



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Divorce Cause 8 of 2008

OOA.....PETITIONER

versus

HOO..... RESPONDENT

RULING

OOA, who I shall now refer to as 'the applicant', seeks the following orders against her husband of Seventeen years, HOO, with whom she has two children who are currently aged 17 and 12 years:

1. ***That the Respondent whether by himself, his servants or agents be restrained from assaulting, harassing, threatening, intimidating, distressing, annoying or otherwise interfering with the Petitioner/Applicant and the children pending the hearing and determination of this suit.***
2. ***That the Respondent whether by himself, his servants or agents be restrained from entering into or upon the matrimonial home being Apartment No. , Lantana Gardens and/or otherwise from evicting, interfering, with the Petitioner's/Applicant's peaceful occupation, enjoyment and/or possession thereof pending the hearing and determination of this application.***
3. ***That the Respondent whether by himself, his servants or agents be restrained from entering into or upon the matrimonial home being Apartment No. [particulars withheld], L[particulars withheld] Gardens and/or otherwise from evicting, interfering with the Petitioner's/Applicant's peaceful occupation, enjoyment and/or possession thereof pending the hearing and determination of this suit.***
4. ***That this Honourable Court be pleased to make such further or other orders as may be appropriate.***
5. ***That the costs of this application be provided for.***

She relies on the grounds that:

- (a) ***That the Respondent has threatened to move back into the matrimonial home.***
- (b) ***That the Respondent has persistently harassed and distressed the Applicant and the children through numerous phone calls since she re-entered the matrimonial home in March, 2009.***
- (c) ***That the Respondent has threatened the Applicant with harm and the Applicant is living in fear of her life and safety and that of the children.***
- (d) ***That it is in the best interests of the said children and the interest of justice that the orders sought be granted.***

It was the submission of Miss Machio, who appeared for the applicant that her client moved back to the matrimonial home after counsel for both parties communicated and the applicant's original request that the matrimonial home be leased with a view to redeeming the mortgage thereon, and that they share the credit balance, was rejected, and on 6/2/2009, when the respondent's counsel indicated that the applicant could take possession of the same, which she did by 2nd March, she now raises concerns about what she refers to as 'the respondent's persistent' requests to see their children.

The application is however opposed, and it was the submission of Miss Omondi, who appeared for the respondent, that not only does the applicant have a similar application which she has yet to prosecute, but that the letters on which the applicant bases her claim were issued on a without prejudice basis, and that in the circumstances, the applicant cannot rely on them.

In her application of 26/11/2008, which has yet to be prosecuted but which, clearly led to the applicant's repossession of the matrimonial home, she sought the following prayers:

1. **That** interim custody, care and control of the two children namely, AAO and NAO be given to the Petitioner pending the hearing and determination of the application herein.
2. **That** interim custody, care and control of the two children namely, AAO and NAO be given to the Petitioner pending the hearing and determination of the suit herein.
3. **That** this Honourable Court be pleased to order the Respondent to clear the outstanding school fees balances for the two children namely AAO and NAO.
4. **That** the Respondent herein be ordered to pay school fees for both the children herein pending the hearing and determination of this case.
5. **That** this Honourable Court be pleased to allow the Petitioner and the children to occupy the jointly owned premises being apartment No. [particulars withheld], L [particulars withheld] Gardens pending the hearing and determination of the application herein.
6. **That** this Honourable Court be pleased to allow the Petitioner and the children to occupy the jointly owned premises being apartment No. [particulars withheld], L [particulars withheld] Gardens pending the hearing and determination of the suit herein.
8. **That** this Honourable Court be pleased to grant any further orders that it may deem fit and just to grant in the best interest of the children.
9. **That** the costs of this application be provided for.

She relied on the grounds that:

- (a) That the two children namely AAO and NAO face suspension from school if the outstanding school fees arrears are not cleared.
- (b) That the Respondent has been occupying the jointly owned house namely apartment No. [particulars withheld], L [particulars withheld] Gardens while she has been paying mortgage therein and renting accommodation for herself and the children.
- (c) That the Respondent is leaving the country on 1st December 2008 and she requires to re-enter the jointly owned matrimonial home on his departure in order to save on the rent payable and further because it is more comfortable for the children.
- (d) That it is in the best interest of the said children that the orders sought be granted.

It is clear from the foregoing, that the two applications are not similar and in the circumstances, the respondents ground of opposition cannot therefore lie.

I have also perused the letters, between counsel which led to the applicants taking possession of the matrimonial home and save for the one, dated 6/2/2009, whereby the respondent's counsel stated that 'your client has prayed to be allowed to re-enter the matrimonial home which our client is agreeable to' none of the other letters was issued on a without prejudice basis. In any event, on 2nd of March, the applicant's counsel informed the respondent's counsel that she had moved in, with a request that he 'respects her space', which fact did not seem to concern the respondent then, I find that the respondent's ground of opposition is also bound to fail.

Be that as it may, I have considered the application, and there is no doubt that the respondent attempted to go to the matrimonial home, on 17th April, which seems to have upset the applicant, who now deposes that she has no intention of keeping him away from his children. There is however no evidence of attempted assault.

I would in the interest of maintaining law and order, and for the benefit of the children, whose interest is paramount, grant the applicant orders in the following terms:

1. Pending the hearing and determination of this suit, the respondent is hereby restrained from harassing, or otherwise interfering with the applicant, save that he shall have access to his children every Sunday whenever he is in this country from 10.00 hrs to 18.00hrs, and that the two will meet him at the P [particulars withheld] Baptist Church in W [particulars withheld], after which he will drop them off at the

matrimonial home on or before the said hour. He shall however be required to notify the applicant and/or the children by 21.00 hrs, on Saturdays whenever he desires to meet the children.

2. That pending the hearing and determination of this suit the respondent shall be at liberty to talk to his children whenever he wishes to. The Applicant shall therefore give them back their phones for ease of communication.

3. The respondent is hereby also restrained from entering into or upon the matrimonial home being Apartment No. *[particulars withheld]*, L *[particulars withheld]* Gardens and/or otherwise from evicting, interfering with the applicant's peaceful occupation, enjoyment and/or possession thereof pending the hearing and determination of this suit.

It is hereby also ordered that the parties do obtain dates for the hearing of the suit on a priority basis.

Costs of this application shall however be in the cause.

Dated and delivered at Nairobi this 6th day of August 2009.

JEANNE GACHECHE

Judge

Delivered in the presence of:

For the applicant – Miss Machio

For the respondent – Mrs. Omondi