



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**DIVORCE CAUSE NO. 33 OF 2010**

I.N.K..... PETITIONER  
**VERSUS**  
N.K.N..... RESPONDENT

**RULING**

By this Chamber Summons brought under Certificate of Urgency and filed in court on 15<sup>th</sup> July 2010 the Petitioner herein seeks inter alia the following orders:-

- “3. ***THAT pending the hearing and determination of this divorce petition the defendant/Respondent his servants & agents be restrained by way of injunction from stepping, entering, re-entering into the said matrimonial house and/or the respondent to desist from threatening, abusing, assaulting, breaking into and/or re-entering in the said matrimonial house at Nyali.***
- 4. ***THAT the costs of this application be provided for.***”

The application was opposed. **MR. OSORO** Advocate appeared for the Petitioner whilst **MR. MUNYITHYA** Advocate appeared for the Respondent. The Application was argued by way of written submissions. The Petitioner and the Respondent are the parties in **High Court Divorce Cause No. [...]** which is still pending for hearing and determination before Mombasa High Court. The Petitioner avers that in early January 2010 the Respondent left the matrimonial home in Nyali Estate Mombasa, and is now cohabiting with another unnamed woman elsewhere.

On his part the Respondent denies having left the matrimonial home in January 2010. In his replying affidavit dated 26<sup>th</sup> July 2010 the Respondent states that he left the home on 5<sup>th</sup> April, 2010. Be that as it may the fact of the matter is that currently the couple do not live together. The Petitioner has remained in the matrimonial home together with their four (4) children. Having looked at the Petition and Reply it is my view that this separation may actually be for the best in the circumstances.

The question before me now is whether there exists sufficient grounds to restrain the Respondent from accessing the matrimonial home. Several factors need to be considered in making this decision. Firstly the home was purchased on a mortgage which the Respondent continues to service to date. Secondly the Respondent’s children continue to reside in that home with the Petitioner. It would be unreasonable and would cause great hardship to both the Respondent and his children if he is restrained from accessing the home to see and visit with them. The Petitioner claims that the Respondent has threatened to return to the home and kill or do grievous harm to both her and the children. The Petitioner has not taken any step to report these threats to her life to any lawful authority. The court has no concrete proof that such threats were actually issued.

I am well aware of the conditions for the granting of injunctions set out in the famous case of **Giella –vs- Cassman Brown**. However in my view this being a matrimonial matter in which the welfare of children is involved, the court cannot rely on a strict technical approach. My sense is that due to the conflict between the couple, emotions are charged and each party is prepared to lash out at the other. A sober and mature approach would be preferred especially in view of the fact that children also live in that home. At the moment I am not persuaded that the injunction sought is called for at this stage and I do decline to grant the same. This application for a restraining injunction is hereby dismissed. Each party to

pay their own costs for this application.

**Dated and Delivered in Mombasa this 1<sup>st</sup> day of November 2010.**

**M. ODERO**  
**JUDGE**

Read in open court in the presence of:-

Ms. Ngugi for Respondent

Mr. Abubaker holding brief for Petitioner

**M. ODERO**  
**JUDGE**  
**1/11/2010**