



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Separation & Maintenance Cause 92 of 2008

L.N.M.....APPLICANT/PLAINTIFF

VERSUS

H.E.M..... DEFENDANT/RESPONDENT

RULING

The Plaintiff's application before the court is dated 14.8.2008. it seeks the following reliefs:-

- (a) That the defendant/respondent ... be restrained from assaulting, molesting, annoying or otherwise interfering with the plaintiff/applicant pending the hearing and determination of this suit.
- (b) That the defendant be excluded from the matrimonial home of both at Karen being L.R. No.[...] pending the hearing and final determination of this unit.
- (c) That the costs of the application be provided for.

The applicant/plaintiff relied upon her supporting affidavit and a further supporting affidavit sworn on 14.8.2008 and 16.8.2008, respectively.

Her case is that the parties herein are wife and husband for many years and have two children one of whom is an adult male, college qualified, but drug influenced and mentally sick due to drug use. The other child who is a female is approximately 18 and mostly stays in boarding school. The parties own a matrimonial home on L.R. No. [...] which the plaintiff claims to have developed in 2007 after purchasing on empty plot. She avers that she purchased the plot herself and developed it herself as the unco-operative respondent watched.

She further swore that on 27.7.2008 the defendant came home later and drunk and assaulted her and she had to run away with the sick boy to escape from further cruel treatment from the defendant. That when her sick son returned home to the matrimonial home she had to follow him in order to take care of him in the absence of the defendant who is a drunkard and who is absent from home most of the time. She does not state when she returned home.

It is her case however, that when she fled from the matrimonial home on 27.7.2008, she reported to Karen Hardy Police Station. She further swore in paragraph 9 of the supporting affidavit that she had not by 18th August, 2008 returned home for fear of the defendant's violence. For that reason she prays that the defendant be ordered to leave the home to enable her to return home to look after the sick child.

She also depones that he should in any case be ordered out of the matrimonial home because the house is hers alone and is registered in her name. She argues that shutting him out won't be a hardship to the defendant because he can move to another house belonging to them and situated at Savannah Estate in Nairobi. She further avers that the defendant did not participate in the development of both houses because of his persistent drunkenness.

She also states that on the same date she ran away because the defendant came home late and drunk, a family meeting had discussed his bad behaviour and advised him to move out to Savannah Estate but he has refused to do so.

The defendant filed a replying affidavit denying that he is drunkard or a violent person. He himself accused the plaintiff to be the one who has a violent temperament and who on 27.7.2008 quarreled with the defendant. He further averred that she damaged his car and other house properties and when she realized that he had reported the incident to Hardy Police Station, she escaped from home to escape arrest. That she later reported to Hardy Police Station but the police realizing the incident to be the domestic, took no action. He further stated that within a week after the incident she had returned home. That it was a lie therefore to say that the reason she wanted him locked out is because she fears going back home.

The defendant also said that the other house, apparently situated at Savannah Estate is occupied by a tenant and therefore not available for his occupation. Also he saw no reasons to be locked out of the matrimonial home. He argued that the two spouses and their children have each a room in the matrimonial home and no one bothers the other. That if the plaintiff has decided to file for separation as she has done, the matter can be decided while they continue to live in the same house peacefully. That in any case, she has filed HCC No.[...] in which she wants him stopped from collecting rent in relation to Umoja House for the family use and he cannot understand how she can at the same time ask that he goes to reside in the Savannah house which she knows is occupied by a tenant.

The defendant further wondered how there could have been a family meeting to advise him to move to Savannah Estate house if he came late on 27.7.2008 while drunk. He stated that he participated in raising the everyday family home expenses including hospital expenses for their sick child. That he paid other expenses as well including water, electricity, transport and other bills. He argued that the houses although registered in the sole name of the plaintiff, were jointly bought and developed.

I have carefully considered the application after perusing the material placed before me by both parties. There is evidence that the spouses have not from time to time, lived peacefully. Sometimes, during disagreements which pop up in some occasions, they appear to have disagreed strongly. They have even expressed intentions to part ways. These are in my opinion, incidents which occur in most homes where spouses by the nature of man, disagree.

