stated that he is a business man he is the best suited to look for alternative accommodation.

On case law the Applicants counsel referred the court to the case of **LUCY NJERI MWOGAH VERSUS HUMPHREY E. MUNENE NAIROBI SEPARATION AND MAINTENANCE CAUSE NO 92 OF 2008** decided by Onyancha J, on the 13th day of November 2008. At page 3 line 11 from the top, the learned judge made observations that *“from the facts before him it was revealed that they have not been living peacefully and appear to have disagreed strongly and had expressed intention to part ways..... The court was left with doubt as to what actually happened on 27/7/2008 when the Applicant left the matrimonial home. It is not clear whether she was indeed assaulted by the Defendant and feared further violence or whether she involved herself in violence before she left the house to escape.....It was not candid of her to allege that she could not return home for fear of suffering violence when in fact she had returned home by 8/8/2008.....there was no evidence that there after the Defendant attempted to apply violence on her although the two were living together in the matrimonial home.....The court was informed that there is a possibility that the Plaintiff may herself be the origin of some of the violence she is trying to place at the dear step of the defendant”*

At page 4 line 3 from the top the court went on:-

“I have no doubt that the matrimonial property is registered in the name of the Plaintiff. That may give her a first claim over it but in view of the fact that it was purchased and developed during the marriage between the two parties, and that the Defendant claims participation in the purchase and development thereof, the court, cannot easily conclude that the defendant has no ownership claim over it. Ownership accordingly has to be left to a proper forum.....”

At page 5 line 12 from the bottom the learned judge concluded:-

“In conclusion the Applicants’ prayer to exclude the defendant from their matrimonial home in LR. NO. 10031/8 Karen has not been shown by evidence to be merit. The two spouses have an obligation to presently continue living in their separate rooms in the said premise as they have done for several months to take care

of their children probably until the cases in court are finally determined.....”

The case of **KARANJA VERSUS KARANJA (1976) KLR 307**. At page 309 paragraph E- The learned Law Lords of the CA quoted with approval the case of **CHAPMAN VERSUS CHAPMAN (1969) 3A ER476, 477** where Lord Denning MR. as he then was said:- *“It is still the law when the matrimonial home or the furniture is acquired by the couple as a joint venture, each of them contributing directly or indirectly to the deposit or the mortgage installments, then it is to be regarded as belonging to them both jointly, no matter that it stands in the name of one only, and in the absence of any clear division their interests are to be regarded as equal.”*

The case of **GISSING VERSUS GISSING (1970) 2AER 780,782:-** *“That if there has been no discussion and no agreement or understanding as to sharing on the ownership of the house and the husband has never evinced an intention that his wife should have a share, then the crucial question is whether the law will give a share to the wife who has made these contribution without which the house would not have been brought. I agree that this depends on the law of trust rather than on the law of contracts. The question is under what circumstance does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part”*

The court, then held inter alia that:-*“Kikuyu customary law has changed radically since the days when land belonged to the tribe and section 17 of the Married Women Property Act 1882 of England together with the English authorities decided there under, is applicable to an African husband and wife in Kenya where both are in salaried employment and contributing to house hold expenses and the education of the children. The fact that property acquired after marriage is put into the name of the husband alone and that the husband has evinced no intention that his wife should share in the property does not necessarily exclude the imputation of a trust nor preclude the wife in appropriate circumstances from obtaining a declaration that the property acquired by virtue of a joint venture is held in trust for them both”*

This court has made due consideration of the afore set out rival arguments and considered the same in the light of principles of case law cited above and in its opinion, the undisputed facts of this case appear to be the following:-

1. *That the Plaintiff/Applicant in both his affidavit in support of the originating summons and the interim application asserts that the disputants herein married each other under Kikuyu customary law in the year 1997 and the two have the three named children between them.*
2. *That the Respondent in both replying affidavits one in response to the originating summons and the one in response to the interim application is silent about the marriage under Kikuyu customary law but the issue of existence of the three children is evident.*

