



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 61 OF 2011

IN THE MATTER OF: ALLEGED CONTRADICTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER (THE PREAMBLE OF THE CONSTRUCTION OF THE REPUBLIC OF KENYA AND UNDER ARTICLES 2,(4)

AND

ARTICLES 2(5), 19, 20, 21

AND

ARTICLES 22(1), 23(1) (3), 24, 25(A) (C)

AND

ARTICLES 26(1), 27(1) (2) (3) (4) (5) (6) (7)

AND

ARTICLES 28, 29(c) (d) (f), 40(1), 43(b), 45(1), (3), (4), 47(1), 48, 50(1), 53, 57(c), 159(2) (d)

AND

Articles 165(1) (3), (a), (b), (d), (ii)

AND

ARTICLES 165, 3(B), (6), (7)

AND

IN THE MATTER OF: THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

BETWEEN

JK.....PETITIONER

VERSUS

BKM.....RESPONDENT

RULING

The Application

1. The application before the court is a Notice of Motion dated 8th June, 2015. It prays for the following orders:

(i) That this matter be certified as urgent and service of the same be dispensed with in the 1st instance.

(ii) That there be a temporary injunction to restrain the Petitioner/Respondent, her agent, servant from collecting rent in all sixteen roomed house of the matrimonial home situated at Makaburini Estate in Mariakani at Kshs. 1,500/= despite the Honourable Court's Judgment of 9th June, 2014, pending the hearing and determination of this application.

(iii) That there be an order to compel the Respondent to open the said house and allow the Petitioner access and possess the rooms and also collect rent from the twelve rooms and remove his goods according to the Judgment delivered on 9th June, 2014 by Honourable Justice F. Tuiyott, pending the hearing and determination of this application.

(iv) That the Petitioner be ordered and condemned to compensate the applicant the monies collected in the twelve rooms since the delivery of the Judgment.

(v) That costs of this application be provided for.

2. The application is premised on the grounds set out therein and is supported by the affidavit sworn by the Applicant BKM.

3. The Applicant's case is that he was the Respondent in this case and Judgment was delivered on 9th June, 2014 where it was ordered that:

(a) The Petitioner had equal rights to the suit premises being matrimonial home at Makaburini Estate in Mariakani a sixteen roomed house.

(b) The Petitioner has equal proprietary rights to the matrimonial home at Makaburini Estate in Mariakani comprising of 4 rooms.

(c) The Respondent, her agents and servants be restrained from evicting and/or blocking the Applicant from accessing the suit premises.

(d) As the litigants herein are husband and wife, each party shall bear its own costs of these proceedings.

4. After the Judgment, the Respondent/Applicant tried to move in the said home but the Petitioner refused and/or denied him access. Ever since, the Petitioner continues to collect rent in all sixteen rooms of the matrimonial home at 1,500/= per room at Makaburini Estate in Mariakani and solely manages the proceeds without consulting and/or giving the Applicant his shares for over five years and even after the order by the court on 9th June, 2014, the Petitioner continues to deny the Applicant his right. The Applicant is also desirous in removing his items and/or belongings from the said house including bed, mattress, wardrobe, two tables, sofa sets, four stools, a cupboard, four jerricans, a basin, a mosquito net, pillows, four sufurias, six plates, ten cups and a baby cot. The Applicant states that the Petitioner becomes violent and/or aggressive when she sees the Applicant and therefore if the orders sought herein are granted, the OCS Mariakani Police Station should effect the same and give the Applicant security. The Applicant also seeks part of the money collected in rent by the Petitioner in the 12 rooms since the delivery of the Judgment.

The Response

5. There is no response to the application, although the same was served. Even a notice of hearing date was served upon the Respondent's advocate M/S Marende Birir on 10th April, 2018. The matter therefore proceeded Ex parte on 6th June, 2018.

Submissions

6. The Applicant submitted that the Petitioner/Respondent has refused and/or ignored to honour the Judgment and order delivered on the 9th June, 2014 by Honourable Justice F. Tuiyott to own four rooms only thereby continuing to collect rent in all sixteen roomed house of the matrimonial home at 5,000/= situated at Makaburini Estate in Mariakani. The Respondent submitted that the Petitioner has on several occasions denied the Applicant access to live in the matrimonial home at Makaburini Estate in Mariakani, and denied the Applicant chance to remove his household items including bed, mattress, wardrobe, two tables, sofa sets, four stools, a cupboard, four jerricans, a basin, mosquito net, pillows, four sufurias, six plates, ten cups and a baby cot, and unless an order to compel the Petitioner to release and allow the Applicant access to the said 12 rooms and to have the rightful possession and also to remove the said items the Applicant shall continue to suffer substantial loss and damage. The Petitioner's case is that the suit property is a family property and that he has three wives namely BKM, WSKM and JN. The Petitioner has denied the two wives their right of collecting rent at Kshs. 5,000/= per room since the said Judgment up to date.

Determination

7. The parties before the court are husband and wife. They differed on the sharing of matrimonial property and came to court. The court delivered a Judgment in the matter on 9th June, 2014 in favour of the Petitioner who is the wife. The Judgment was as follows:

(a) That the Respondent's attempt to evict the Petitioner from her matrimonial home at Makaburini Estate, Mariakani violates her Equal Right to that property.

(b) The Petitioner has Equal Proprietary Rights to the Petitioner in the matrimonial home comprising of 4 rooms at Makaburini Estate, Mariakani.

(c) The Respondent, his agents and servants are restrained from evicting the Petitioner from, or disposing or in any other way

alienating that property.

(d) As the litigants herein are husband and wife, each party shall bear its own costs of these proceedings.

8. It appears to me that the Applicant, who is the husband, is not disputing that Judgment through the current application, but is rather seeking that the same be fully effected in terms of equal ownership of the property, and considering that he has other wives and other family members. To that extent this court will not interfere with the Judgment entered on 9th June, 2014. This court will however enforce that Judgment which declared that the Petitioner and the Respondent had equal rights to the suit property. In that regard the court makes the following orders:

(a) That the matrimonial home comprising of four (4) rooms at Makaburini Estate, Mariakani be shared equally between the Petitioner and Respondent in terms of the Judgment dated 9th June, 2014.

(b) That the Respondent is entitled to half of the rent from the said house mentioned in (a) above from 9th June, 2014.

(c) The Respondent is also entitled to access the said matrimonial home to collect his personal household items mentioned in the Ruling.

(d) The Officer Commanding Station (OCS), Mariakani Police Station shall effect the execution of these orders and to ensure that peace is maintained as the Applicant/Respondent collects his aforesaid household goods.

(e) Parties shall bear own costs.

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 10th day of July, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Applicant in person

Mr. Kaunda Court Assistant