



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 55 OF 2018

IWR.....PLAINTIFF

VERSUS

JRM.....RESPONDENT

RULING

1. The applicant/plaintiff herein is a wife to the defendant/respondent having celebrated their marriage sometime on 10th May 1997 under the African Christian Marriage and Divorce Act. That during the subsistence of their marriage which is still in force, the couple acquired joint property known as Plot No. XXXX (R XXXX) Lucky Summer Estate Company Ltd. They subsequently acquired Nairobi/Block Komarock/XXX/XXX Phase 4 through a joint mortgage thus establishing their matrimonial home therein.

2. Due to domestic differences and failure to meet the mortgage obligations in servicing the loan for Komarock property, the couple parted with the defendant opting to rent a house at Kayole and the plaintiff/applicant renting a house at Lucky Summer estate near their acquired property. They consequently rented out the Komarock property to assist in raising funds to service the mortgage.

3. That the applicant continued to service the mortgage single handedly and cleared the same after paying a lumpsum of Kshs.991,444/= while the defendant developed their Lucky Summer plot into a flat.

4. Following their living apart, the defendant got engaged to a lady friend whom he is staying with as a wife. As the defendant took occupation of the Lucky Summer Property, the applicant also moved back to their property at komarock house.

5. That sometime in August 2018, the defendant stormed into her house and confronted her man friend (visitor) one SD thus harassing him. That subsequently, the defendant continued harassing and threatening her while directing her to chase away the man friend from his house. Following reports by the defendant to the police asking them to tell the applicant/plaintiff to chase away the man friend, the applicant/plaintiff felt insecure hence came to court seeking a declaration that the said Komarock property is hers 100% and that the respondent be restrained from disposing and or interfering with the applicant's quiet possession.

6. Contemporaneously filed with the plaint is a notice of motion of even date brought pursuant to Order 40 rule 1 of the Civil Procedure Rules seeking orders as follows:

(a) Spent.

(b) An order be issued to restrain the defendant/respondent herein, his employees, servants, agents or any person claiming through him from evicting the applicant from the property known as Nairobi/Block XXX/XXX Komarock Phase 4 Githaa Court house No. XXX or from otherwise interfering with the applicant's quiet possession of the said property, or alienating interest of the plaintiff/applicant pending the hearing and determination of this application interpartes.

(c) An order be issued directing the Officer Commanding Kayole Police Station to maintain peace and ensure strict compliance with this order.

(d) The costs of the application be provided for.

(e) Any other or further relief and or remedy this honourable court may deem fit and expedient to grant.

7. On 7th September 2018 the court certified the application filed under certificate of urgency and granted exparte injunction in terms of prayer two and the matter fixed for interpartes hearing on 20th September 2018. However, from the record, on 20th September 2018 the court did not sit. On 9th October 2018 when the matter came up for interpartes hearing, the applicant indicated to the court that the respondent had

disobeyed the court order issued on 7th September 2018. On the same day, the respondent filed a replying affidavit in response to the application dated 6th September 2018 admitting that he had demanded for the wife's 'new husband' to move out.

8. Prior to the interpartes hearing, the applicant filed a notice dated 4th October 2018 pursuant to Order 40 rule 3 of the Civil Procedure rules 2010 and all other enabling provisions seeking orders as hereunder:

1. Spent.

2. This honourable court be pleased to punish the defendant/respondent, JRM by way of attaching his property, for willful disobedience of the orders of this court.

3. In the alternative, this honourable court be pleased to impose a fine to be determined by the honourable court upon the defendant/respondent JRM for willful disobedience of the orders of this court.

4. Any other orders this honourable court may deem just and expedient considering the circumstances of the case, and to meet the ends of justice.

9. The application is predicated upon grounds on the face of it and affidavit in support sworn by the applicant in which she claimed the respondent in contravention of the orders of the court visited their matrimonial home, harassed her man friend and their children.

10. She stated that on 2nd August 2018 the respondent visited their Komarock home where she is staying with their children and assaulted them after breaking into their house. That he manipulated police officers who arrested her boyfriend and took him to the police station but was released by the OCS.

11. In response, the respondent filed a replying affidavit of 9th October 2018 denying harassing or assaulting his children as alleged. He however took issue with a Ghanaian man staying with the applicant his wife in his house before they could officially divorce. He stated that on 29th September 2018 he visited his daughters at their Komarock home whereby he was denied access by the applicant. He averred that his relationship with children is very good and cordial. He further averred that on 4th September 2018 he met with his two daughters and reconciled over some misunderstanding that took place on 2nd September 2018.

