



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NO.5 OF 2019

IN THE MATTER OF SECTIONS 7, 12 & 17 OF THE MATRIMONIAL PROPERTY ACT NO.49 OF 2013

AND

IN THE MATTER OF AN APPLICATION FOR DIVISION OF MATRIMONIAL PROPERTY

BETWEEN

KLW.....APPLICANT

VERSUS

BKW.....RESPONDENT

RULING

1. This is a ruling on application dated **13th December 2019**. It seeks the following orders: -

1. **Spent**

2. **Unconditional access to the matrimonial home.**

3. **Spent.**

4. **That pending hearing and determination of originating summons/suit, the respondent whether by himself, his agents or otherwise howsoever be restrained from selling, disposing off or interfering in any manner whatsoever with properties the parties acquired during the subsistence of the marriage.**

5. **Costs of the application.**

2. Grounds on the face of the application are that the applicant and respondent were customarily married for approximately 21 years under the Kikuyu customs and have been cohabiting at Pipeline, Nakuru County.

3. That the respondent denied the respondent forcefully and violently ejected the applicant from their matrimonial home and denied her entry into the home where all her belongings and has subjected the applicant to immense mental and physical torture and inconvenience of having to live and operate from a hotel room and subsequently move into a rented apartment.

4. Further that the respondent's extended family have a history of conniving and ganging up in support of inflicting violent attacks on their in-laws.

5. That the respondent has all documents to their properties and the applicant is apprehensive that he will dispose off the property causing a lot of prejudice, anguish and loss to the applicant.

6. The application is supported by affidavit sworn by the applicant on 13th December 2019. She reiterated grounds in support of the application and at paragraph 9 she listed all matrimonial properties.

7. She averred that she has been rendered homeless with no income and has been chased away from business she used to attend to; that she has been excluded from running and management of family properties and business.
8. She averred that the respondent will not suffer any prejudice if orders sought are granted.
9. In response the respondent filed a replying affidavit sworn on 27th January 2020. He denied chasing the applicant from the matrimonial home and averred that to the contrary, she requested to leave in the presence of their children and thereafter she did not go back and therefore issue of denial of access does not arise.
10. The respondent averred that it is not possible to live with the applicant under one roof as before a meeting held on 9th June 2019 of their parents, *nyumba kumi* elders, a church elder and their friends she confessed her plan to kill him; and following the confession, she was arrested and placed in custody but was released after her parents pleaded with the respondent to forgive her.
11. He averred that on 30th July 2019, he went to his in-laws and the applicant told her in the presence of his mother in-law that she was prepared to go back to her matrimonial home and the bad past was now behind them.
12. He averred that after staying with the applicant for a while, she started to insult and provoked him and later deserted matrimonial bed to sleep in the children's bedroom and on 21st November 2019 she arrived home drunk from saloon and started beat children for no reason and on the same day insulted him for 2 hours.
13. He denied subjecting the applicant to any physical harm at any one time. He averred that on 30th November, he told their children of the applicant's plan to eliminate him in her presence and that she confirmed the same and immediately said she wanted to leave and she left after respondent telling her she was free to go.
14. Respondent said he is an insurance agent and he also does property management and attached registration certificate in the name **[particulars withheld] & Commercial Agents** and licence for 2019.
15. He averred that he also trades in buying and selling land for profit and stated that he has been depositing funds into the applicant's 2 accounts particularized in paragraph 20 and he believed the balance in the accounts was kshs.200,000 in one account and kshs.70,000 in the other account.
16. He averred that the applicant has been a housewife all along and the properties bearing her names were all purchased by him and registered in her name with the intention that she holds them in trust for him.
17. He averred that he does not intend to dispose their matrimonial home which is registered in his name and the other the plot named [particulars withheld] grass is registered in the name of their son **RW** who is holding it in trust of their other 2 children who are minors. He attached copy of title deed.
18. He averred that plot No. Nakuru Municipality Block xxxx (MUGUGA) which has a storey building has huge liability of at least 5,895,000. He attached title deed and copy of letter dated 13th January 2020 from Equity Bank.
19. He averred that the land in Greenstead, No. Miti Mingi/Mbaruk Block xxxx was sold on 20th June 2019. He attached sale agreement. Further that the three plots he purchased from Greenstead were purchased using loan and attached bank statements. That 4 plots at Nyama Choma area were sold as per sale agreement dated 15th March 2018; same to Kibira LR No. Nakuru Municipality Block xxxx.; and 2 parcels being Miti Mingi/Mbaruk Block xxxx and xxxx are Registered in the Applicant's name but was intended to be in trust for him. He also attached title of registered in applicant's name and **Kiambogo/Kiambogo Block xxxx** registered in his name.
20. He averred that he purchased motor vehicle registration number Kxx 3xx through loan from Equity Bank and registered in the name of the applicant. He attached statement from Equity Bank showing deposit of kshs.1,200,000 in entry of 17th February 2016; that he used the deposit to acquire bankers cheque to Truck World which he attached to the affidavit.
21. He averred that in addition he took a loan of kshs.3,000,000 from Stima Sacco as per statement attached. He added that the vehicle was attached by Hegeon Auctioneers to satisfy a decree in Naivasha CMCC No.xxx of xxxx. He annexed proclamation and warrants.
22. Respondent further averred that he purchased motor vehicle registration number Kxx 3xxx and entrusted the applicant and motor vehicle registration number Kxx 1xx he purchased through loan of kshs.3,200,000 and is registered jointly registered in his name and Baham Sita Sacco as shown in logbook attached.
23. Further that he purchased motor vehicle registration number Kxx and transferred to DG Muthoni for kshs.1,600,000 as shown by Equity Bank statement attached.
24. He averred that the applicant has not exhibited any evidence of direct contribution for acquisition of any asset.
25. He averred that he has loans utilized for acquisition of assets totaling to kshs.11,131,456 in Equity Bank, Stima Sacco and Baham Sita Sacco and if he is restrained from disposing land assets he will be grounded.
26. Counsels agreed to do oral submissions. Mr. Odhiambo for the applicant applied for release of motor vehicle to the applicant so that she

