



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO. 6 OF 2015**

**S M K.....PETITIONER**

**VERSUS**

**N W M K.....RESPONDENT**

**RULING**

1. This ruling is in respect of a matter relating to access of the matrimonial home by the respondent. The matter was initially raised off record on 12<sup>th</sup> May 2016 by counsel for the respondent and I allocated a date for it. It later transpired that the said date fell on a Sunday. The parties eventually had the matter fixed for 16<sup>th</sup> June 2016, to enable the court hear oral submissions on the matter. They ended up addressing me on the matter for two days.

2. The respondent's position is that she has been having difficulties accessing the matrimonial home. Her access is dependent on the whims of an employee, as the respondent cannot open the main door to the house unless she is opened for by the employee. The respondent is said to have keys to a backyard entrance, but even that is not easily accessible for it is usually latched from the inside, and she has to get someone in the inside to open for her. She complains that that restricts her entry into the home, which she is entitled to without any let or hindrance. Counsel for the respondent appeared in the end to ground her submissions on the respondent's application dated 24<sup>th</sup> June 2015.

3. The petitioner's response was that the respondent no longer lives at the matrimonial home. She lives elsewhere with one of their children, and she comes occasionally. He complained that whenever she comes in she causes a disruption that he and the household need not have to put up with. He stated that the restricted access was meant for security purposes. He hinted to an effort by the petitioner to cause him harm.

4. On the law, it was submitted that both parties were entitled to an unrestricted access to the matrimonial home, so long as the divorce cause, together with that for division of matrimonial property, was still pending and the rights of the parties not yet determined. It was submitted that to the extent that the parties were still married, they were entitled to equal rights.

5. The main suit is part-heard before me; I am therefore fairly familiar with the facts of the case. The suit is essentially for dissolution of the marriage between the parties and for division of matrimonial property. To that extent the parties are still within matrimony, bound by all the rights and duties accruing to them as a consequence of the marriage.

6. At the initial stages of the matter, on 26<sup>th</sup> February 2015, the parties recorded a consent in open court, which was duly executed by the petitioner and counsel for the respondent. It was a term of the consent

that the respondent would continue to reside at the matrimonial home, and that both parties would endeavor to live in peace. The further term of the consent was that there was liberty to apply by either party. The latter term was intended to apply in situations where either party felt that there was breach or non-compliance with the terms of the consent, or there was need to vary the same.

7. As the parties are still within wedlock, Article 45(3) of the Constitution of Kenya, 2010, is relevant. It states that parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of marriage. With respect to access to the matrimonial home during marriage, this would mean that both parties have equal rights there to.

8. There would, of course, be circumstances when access to a matrimonial home may be restricted for either spouse. Such restriction can only be founded on a court order, where the court granting it would have to be convinced beyond peradventure that there was real threat to life or limb. The court would need to be moved in that behalf, and relevant material ought to be placed before it to support a case for restriction.

9. In view of what I have stated above, it goes without saying, that the respondent herein is entitled to access the matrimonial home herein in equal measure with the petitioner. The petitioner is yet to move the court for restriction of the respondent's right of access. I therefore have no basis for excluding her altogether or restricting her right of access in any manner.

10. There is, however, on record an application by the respondent for the exclusion of the petitioner from the matrimonial home. That application is dated 24<sup>th</sup> June 2015. The same has never been argued. It has never been given a date for hearing. When counsel raised the issues of access, she did not expressly state that she was seeking the orders in that application. Rather, she said she was seeking directions on the situation at the matrimonial home with respect to access by the respondent.

11. The respondent had filed an application seeking unlimited access to the matrimonial home. That application was dated 17<sup>th</sup> February 2015. It was disposed of when the consent, referred to in paragraph 6, was entered into. There is therefore an order on record allowing the respondent unlimited access to the home. The terms of the consent have not been altered. Both parties ought to comply with them until such time that they are varied or vacated by the court on application.

12. The petitioner submitted that there has been a limited restriction of access to the home for the respondent for security reasons. It was said that the respondent does not actually live on the premises and comes in occasionally, during which times she causes commotion and disturbs the peace. The answer to this is that the respondent is still the petitioner's spouse, and she is entitled to access the home at all times, by virtue of Article 45(3) of the Constitution. The fact that she does on her own volition move in and out of the home does not mean that her rights as such have been waived.

13. I wish to bring the attention of the parties to their consent of 26<sup>th</sup> February 2015. They are still bound by it. Clause (6) of the Consent states as follows –

‘That the petitioner and the respondent to avoid any conduct that will provoke a breach of the peace in the matrimonial home and that there is liberty to apply.’

14. There are claims by the petitioner that the respondent has on various occasions acted at the matrimonial home in a manner that amounted to a breach of the peace. If that was so then her conduct contravened the consent order and was actionable. The consent reserved a right to apply. The petitioner ought to have moved the court appropriately for contempt of the said order, so that the court could make an enquiry based on the facts presented in the contempt application by the petitioner, and in the reply to it by the respondent.

15. The bone of contention appears to be the househelp, Juliet Ingati. The respondent implies that she enjoys a curious relationship with the petitioner, and this is what appears to fuel her anger. This is made the worse by the petitioner's apparent defence of her. From what has been placed before me it is apparent

to me that the said employee does not have any specialized skills, and should therefore be easily replaceable if any semblance of peace is to be maintained at the matrimonial home.

16. In view of everything that I have stated above, the following are the final orders that I feel compelled to make, or the directions that I am bound to give; -

- a. **That the respondent is entitled to free access to the matrimonial home, and the petitioner is hereby directed to ensure such access is made possible for her without compromising the security of the home;**
- b. **That both parties are hereby directed to strictly observe the terms of clause (6) of the consent order recorded on 26<sup>th</sup> February 2015;**
- c. **That any party that shall contravene or fail to comply with the said clause (6) shall, upon proof of the said breach, have their right to access the matrimonial home restricted or they shall be excluded altogether from the home for the sake of peace;**
- d. **That to ensure harmony and peaceful co-existence at the matrimonial home, the petitioner shall cause the services of J I to be terminated, subject to the said employee being paid all her terminal duties as appropriate;**
- e. **That the parties should endeavour to have the suit herein disposed of expeditiously so as to determine once and for all the rights of the parties to the property the subject of the suit;**
- f. **The matter herein shall proceed for hearing on 14<sup>th</sup> July 2016 as scheduled; and**
- g. **That there shall be no order as to costs.**

**DATED, SIGNED and DELIVERED at NAIROBI this 8<sup>TH</sup> DAY OF JULY, 2016.**

**W. MUSYOKA**

**JUDGE**