12. He contended that the court order of 7th September 2019 did not restrict him from visiting his house which he bought through a mortgage yet a mysterious foreign man is staying there without his permission.

13. He claimed that he has equal rights to stay in his house till divorce and property ownership is determined.

14. When the matter came up for hearing, parties agreed to file written submissions. However, only the applicant's counsel Mr. D.K. Githinji & Co. filed his submissions on 19th November 2018. In the said submissions, counsel reiterated literally every averment contained in the affidavit in support. He cited some three authorities in the case of M.M.M. vs E.N.W. (2016) eKLR and Kisumu Civil Appeal No. 24/1996 Mugunga General Stores Ltd vs Pepeo Distribution Ltd (1987) eKLR all which I do not find relevant to the subject at hand.

Determination

15. I have considered the application herein, affidavit in support, replying affidavit and submissions by the applicant's counsel.

16. There is no dispute that an ex parte order was issued on 7th September 2019 restraining the respondent from evicting the applicant from property known as Nairobi/Block XXX/XX, Komarock Phase 4 Githera Court or from interfering with applicant's quiet possession of the said property, or alienating, transferring, disposing and or dealing with the property in any manner adverse to the plaintiff's proprietary right.

17. Disobedience of an order issued under Order 40 of the Civil Procedure Rules is punishable under rule 3 (1) which provides:

“in cases of disobedience, or of breach of any such terms, the court granting an injunction may order the propriety of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release”.

18. The principles governing contempt proceedings have aptly been articulated in a variety of case law authorities inter alia Mutitika vs Baharini Farm (1982 – 88) IKAR 863, Hadkinson vs Hadkinson (1952) ALL ER 567, Johnson vs Grant (1923) SC 78 90 and Christine Wangari Gechege vs Elizabeth Wanjiru Evans and 11 others Civil Application No. 33/2013 where it was held:

“a person who knowing of the existence of an order of injunction or stay is liable to be committed for contempt; that a party directed by an order of court to do or to restrain from doing any act must comply with the direction until it is discharged, irrespective of that party's view or opinion over the order; that contempt of court proceeding are intended not to protect personal dignity of the individual judge or private rights of any litigant, but are meant to protect the fundamental supremacy of the law and the rule of law and that leave to commence contempt of court proceedings is no longer required in view of the 1995 civil procedure rules of England and the civil procedure (Amendment No. 2 rules of 2012 (England))”.

19. The application herein is basically anchored on part of the order dealing with “not to interfere with the applicant’s quiet possession of the property”. According to the applicant’s affidavit in support of the application, she only referred to interference caused in her house on 2nd September 2018 when the respondent is alleged to have assaulted their 2 daughters. This was way before the grant of the exparte orders of 7th September 2018.

20. There isn.t any other day after 7th September 2018 that the respondent is alleged to have harassed the applicant. The duty to prove disobedience to a court order which actually translates to stepping on the authority of the court squarely lies with the applicant. It is true that the order did not restrain the respondent from visiting his home and children. Unless and until the parties divorce or orders restraining him from accessing his house are made under the protection against domestic violence is made, the respondent will continue to access his home as long as he does not interfere with the applicant’s quiet possession or harass her.

21. Besides, the acts committed on 2nd September 2018, the applicant has not proved any other day that the respondent interfered with her quiet possession. In any event, the property belongs to the two as of now hence no orders restraining access.

22. This court is duty bound to jealously guard the integrity of the court’s authority and enforcement of its orders so as to maintain the integrity of the entire judicial system being the final arbiter and the only place of refuge for any person aggrieved regardless of one’s social, economic or political status or influence.

23. However, where there is no proof of contempt and such orders are likely to be misused to settle scores, courts should be reluctant to give in and very quickly disentangle from such abuse by rejecting the same. The penal consequences attached to contempt proceedings are serious thus touching on ones constitutional liberty and freedom which is guaranteed under our Constitution. To balance the two, the applicant must prove the allegation without living room for speculation.

24. In the instant case, there is no proof of disobedience of the court orders. The applicant and respondent are basically in bad terms and more particularly for the applicant taking another man to their matrimonial home before divorce. I would urge the parties to either reconcile or divorce to let each party free to remarry or not remarry hence stop monitoring each other.

25. For the above reasons stated, it is my finding that the applicant has failed to prove her case to the required degree hence the application dated 4th October 2018 for contempt is hereby dismissed with no order as to costs.

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MAY, 2019.

J.N. ONYIEGO

(JUDGE)