

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Divorce Cause 5 of 2007

S W M.....PETITIONER

VERSUS

M K K.....RESPONDENT

RULING

On the 11th May 2007, the petitioner S W M filed a petition seeking to be divorced from the respondent, M K K. Among the grounds relied upon by the petitioner in her petition for divorce is that the respondent had treated her with cruelty by, *inter alia*, being abusive and violent towards the petitioner. She further averred that the respondent had threatened to kill her. Contemporaneous with filing her petition for divorce, the petitioner filed an application under the provisions of **Order XXXIX rules 1, 2, 3 & 9** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking the order of injunction to restrain the defendant from harassing, insulting, battering or entering into the petitioner's homestead (*i.e. the matrimonial home*) pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application and are supported by the annexed affidavit of the petitioner. The respondent filed a notice of preliminary objection in opposition to the application. At the hearing of the application, this court directed that the respondent argues the grounds in support of Notice of Preliminary Objection in response to the application filed by the petitioner.

Miss Njoroge for the petitioner submitted that the respondent should be restrained from entering the matrimonial home or harassing the petitioner due to the fact that the respondent had on 18th April 2007 taken an axe and destroyed several household items. She submitted that the respondent had threatened to harm the petitioner. A report was made to the police who so far have taken no action. Miss Njoroge submitted that the property in question *i.e.* the matrimonial home was previously owned by the petitioner before the same was transferred to the joint names of the petitioner and the respondent. She submitted that the petitioner was properly before court because she was seeking the court's protection pending the hearing and determination of the divorce cause. She submitted that the application was not founded on the provisions of **Section 17 of the Married Women Property Act**. She submitted that the fears of the petitioner were well founded. She therefore urged this court to grant the petitioner the order of the injunction sought.

Mr. Karanja for the respondent submitted that the respondent was opposed to the application. He submitted that since this court issued interim orders of the injunction, the respondent has been residing in a hotel. He submitted that the petitioner is actually applying for the division of the matrimonial property under the provisions of **Section 17 of the Married Women Property Act** under the guise of applying of an injunction. He submitted that the petitioner's application was therefore incompetent in so far as it seeking the determination of the ownership of matrimonial property. He argued that the petitioner ought to have filed an Originating Summons after the issues in the petition for divorce had been determined. He submitted that the fact that a wife alleges that her husband is violent towards her is no basis upon which the court can restrain the husband from gaining access to the matrimonial home. He submitted that this court lacked jurisdiction to bar the respondent from his matrimonial home during the pendency of the marriage. He urged this court to disallow the application. Mr. Karanja relied on several decided cases in support of his submissions.

I have carefully read the pleadings filed by the parties in support of their respective positions in this

application. I have also considered the rival submissions made by the counsel for the petitioner and counsel for the respondent. The issue for determination by this court is whether the petitioner, firstly, has the *locus standi* to apply for an order of injunction to restrain the respondent, her husband, from entering the matrimonial home. The second issue for determination is whether the petitioner has satisfied the conditions laid down by the law for the grant of an interlocutory injunction. Mr. Karanja has submitted that this court lacked jurisdiction to determine issues of matrimonial property in a petition for divorce. He argued that the petitioner ought to have filed an originating summons under **Section 17 of the Married Women Property Act**. Miss Njoro for the petitioner on the other hand, submitted that the issue before court is not the issue of a declaration of matrimonial property but the issue of protection of the petitioner against threats to her life by the respondent.

Having evaluated the said submissions made it is clear to this court that the petitioner is seeking an order of this court to restrain the respondent from harassing or threatening her with violence at her matrimonial home. It is clear from the contents of her affidavit, which facts were not controverted by the respondent, that the respondent has been violent towards the petitioner. The respondent has even destroyed some of the properties in the said matrimonial home. He has also threatened to do harm to the petitioner. It is clear to this court that the petitioner is not seeking any declaration or determination of the ownership of matrimonial property in her application for injunction. Rather, she is seeking an order of this court so that she can reside in the said matrimonial home with her children in peace without threats or violence by the respondent. I therefore hold that the petitioner's application is competently before this court. The respondent's contention that the petitioner's application is misconceived is therefore misplaced and has no basis in law.

Has the petitioner satisfied the principles of the law set down in the celebrated case of **Giella vs Cassman Brown [1973] E.A 358** for the grant of an injunction? Under the **Matrimonial Causes Act** this court has jurisdiction to grant temporary reliefs or ancillary reliefs pending the hearing and determination of the petition of divorce. Those powers are provided for under **Part VI of the Matrimonial Causes Act**. Where a wife is apprehensive that her life may be threatened by her husband, in my considered view, she has a right to seek a protective order of the court to be protected from the threat of violence by her husband. In the present application, the petitioner has established by affidavit evidence that the respondent is a person who is prone to acts of violence. She has further established that should the respondent not be restrained from visiting the matrimonial home, there is a possibility that the respondent would injure the petitioner.

In the circumstances of this application therefore, I do hold that the petitioner has established a prima facie case as to entitle her to the order of injunction sought. The respondent is restrained by himself, his agents or servants from entering or interfering with the petitioner's occupation of the matrimonial property at Bahati /Kabatini [*particulars withheld*] pending the hearing and determination of the Divorce Cause. The respondent shall be at liberty within seven (7) days of today's date, under the escort of a Court Bailiff, to collect his personal effects from the said matrimonial property. The petitioner shall have the costs of the application.

DATED at NAKURU this 13th day of June, 2007

L. KIMARU

JUDGE