



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. E371 OF 1999**

**CNN.....PLAINTIFF/APPLICANT**

**VERSUS**

**SM .....DEFENDANT/RESPONDENT**

**RULING**

*(Notice of Motion Application dated 3rd November, 2021)*

**Background**

1. The Application by the Plaintiff seeks: -

***i. Spent***

***ii. Spent***

***iii. That pending the hearing and determination of this suit, the Honourable court be pleased to grant a mandatory interlocutory injunction for an eviction order against the Defendant/ Respondent, his servants, agents and dependants from Land Parcel No. NAIROBI/BLOCK xxxx.***

***iv. That pending the hearing and determination of the suit, the Honourable court be pleased to grant a mandatory interlocutory injunction restraining the Defendant herein by himself or his agents from entering, trespassing and/or in any manner dealing with the parcel of Land NAIROBI/ BLOCK xxxx (hereinafter referred to as the suit property).***

***v. That the OCS Mihango Police Station do provide security during eviction.***

***vi. That costs be provided for.***

2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of the Plaintiff, CNN sworn on 3<sup>rd</sup> November 2021. The Plaintiff has also filed a supplementary affidavit.

3. In a nutshell, the Plaintiff seeks to evict the Defendant from Land Parcel No. NAIROBI/BLOCK xxxx (hereinafter referred to as the suit property). The Plaintiff's claim is that she is the sole registered owner of the suit property, on which she has constructed a residential house. The Plaintiff and the Defendant are a wife and husband. They got married in the year 2015.

4. The Plaintiff alleges that the Defendant entered into the suit property sometimes in the year 2017 without her explicit consent when she was out of the country. She has since requested the Defendant to vacate her house on numerous occasions but he has adamantly refused to vacate necessitating her to file this case. The Plaintiff avers that the Defendant has been abusive to her not only physically but also psychologically.

5. The Defendant/ Respondent on his part opposes the application by the Plaintiff by way of a replying affidavit and grounds of opposition both filed on the 6<sup>th</sup> December 2021. The Defendant/ Respondent in his response states that the suit property is the matrimonial property of the Plaintiff and himself. He alleges that he jointly put up the house with the Plaintiff. He claims that he not only financed but also supervised its construction when the Plaintiff was outside the country. That he has even been living in the suit property with their daughter, until April, 2021 when the Plaintiff secretly took the child away. Consequently, there is a case pending before the Children's Court in Nairobi over the

custody of that child.

6. The Defendant vehemently opposes the Plaintiff's application citing Section 12 of the Matrimonial Property Act, 2013 which prohibits one spouse from evicting the other from a matrimonial home.

7. The Defendant further avers that he has already filed a suit at the Family court in Nairobi, being, Nairobi HCCFOS/E088/2021 (**Seme Mochoge –vs- Caroline Nyangige Nyanchoka**), seeking for a declaration of rights over the matrimonial home, the subject matter of this case in accordance with the provisions of the Matrimonial Property Act, 2013.

8. The Defendant prays for the dismissal of the Plaintiff's application. He believes that the dispute falls within the jurisdiction of the Family Court and not this Court.

9. The Plaintiff in her Supplementary Affidavit denies the allegations by the Defendant. She is categorical that the suit property in dispute herein is not matrimonial property. She further acknowledges that she was served with summons to enter appearance and other Court documents in relation to the suit filed before the Family Court, HCCFOS/ E088/ 2021 on the 7th December, 2021. This was 12 days after this court had issued directions in regard to the hearing of the Application by the Plaintiff in this case. She terms the Defendant's action of filing the case before the Family Division of the High Court as an abuse of the process of Court.

**WHETHER THE COURT HAS THE JURISDICTION TO HEAR AND DETERMINE THIS MATTER**

10. The pleadings filed by the parties in this case, which I have discussed above raise the fundamental issue of jurisdiction; whether this court has the jurisdiction to hear and determine the application filed by the Plaintiff and the main case against the Defendant. This is an issue that the Court must consider before anything else.

11. The parties in this case have already filed their submissions as directed by the Court. The issue as to whether the suit property comprises matrimonial property has been identified by both parties as an issue for determination.

12. The Plaintiff submits that the suit property cannot be matrimonial property since she bought and developed it before she got married to the Defendant. The Defendant on the other hand in his replying affidavit depones that he jointly bought and developed the said suit property with the Plaintiff. It is his submission therefore that the suit property is matrimonial property. That is the reason why he has gone ahead to file the case before the Family Division of the High Court in accordance with the provisions of the Matrimonial Property Act, 2013.

13. Justice M.A. Odeny while considering a similar matter in **Kobilo Chepkok –vs- Francis Chepkok Tuewei (2018) eKLR**, observed that proceeding with the matter before her would have required her to look into the contributions of each spouse during the marriage and apportion shares accordingly. That, she stated, would be tantamount to determining distribution of matrimonial property in a marriage which had not been dissolved. Her conclusion was that, "*the distribution of matrimonial property is best handled in the Family Division of the High Court.*"

14. This court now finds itself in a similar situation. The parties before the court are a wife and husband. Their marriage has not been dissolved. Whereas one party alleges that the property in dispute is matrimonial property, the other party insists that it is not.

15. This Court agrees with the sentiments of Justice Odeny that the issues before this Court are issues that would best be handled by the Family Division of the High Court. The jurisdiction on division and or declaration of rights over matrimonial properties is with the High Court. In any event, there is already a case pending before the Family Division filed by the Defendant herein. The Court therefore directs that this matter be placed before the Family Division of the High Court for consideration and disposal.

16. The court will refrain from expressing any opinion as to the merit or otherwise of the Plaintiff's application and leave it to the decision of the Family Division.

17. Accordingly, the Court's direction is that this matter be placed before the Presiding Judge of the Family Division of the High Court, Nairobi forthwith for further directions.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF DECEMBER, 2021.**

**M.D MWANGI**

**JUDGE**

**IN THE VIRTUAL PRESENCE OF: -**

**M/S KOECH FOR THE PLAINTIFF/APPLICANT**

**M/S NG'ANG'A FOR THE DEFENDANT/RESPONDENT**

**COURT ASSISTANT: HILDA**

**M.D MWANGI**

**JUDGE**