



**MKM v JMM (Family Originating Summons E084 of 2021)
[2024] KEHC 12025 (KLR) (Family) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12025 (KLR)

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

FAMILY ORIGINATING SUMMONS E084 OF 2021

CJ KENDAGOR, J

OCTOBER 4, 2024

BETWEEN

MKM APPLICANT

AND

JMM RESPONDENT

RULING

1. The Applicant and the Respondent were married in 1998, they divorced in 2021. During the time of their marriage, the couple acquired several properties, including a matrimonial home constructed on L.R No Kiambu/municipality/block 111/xx, hereinafter referred to as (“the Matrimonial Home in Runda”). The Applicant filed Originating Summons dated 4th November, 2021 where she sought an order restraining the Respondent from interfering with her quiet and peaceful enjoyment of the matrimonial home in Runda. She also sought an order restraining the Respondent from disposing, selling, charging and/or in way interfering with the titles to or ownership of the several properties, including the matrimonial home in Runda.
2. The parties entered into consent on 26th November, 2022. According to the terms of the consent order, the Respondent was restrained from disposing, selling, charging and/or in any way interfering with the titles to or ownership of the matrimonial home in Runda, pending the hearing and determination of the Notice of Motion. The hearing of the main suit was to proceed by way of viva voce evidence at a later date. However, before the Cause could be heard and determined, the Applicant filed a Notice of Motion dated 9th July, 2024 in which she sought Court orders compelling the Respondent to allow her access to the matrimonial home in Runda from time to time.
3. She also sought an order restraining the Respondent from evicting and/or denying her free access and use of the matrimonial home. She claimed that she needed the access to return her effects that had



allegedly been thrown in the store back to the house in a decent room. She stated that she could not access the matrimonial home because the Respondent had changed the house door locks. Lastly, she stated that she has all the rights to access and even stay at the matrimonial home anytime she wills until the determination of the matter. In addition, she also made an oral application on 10th July, 2024 seeking leave to file further/additional documents.

4. The Respondent opposed the application and filed a Replying Affidavit sworn on 17th July, 2024. He claimed that the Applicant moved out of the matrimonial house in November, 2021, and thus it is not possible for the Court to issue an order stopping her eviction in the first place. He also denied ever evicting the Applicant from the matrimonial home in Runda or at all. He insisted that the Applicant left the matrimonial home on her own volition.
5. He claimed that it is not for the Applicant to find her way back to the matrimonial home, but instead, they should work towards the earliest conclusion of the above suit in order to settle the matrimonial property. He stated that while the Applicant enjoys rights and interests in the matrimonial property, it is only fair and, in the current circumstances, that they should go separate ways until the Court determines her rightful share in the matrimonial property, if any.
6. The matter was disposed of by way of written submissions, and the parties filed their written submissions.

Applicant's Written Submissions

7. The Applicant argued that she has the right to access the matrimonial home in Runda. She argued that the property forming the basis of this application has been registered in the names of both the Applicant and the Respondent. To this end, she submitted that both parties have an equal right of use and access to the property until the Court finds otherwise. She argued that it is not right for the Respondent to enjoy the use of the entire property to the exclusion of the Applicant.
8. She based her arguments on Article 45 (3) of *the Constitution* of Kenya, 2010, which provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. She cited the case of S M K V N W M K [2016] eKLR. She also defended her request for leave to file further documents, arguing that the documents she intends to introduce go to the root of her claim in the suit.

The Respondent's Written Submission

9. The Respondent submitted that the Applicant does not have the right to free access and use of the matrimonial home in Runda pending the hearing and determination of the main cause. His main argument was that the Applicant voluntarily moved out of the matrimonial home sometime in November, 2021 and had never returned since. He thus argues that there is no justification for her immediate access to the home. He argued that the Applicant's presence will disrupt the peaceful environment, especially given the history of the divorce and the tumultuous nature of their separation. He relied on the case of M M V J K M [2018] eKLR.

Issues for Determination

- a. Whether the Applicant should be given access to the matrimonial home in Runda pending the hearing and determination of the Matrimonial Property Case;
- b. Whether the Applicant should be allowed to put in further documents and statements/affidavits.



