



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS APPLICATION NO. 19 OF 2018 (OS)**

**NKG.....APPLICANT**

**VERSUS**

**SGB.....RESPONDENT**

**RULING**

1. Before me for consideration are 2 applications by **NKG**, the Applicant. The 1<sup>st</sup> Application filed under certificate of urgency is dated 29.6.18 seeking:

**1. Spent.**

**2. That the honourable court be pleased to issue a temporary injunction order restraining the Defendant by himself, his agents and or servants from further interfering, entering, visiting, threatening to kill and with the intention to kidnap the Applicant's child and engaging in forceful conjugal rights against the Applicant's wish and consent pending hearing and determination of this application.**

**3. The honourable court be pleased to order the OC's Nyali Police Station to provide security to the applicant upon terms and conditions it may impose.**

**4. That the Honourable Court be pleased to deem the annexed originating summons (OS) as properly filed as a representative suit upon payment of the requisite fees.**

**5. That costs of this application be provided for.**

2. The Applicant avers in her affidavit sworn on 29.6.18 that she got married to the Respondent and they have a child. She claims that the Respondent used lies and pretence to win her and did not disclose to her that he had 4 other wives and many children. She further claims that when the Respondent visits her at her house in Nyali, he is brutal, abusive and a rapist. He is a licensed gun holder has severally threatened to kill her and dump her in the ocean which matter she reported at Nyali Police Station. She therefore fears for her life and that of the child. She also accuses the Respondent of failing to provide for the child's upkeep. She seeks the orders herein for her safety and protection.

3. On 3.7.18, Otieno, J, granted restraining orders against **SGB**, the Respondent in terms of prayer 2 of the 1<sup>st</sup> Application. Shortly thereafter, the Applicant filed the 2<sup>nd</sup> application dated 12.7.18 seeking a warrant of arrest for the Respondent, his servants and agents for having acted in contempt of the Court order of 3.7.18 and served upon him on 4.7.18. She further sought orders that the Respondent be cited for contempt and punished for the same.

4. In his Replying Affidavit sworn on 11.12.18, in response to the 1<sup>st</sup> Application, the Respondent acknowledges marriage to the Applicant and the fact that they have 1 child. He however avers that the Applicant was well aware that he had another family at the time of their courtship and subsequent marriage. According to him the Applicant seeks to drive a wedge between him and the other family and have him exclusively to herself. He is a peace loving man, has been providing for the Applicant and their child. However she is unable to stem her jealousy and she has become increasingly demanding. The Application is an attempt to pressure him into staying with her. He denies the allegations of brutality and abuse and threats to kill or kidnap the Applicant or child. The allegations are made in bad faith to tarnish his reputation.

5. The 1<sup>st</sup> Application was fixed for hearing on 18.7.18. On that date the Respondent was granted time to file response within 2 weeks. Directions on filing submissions were also given. The matter was to be mentioned on 1.11.18 to confirm compliance. On 1.11.18 however,

parties had not complied with directions and time for filing response and submissions was further extended and compliance would be confirmed on 20.12.18. On that day, parties had still not filed submissions but the Respondent had filed his response to the Application of 29.6.18, though late. The Applicant's advocate informed the Court that he would rely on the Application and the Affidavit. The Respondent's advocate was not present in Court.

6. I have considered the Application and the rival affidavits. I note that the Applicant did not counter the allegations in the Replying Affidavit of the Respondent by way of a further affidavit. What I therefore have before me are accusations and counter-accusations with no proof on either side. He who alleges must prove. The burden of proof of the allegations of threats to the life of the Applicant and the child of the marriage by the Respondent lay on the Applicant. She however failed to discharge that burden.

7. The Applicant prayed that the originating summons annexed to the 1<sup>st</sup> Application be deemed as properly filed as a representative suit. This is a rather peculiar prayer. A representative suit is one in which one or more persons may commence proceedings representing numerous persons who have the same interest in the proceedings. Order 1 Rule 8 of the Civil Procedure Rules makes provision for representative suits as follows:

***(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.***

8. This suit is about the Applicant and the Respondent. It has not been filed on behalf of any other person or persons. Indeed by its very nature the 1<sup>st</sup> Application cannot be a representative suit. It would therefore appear that this particular prayer is misplaced and misconceived and arises from a misapprehension of the law.

9. I now turn to the 2<sup>nd</sup> Application. On 18.7.18 the date for the hearing of the 1<sup>st</sup> Application, the Applicant's advocate stated that there were 2 applications before the Court. The Respondent's advocate however stated that he was not aware of the 2<sup>nd</sup> Application. I have looked at the record and I see no evidence of service of the 2<sup>nd</sup> Application upon the Respondent. In the circumstances, the Court is unable to consider an application that had not been served upon the Respondent.

10. The Court notes that both parties' advocates have treated the matter herein rather casually and with a lack of seriousness. No effort was made to prosecute or defend the same. No submissions oral or written were made before this Court in support or against the Applications. The matter was left to the Court to make a determination based on the insufficient material before it.

11. In the result, I do not consider that the Applicant has made out a case to warrant the grant of the orders sought. Accordingly the Applications dated 29.6.18 and 12.7.18 are hereby dismissed but with no order as to costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 15<sup>th</sup> day of February 2019**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**