3. *There is no dispute that the major suit property namely the house is registered in the name of the Respondent.*
4. *Both disputants appear to have been residing in the same house before events leading to these proceedings arose.*
5. *It is evident that the Respondent and the children vacated the house in February 2010 leaving the applicant still residing there in and illegally moved to this court after the Respondent accompanied by her siblings made dubious attempts to forcefully evict him from the house.*
6. *That the Plaintiff/Applicant has expressed fear that the Respondent might move to dispose off the property hence the request for a preservative order preserving the property in its current state before the determination of the suit on merit. The reason for seeking the preservative orders is because the applicant is fearful that the Respondent might dispose it off since it is registered solely in her name.*
7. *That him Plaintiff/Applicant is claiming a share of the said house along side other properties mentioned in the originating summons.*
8. *That the Respondent in both her replying affidavit has deponed that she has no objection to the issuance of the preservative orders since she has no intention of disposing off the said property since this is the only home she has with her children.*
9. *That the Plaintiff/Applicant has asserted that the Respondent left home of her own volition. Whereas the Respondent alleges that the reason for her departure was due to violence committed against her and the children by the applicant.*
10. *That there are criminal proceedings pending which the Respondent asserts were procedurally initiated. Whereas the Applicant alleges that these are fabrications.*
11. *That the issue of the Applicants assertion of being entitled to a share of the suit property, and the Respondents' assertion that the Applicant is not entitled to any share of the said property has not yet been determined.*
12. *That case law cited one by a court of concurrent jurisdiction and another one by the court of appeal go to demonstrate that there is jurisdiction vested in this court to make a pronouncement on merit on issues raised under the section 17 of the 1882 Women Property Act of England, where parties allege to have married each other under native customary law.*
13. *That there is consent on the record settling the issue of preservation of the property till the hearing and determination of the suit.*
14. *That what has been left for determination is the issue of crystallizing the Applicants*

stay in the said house before the hearing and the issue of having the Applicant excluded from the said house before the hearing and determination of the suit.

15. *The Applicant's plea is anchored on the interim application filed on 7/4/2010. Where as the Respondents' plea for exclusion is anchored in the replying affidavit. The question that arises is which of these competing assertions is to be upheld and why?*

This court has given due consideration of the afore set out undisputed facts or common grounds of the dispute and the same has been considered in the light of the plea in prayer 4 of the application subject of this ruling. The court is satisfied that prayer 4 has merit and the same is allowed because:-

- (i) The Applicant is already in the house and he can only be excluded from the house through a mandatory injunction prayed for by the Respondent in a substantive application. Herein there is no substantive prayer in an application filed by the Respondent seeking an order of exclusion of the Applicant from the said house.
- (ii) A deponement in an affidavit is not a substantive prayer and no orders can be issued on that basis in favour of the deponent.
- (iii) As found by the learned judge in the case of **LUCY NJERI MWOGAH VERSUS HUMPREY MUNENE (SUPRA)** The issue of violence as a factor forcing the wife out of the home necessitating the exclusion of the husband has to be demonstrated. Herein it is on record that the Respondent returned to the home shortly after the alleged violence had taken place and took away some properties. It is alleged she was in the company of her siblings. It is not clear as to whether the presence of the Respondents siblings contributed to the non violence behaviour of the Applicant, or that the Applicant would not have been violent anyway, even if the Respondent would have come alone without her siblings. For this reason it is necessary to demonstrate the tendency to be violent before one can earn a relief of exclusion.
- (iv) It is on record that there are no matrimonial proceedings such as divorce and or judicial separation pending between the parties. This court has judicial notice that these are usually the best forums for deliberation and issuance of exclusion orders.
- (v) The issue of financial incapacity experienced by either side if either were to be excluded from using the house facility has featured. But in this courts', opinion this is not an issue that can be dealt with by way of affidavit. It requires adduction of evidence and or if by way of affidavit then there is necessary for the court to establish the truthfulness of existence of such

hardship through cross-examination. Herein since neither party sought to cross examine the other on the issue of hardship mentioned, the court is not in a position to assess the same and use it as a criterion for determining the issue of exclusion.

(vi) The finding in number (v) above notwithstanding the Respondent is not left remediless. She is at liberty to present a substantive application for a mandatory injunction and have the issue of exclusion revisited by the court substantively.

2. This being a matrimonial cause, the costs of the application will be ordered to be in the cause.

DATED, READ AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2010.

R.N. NAMBUYE

JUDGE