Before considering the legal principles that decide the issue raised in this application, however, I must state that the court was left with doubt as to what actually happened on 27.7.2008 when the applicant had to leave 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 home to escape arrest by the police. Secondly, it was not candid of her to first claim that she had not yet returned home because she feared that the defendant would again assault her, when she actually had returned home by the 8.8.2008 as she later admitted in her further affidavit. That was not helpful or in her favour when she is asking the court to remove him from the matrimonial home. This is because there is evidence and she so admitted that she returned home soon after the Hardy Police Station, probably for good reason, failed to take any action against her on a report made against her by defendant. Thirdly, thereafter, there was no evidence that the defendant had attempted to apply violence on her although the two were living together in the matrimonial home since her return on about 8.8.2008 until the matter came before the court for hearing. Fourthly, the court was given the impression which is arguable that the plaintiff may herself be the origin of the some of the violence she is trying to place at the doorstep of the defendant. The correct position, would probably be that the issue will be the subject of investigation in a different forum and not in this application.

I have no doubt in my mind 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, probably in another case making that tissue a subject of claim.

Turning now to the reliefs sought by the plaintiff, should this court grant her restraint orders against the defendant as sought? Should it as well exclude the defendant from the matrimonial home until the main suit herein is determined?

Similar issues arose in the case of Silverstone v. Silverstone [1953] 1 ALL E R, 556. The wife had filed a petition for judicial separation, alleging cruelty and adultery by her husband. She took out summons seeking injunction to restrain the husband from using the flat which was the matrimonial home. The husband in return filed cross-summons for injunction against the wife claiming to restrain her from interfering with his use of the matrimonial flat. The flat belonged to the husband although the wife claimed ownership of all the furniture, which was strongly denied by the husband who also claimed ownership. The court there accepted that the husband treated the wife (petitioner) with cruelty, was adulterous and that he was using his ownership of the house and the cross-petition to remove her from the house and to force her to withdraw her petition against him. Secondly, the court believed that if it allowed the husband who then lived elsewhere to return to the house the wife was likely to be forced to leave the house to escape his cruel conduct. It was also clear to that court that the husband was living with another woman in the latter's house and the attempt to return to the matrimonial home was intended to bring negative pressure on his wife to make her leave.

The facts in the case before me are different. First the spouses have been and were living in the same house as they came to court for the plaintiff to seek the order to oust the husband-defendant. The wife/petitioner had gone out of the matrimonial house on 27.7.2008 and returned by 8.8.2008. Secondly, she had not reported any further cruel incident from the husband after her return and by the time the hearing of her application took place. Apparently each spouse occupied a different room of the matrimonial house as did the sick child and the school girl when she returned home from a boarding school. Thirdly, she swore in her first affidavit that she was driven away from home by the defendant on 27.7.2008 and had feared returning home owing to his violence while there was this impression she also made that she actually had returned home soon after walking out because she needed to look after the sick son.

In my humble opinion the eventual ownership of the matrimonial home or house may not be the overriding factor in this issue. The basic factor is the fact that the house or home is the matrimonial home in which the two spouses and their children resided when their differences leading to separation proceedings were filed. Put differently, if the court deems it necessary to exclude a spouse from the matrimonial home for good reason, it will do so whether or not the home is registered in the name of the either spouse. That is what happened in the Silverstone case in the exercise of the court's discretion under this legal principle.

In this case before me, however, the court has not been adequately persuaded that the applicant has a good case for excluding her husband from the matrimonial house. She has not on the facts placed before this court, convinced this court that she was not the perpetrator of the violence she attempted to runaway from. She has not convinced the court that the two spouses have not lived peacefully despite the alleged drunkardness of the defendant. Finally, she has not persuaded this court that the issues as to who bought and developed their real properties is relevant in this application.

In conclusion the applicant's prayer to exclude the defendant from their matrimonial home in L.R. No. [...] Karen has not been shown by evidence to be merited. The two spouses have an obligation to presently continue living in their separate rooms in the said premises as they have done for several months to take care of their children, probably until the cases in court are finally determined.

On the other hand, neither the plaintiff nor the defendant is entitled to assault, molest, annoy or otherwise interfere with the other as they share the home until this pending suit is finally determined. I would without hesitation grant this prayer against the defendant as prayed. I am however, at the same time anxious not to allow the plaintiff to think that she is herself not bound by the same relief. She has been alleged to have perpetrated some of the violence occurring between the two. She should herself take care not to start any violence or acts provoking violence until this suit is finally decided.

The end result is that this court rejects the prayer to exclude the defendant from the house. It grants the prayer to restrain assault, molestation, annoyance and interference against the defendant. It however warns the plaintiff to adhere to standards of peaceful co-existence with the defendant. Orders accordingly. No order as to costs.

Dated and delivered at Nairobi this 13th day of November, 2008.

D.A. ONYANCHA

JUDGE