Whether the Applicant should be given access to the matrimonial home in Runda pending the hearing and determination of the Matrimonial Property Case;

10. Rule 20 (2) of the Matrimonial Property Rules of 2022 provides as follows;

“A party to the proceedings may, before or after commencement of the proceedings under these Rules, but before the final determination of the respective claims, apply for temporary injunctions or other interlocutory orders in accordance with Order 40 of the Civil Procedure Rules, 2010, and the court may grant the orders sought on such terms or conditions as may be just in the circumstances.”

11. The Applicant submitted that she has an equal right of use and access to the property until the Court finds otherwise. On the other hand, the Respondent argues that the Applicant’s right to use and access the matrimonial home should not be allowed in the circumstances because her presence there is potentially disruptive and could lead to an undue breach of the peace. He argues that the fairest thing is for the Applicant to wait until the Court determines her rightful share in the matrimonial property, if any.

12. There is no dispute that L.R No Kiambu/Municipality/Block 111/xx, the parcel on which the matrimonial home in Runda sits, has been registered in the names of the two parties, the Applicant and the Respondent. The Consent Order dated 26th November, 2021 affirms this position. There is also no dispute that the parties have since divorced, and a Certificate of making Decree Nisi Absolute was issued on 24th October, 2021. The parties are also in agreement that they treated the suit property as the matrimonial home. The Applicant’s rights and interest over the property is not denied.

13. Parties also agree that the Applicant is not residing in the matrimonial home and has not been residing therein since November 2021. They disagree on the circumstances in which she left the matrimonial home in Runda. While the Applicant claimed that she left for her safety due to the Respondent’s threats of violence, the Respondent maintains that she left out of her own volition.

14. The case of EMN v DNN [2021] eKLR bears similarity to this case. In that case, the Applicant sought an order restraining the Respondent from denying her access to the matrimonial house. She however had not moved out compared with the present case. The parties had lived in the matrimonial home for 27 years prior to their divorce in 2019. The Court allowed the application and allowed the Applicant free access to the matrimonial home. It held as follows;

“In the premises I find merit in the application dated a Motion dated 7th July, 2021 and grant the following order:

An order of injunction restraining the Defendant/Respondent from evicting and/or denying the applicant free access, use and quiet occupation of the parties’ matrimonial home constructed on Land Parcel Number Kangundo/Mbusyani/xxx pending the hearing and determination the cause herein.”

15. The application was brought approximately three years after she moved out of the home. The Respondent has been in occupation. According to the affidavit in support of the application, the application was ignited by the movement of household items from the main house to the storage within the property and the changes in the locks rather than a need for use and occupation by the applicant. On use and occupation, the balance of convenience tilts in favour of the Respondent since he is presently occupying the house with the children. Granting an order of use/occupation would reinstate the Applicant’s stay in the house, which would, in turn, affect the status quo. The period



between her moving out and the filing of the application raises a presumption that the applicant is well-settled. I agree, though, that unless the Applicant is granted access, she will not be able to secure her movable property in the home which may expose them to destruction and degradation.

16. There is an order restraining the Respondent from disposing, selling, charging, and/or in any way interfering with the titles to or ownership of the Matrimonial Home in Runda. The Applicant has a right to access the matrimonial home in Runda pending the hearing and determination of this matrimonial property dispute.
17. Accordingly, the Court issues the following orders in respect of the Notice of Motion dated 9th July, 2024;
 - i. That an order of injunction is issued restraining the Respondent from denying the Applicant access to the parties' matrimonial home constructed on Land Parcel Number L.R. No Kiambu/Municipality/Block 111/xx from time to time pending the hearing and determination of the cause herein.
 - ii. The parties are encouraged to work together and agree on how the access will be facilitated without occasioning a breach of peace and also address the secure placement/storage of the household items that they both agree have been removed from the main house.
 - iii. The Applicant is granted leave to file and serve the Supplementary/Further Documents and Statements/Affidavits Statement within Fifteen (15) days of the date of delivery of this Ruling.
 - iv. The Respondent is granted corresponding leave to file and serve any Supplementary/Additional documents within Fifteen (15) days of the date of service by the Applicant.
 - v. The case shall be set down for hearing on a priority basis to determine the property rights in question conclusively.
 - vi. No orders as to costs.

It is so ordered.

DATE, DELIVERED AND SIGNED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE PLATFORM ON THIS 04TH DAY OF OCTOBER, 2024.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Kyalo Mbobu: Advocate for Respondent

Wambui: Advocate for Applicant