can use it to do business and get funds to take care of her child. He submitted that the respondent can retain the documents and no party will be allowed to sell the property pending determination of matrimonial cause. He stated that the applicant is the one who has been running up and down to satisfy the decree of case in Naivasha to avoid attachment of the vehicle; that she has come to court with clean hands and does not intend to dispose of the vehicle.

27. He further submitted that in respect to prayer 4, the respondent has partially complied with the order issued by court. Though the vehicle was delivered at Bakawa Police Station with 3 tyres removed; that it was delivered with 4 small spare tyres.

28. Counsel sought to file further affidavit in respect to prayer 2. He said the main orders they are seeking are 4 and 5.

29. In response **Mr. Ngure** for the respondent submitted that the respondent sourced a loan of 4.5 Million from Stima Sacco in April 2017 and used the money to purchase 3 plots in August 2018 parcels xxxx, xxxx and xxxx in the name of the applicant; that he is paying the loan by instalments of kshs.123,000 per month; that he uses proceeds from the subject vehicle Kxx and tops up from his business to repay the loan and if the lorry is released to the applicant, he will not be able to service the loan. He further submitted that the respondent has exhibited documents to show he borrowed 3 Million from Stima Sacco and has demonstrated how he pays for the lorry.

30. Counsel further averred that the respondent does not have another source of income to repay the loan because he pays kshs.200,000 per month and since kshs.4.5Million was taken for the applicant's benefit, the loan should be paid. Counsel prayed for the lorry to remain with the respondent as he is the one managing and sourcing for clients.

31. Counsel further submitted that if the court is inclined to release the vehicle to the applicant then she should take the responsibility of repaying the loan of kshs.123,000 per month from Stima Sacco. And if she defaults in paying the lorry be restored back to the respondent.

32. On her maintenance, he submitted that the respondent is taking care of responsibility of the family; that he is paying school fees for the children, food, medication and upkeep; that he deposited money in the applicant's account as demonstrated in paragraph 20 and 21 of the replying affidavit and as at 30th November 2019, the account had about kshs.270,000; that the applicant has not filed statement for that account. On the vehicle released to the applicant he submitted that it was released in good faith. He said it was driven to police station with tyres and she went to collect it.

