



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO 14 OF 2015

A N M.....PETITIONER/APPLICANT

VERSUS

DR.P M N.....DEFENDANT/RESPONDENT

JUDGMENT

By an Application filed on 19th March 2015, brought under **14 & 17 of the Matrimonial Property Act 2013, Order 40 of Civil Procedure Rules, (Cap 21) & section 3A of the Civil Procedure Act.**

The Applicant sought the following orders from the Court;

1. An order of temporary injunction against the Respondent restraining him, his agents and /or servants from selling, alienating or charging the suit property L. R. No. Ruiru/Block **[particulars withheld]**
2. An order preventing the Respondent from harassing, threatening, and interfering in any manner whatsoever with the matrimonial property, L.R. No. Ruiru/Block **[particularsv withheld]**
3. The Applicant herein is allowed to peacefully stay in her matrimonial home L.R. No. Ruiru/Block **[particulars withheld]**
4. The OCS Ruiru to supervise the said orders.

By an application filed on 2nd April, 2015 The Applicant sought similar orders from the Court with regard to property Ruiru/Ruiru East Block 2/5152.

This Court issued interim orders on 28th April, 2015 restraining the Respondent from interfering in the matrimonial home until the hearing and determination of the Court.

The Respondent filed a Supplementary Affidavit on 25th September, 2015 and deposed as follows;

The Applicant and Respondent were married on 7th March, 1987 under the **African Christian Marriage Act Cap 150 (repealed)** as evidenced by the marriage certificate attached.

They have 2 children of the marriage; G W M -28 years old and P W M- 21 years old.

The marriage was unbearable and the parties have since separated in 2012.

The Applicant sought division of matrimonial properties. During the marriage they acquired the following properties;

- a. Kitale Block **[particulars withheld]** (Koitogos) **[particulars withheld]** of 0.253Ha Sheet No1**[particulars withheld]** which the Respondent sold and did not share proceeds
- b. Ruiru East Block **[particulars withheld]**
- c. Land in Thika West; Parcel **[particulars withheld]**
- d. Rental houses which the Respondent refused to disclose despite her contribution to the construction through funds from the chemist businesses they operated.
- e. A business No. **[particulars withheld]** registered in the Respondent's name.
- f. 3 chemist shops that have closed down
- g. A parcel of Land in Gatundu registered in the Respondent's name and whose official documents are still in his care.
- h. Proceeds in Barclays Bank joint account number **[particulars withheld]**
- i. Proceeds in a bank Account **[particulars withheld]** in National bank in the Respondent's name.
- j. Proceeds in Family Account **[particulars withheld]** & **[particulars withheld]** Barclays Bank in the Respondent's names
- k. Motor vehicles Mercedes Benz Reg. **[particulars withheld]**
- l. Toyota Premio Reg. **[particulars withheld]**
- m. Toyota Premio Reg. **[particulars withheld]**

The Applicant deposed that in February, 2015, the Respondent demolished the matrimonial home as shown in photographs attached to the application carried away the 2 gates and assorted household goods listed in the affidavit; practically he emptied the house.

The Applicant applied for maintenance for the 2 children, school fees and school expenses. She attached her payslip of Ksh. 13, 798/= and outlined expenses as follows;

1. Utilities Ksh 10,000/= (water & electricity)
2. Transport expenses Ksh 6,000/=
3. Security costs Ksh 10,000/=
4. Food Ksh 10,000/=
5. Medical care AAR annual subscription Ksh 70,000/=
6. School Fees (not estimated)

ISSUES

Is the suit premises matrimonial home and what are the rights of the Applicant and Respondent over the suit premises?

Is the Respondent responsible for the children of this marriage?

Is the Applicant entitled to injunctive relief?

EVALUATION

The Applicant and Respondent were married for 28 years. They are separated but not divorced. The Applicant resides with the children of the marriage matrimonial home L.R. Ruiru/Ruiru East Block *[particulars withheld]*. The Respondent left the home dilapidated as shown by attached photographs and carried away all household goods as listed in ANM3. The Applicant confirmed although the matrimonial home is registered solely in the Respondent's name as shown by the copy of title attached, the home is one of the properties listed above that was obtained through joint effort by both parties.

Despite service of this application and Supplementary Affidavit through the Court's Deputy Registrar the Respondent declined service as evidenced by the affidavit of service filed on 30th September 2015. The Respondent did not file a replying affidavit or any document in relation to the matter. There was no explanation provided for the Court to consider. The matter proceeded *ex parte*.

The Applicant sought division of her share of the matrimonial home in the application filed on 19th March, 2014 and Supplementary affidavit filed on 25th September, 2015.

The matrimonial home is matrimonial property under **Section 6 of the Matrimonial Property Act, 2013** and division of matrimonial property can take place only after divorce or dissolution of marriage as prescribed under **Section 7 of the Matrimonial Property Act, 2013**. In the instant case, the Applicant and Respondent are separated but not divorced. The matrimonial home belongs to both parties until the division of the said property is done.

The Applicant also sought maintenance for herself and the school fees and school expenses for the children of the marriage. The Applicant intimated to the Court that the eldest daughter was in Strathmore University and sent away due to lack of fees as the Respondent refused to pay the fees.

The Court finds that the Respondent and Applicant contracted a marriage under the **African Christian Marriage and Divorce Act Cap 150** now repealed. The said marriage is recognized under **Section 98 (1) of the Marriage Act 2014** which provides in Part XII for Maintenance of spouses and other reliefs. The applicant is entitled to maintenance under **section 77 (1) a-d of the Marriage Act 2014**. Although she is employed, her pay slip reflects a meager sum to cater for the expenses she shoulders single handedly as listed above. This is coupled by the fact that she has a medical condition that requires medical expenses. On the other hand the Respondent is retired and may not have a steady income. To balance the 2 situations, the Court finds that the Respondent ought to cater for his family. He shall pay to the Respondent Ksh. 15,000/- a month.