33. In response counsel for the applicant reaffirmed their position on the issue of the loan since no document has been filed to show that the motor vehicle is the only source of income. He submitted that there are no receipts to show that it is the respondent who made payments for the vehicle. He said he is agreeable to proposal that the vehicle be released to the applicant but there is no document to show that it is being used to repay loan. On kshs.270,000 deposited for applicant he denied she received the amount and admitted that she received only kshs.46,000 which is a minimum amount.

34. Applicant filed further affidavit dated 28th February 2020. She averred that the respondent has filed deposit slips for only kshs.46,000 from 28th October 2017 and she has no source of income as all properties acquired in the subsistence of the marriage are in the respondent's custody.

35. She averred that her status as house wife was as a result of respondent's direction. She said they managed their business at Barnabas on LR Municipality Block xx/xxxx where she made sure the bar was running smoothly and managed all the financial records and made sure the storey building had tenants all the time. She said the business would fetch kshs.150,000 per month and she made sure all the monies were debited in the respondent's account.

36. She agreed with the respondent that the properties registered in her name are matrimonial properties even if registered in the name of one person; that the other spouse has proprietary interest if he or she made contribution.

37. She averred that purported sale of **Miti Mingi/Mbaruk Blockx/xxxx** is falsehood as they planted hay which is about to be harvested for sale; further sale of 4 plots at Nyama Choma area have not been disclosed.

38. She urged court to consider her wellbeing and maintenance pending hearing and determination of this suit.

ANALYSIS AND DETERMINATION

39. The applicant in the submissions argued orally has pursued release of the lorry registration number Kxx 3xxx which she said would assist her earn income for her upkeep; on the other hand, the respondent argued that, he deposited money in her account and is taking care of family responsibilities. His argument to retain the vehicle is to assist in repaying loan of kshs.123,000. He stated that he owes 3 financial institutions loan totaling to kshs.11,000,000 which he says was utilized to purchase the family assets.

40. Respondent's counsel submitted that if the court is inclined to release the vehicle to the applicant then the applicant should be made to take care of responsibility of repaying the loan.

41. The applicant argued that the respondent has not shown that there is no other source of repaying the loan. On the other hand, besides the applicant stating that she was managing a business which earned kshs.150,000 per month, the applicant has not demonstrated the earning neither has she denied that loan facilities were taken by the respondent to acquire the matrimonial properties. Respondent has shown that he owes financial institutions. In asking to be given the vehicle, the applicant has indicated that she needs it to earn money for her upkeep. She has not made any commitment to assist in paying the loans. She has not also denied the respondents claim that he is taking care of the children's needs.

42. The respondent having demonstrated through bank statements that there are loans which he has to continue paying it would be in the interest of justice to allow him have possession of the lorry to run and manage it to avoid losing it as a result of unpaid loan. I note from the averments that the applicant has been a housewife and has been assisting the respondent in running family business; there is no mention of any other independent source for her income.

43. It would therefore be of responsibility of the respondent to maintain her elsewhere if they cannot live together in their matrimonial home while awaiting hearing a determination of the matrimonial property. Respondent has indicated that he has been depositing money in the applicant's account though the figure alleged to have been deposited is denied. My view is that they should agree on monthly maintenance cost for the applicant as no figure has been suggested by the applicant. In the event that they fail to agree then the applicant may table expenses for her maintenance before court.

44. In respect to the respondent's proposal to dispose of some parcels of land, my view is that if he is to manage the lorry to repay the loans and he is also earning from work as insurance agent, there is no justification to sell the matrimonial property which the court is yet to determine how it should be distributed between them.

45. FINAL ORDER

- 1. Respondent is hereby restrained from disposing any of the properties acquired during the marriage between him and the respondent pending hearing and determination of matrimonial cause.**
- 2. Motor vehicle registration No. Kxxx 3xxx to remain in respondent's possession and management.**
- 3. In the event the respondent defaults in repaying the loan, management of the vehicle to go to the applicant.**
- 4. Parties to agree on monthly maintenance expenses for the applicant.**
- 5. In the event the parties fail to agree on 4 above, the court to make determination upon filing of expenses of applicant and statement of means of the respondent.**
- 6. Each party to bear own costs of the application.**

Ruling dated, signed and delivered via email at Nakuru This 14th day of May, 2020

RACHEL NGETICH, JUDGE

TO:

Kanyiha Chege Advocates Counsel for Applicant

Rubua Ngure Advocates Counsel for Respondent