With regard to school fees it is conceded the daughters of the Respondent are adults 28 and 21 years respectively. It is also on record that the 1st born daughter, G W M was studying in Strathmore University and stopped due to lack of school fees. Ideally the issue of children is within the purview of Children Court as the Court of first instance but in light of the special circumstances of this case this issue is intertwined with the other issues before this Court. Therefore under **Article 165 (3) of the Constitution and Section 28(1) of the Children Act, 2001**, the children shall present the School fees structures in Court and serve the Respondent for payment.

Finally, the Applicant sought preservation of the matrimonial properties pending the division of the properties upon dissolution of the marriage.

The Applicant deposed that she sold second hand clothes to help purchase the matrimonial properties. She ran jointly with the Respondent 3 Chemists .She contributed in the purchase and development of the matrimonial properties.

When the Respondent left the matrimonial home it was run down. She came back and she refurbished the home and continues to reside in the home with the children of the marriage.

The Applicant is apprehensive that the Respondent may dispose of /alienate/ sell/ lease/subdivide or in any other way deal with the suit property in a manner prejudicial to the Applicant's and children's interests. The applicant stands to suffer irreparable loss and damage and be rendered destitute for the following reasons;

The Respondent is registered as the sole owner of the property;

The Applicant has a beneficial interest under **Section 7 of the Matrimonial property Act, 2013** to be realized upon proof and division of matrimonial property after dissolution of marriage

In the meantime, the Respondent has interefered with her peaceful stay in the matrimonial home by welding doors to deny her access to the home, demolished part of the house and brought down the gate and fence.

In February, 2015 the Respondent carried away from the home, assorted household items, beds, mattresses, beddings, TVs, washing machine, fridge and freezer, computers, generator , sofasets, gates and doors cutlery and treadmill machine among others.

The Respondent has subdivided the land on which the home is and threatens to sell the land and matrimonial home without her consent and in spite of filing a caution against the land.

The Respondent is a licensed gun holder, violent and aggressive and the Applicant is fearful and apprehensive to confront him and prevent sale of the matrimonial property.

The Respondent has in his custody documents to all matrimonial properties, all the motor vehicles and proceeds in all business and joint accounts. He has investments and pension funds to the exclusion of his family.

Due to the above reasons the Applicant sought for preservation of the matrimonial properties pending dissolution of marriage and division of matrimonial property. The Applicant sought injunction to retrain the Respondent from interfering with the matrimonial home.

A party may seek injunctive relief if the party can establish by evidence the grounds set out in the land mark cases of;

GIELLA vs. CASSMAN BROWN& Co LTD (1973) E.A.358

E.A. INDUSTRIES vs. TRUFOODS (1972) E.A. 420

A party shall present evidence to establish a prima facie case with probability of success. The party shall demonstrate that if the act or omission is not injuncted, the aggrieved party shall suffer irreparable loss, damage or injury. The Court where in doubt may grant an injunctive relief on a balance of convenience

In the instant case, the Applicant has demonstrated a prima facie case with probability of success; she is married to the Respondent and they have been for 27 years. During that period she was working and contributed to the purchase and development of matrimonial properties. The Applicant alleges that the Respondent has made spirited attempts to hound her and the children out of the matrimonial home as per the incidents explained above. She has reasonable grounds to be apprehensive that the matrimonial

property shall be interfered with such that at the time of division of such property there may be nothing left. Therefore she seeks preservation of matrimonial properties through an injunctive relief.

The Respondent despite service of the Application, Court Order and Supplementary affidavit has not filed any documents or made any representation. The Applicant's evidence on record is not controverted. The Applicant has proved her claim on a balance of probability.

FINAL ORDERS

The Court therefore orders as follows;

- 1. The Court orders issued of 29th June, 2015 are confirmed.**
- 2. An order of injunction against the Respondent restraining him, his agents and /or servants from selling, alienating, subdividing, disposing, leasing, transferring, charging, constructing or in any other way interfering with the suit property L. R. No. Ruiru/Ruiru /East Block [particulars withheld]**
- 3. An injunction preventing the Respondent and/ or his agents or servants from harassing, threatening, demolishing, constructing, and interfering in any manner whatsoever with the matrimonial property, L.R. No. Ruiru/Ruiru/ East Block [particulars withheld]**
- 4. An injunction restraining the Respondent by himself or his agents or servants from threatening, harassing, abusing and harming the Applicant and the Children of the marriage in any way or interfering with their quiet possession and enjoyment of the matrimonial home L.R. No. Ruiru/Ruiru/ East Block [particulars withheld]**
- 5. The OCS Ruiru Police Station to supervise the above orders.**
- 6. The Respondent to pay maintenance of Ksh. 15,000/- a month to the Applicant and children of the marriage.**
- 7. The payment of School fees for the children shall be determined upon presentation and service of the official fees structures to the Respondent and application in Court.**
- 8. The Land Registrar, Ministry of Lands Kiambu County is restrained by injunction from registering any interest, sale, transfer, subdivision, and lease on the matrimonial home property L.R. No. Ruiru/Ruiru/ East Block [particulars withheld] until hearing and determination of the matter in Court or further orders of the Court.**
- 9. Any aggrieved party may apply**
- 10. Each party to bear its own Costs**

DELIVERED, DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF NOVEMBER, 2015

M. W. MUIGAI

JUDGE

In the presence of: